IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Smith Kielly Professional Optometric Corporation v. Foreyes Optical Ltd.*, 2024 NLSC 148
Date: November 8, 2024
Docket: 202101G0915

BETWEEN:

SMITH KIELLY PROFESSIONAL OPTOMETRIC CORPORATION

FIRST PLAINTIFF

AND:

AVALON PENINSULA PROFESSIONAL OPTOMETRIC CORPORATION

SECOND PLAINTIFF

AND:

FOREYES OPTICAL LTD.

FIRST DEFENDANT

AND:

HEATHER POWER

SECOND DEFENDANT

AND:

FOREYES OPTICAL LTD.

PLAINTIFF
BY COUNTERCLAIM

AND:

MARK SMITH

FIRST DEFENDANT
BY COUNTERCLAIM

AND:

AVALON PENINSULA PROFESSIONAL OPTOMETRIC

CORPORATION

SECOND DEFENDANT
BY COUNTERCLAIM

AND:

SMITH KIELLY PROFESSIONAL OPTOMETRIC CORPORATION

THIRD DEFENDANT
BY COUNTERCLAIM

Before: Justice Vikas Khaladkar

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: September 13, 2024

Summary:

The Plaintiffs' claim against the Defendants, payor and guarantor of a promissory note, was successful and their counterclaim was dismissed.

Appearances:

Robert Bradley	Appearing on behalf of the Plaintiffs, Defendants by Counterclaim
Darren D. O'Keefe	Appearing on behalf of the Defendants, Plaintiff by Counterclaim

Authorities Cited:

CASES CONSIDERED: *Hennessey v. Eastern Regional Integrated Health Authority*, 2022 NLCA 45; *Dr. P. Andreou Inc. v. McCaig*, 2007 BCCA 159; *Smilecorp Inc. v. Pesin*, 2012 ONCA 853; *Dentalcorp Health Services v. Poorsina*, 2023 ONSC 3531; *Tank Lining Corp. v. Dunlop Industries Ltd.*

(1982), 140 D.L.R. (3d) 659, 17 A.C.W.S. (2d) 36 (Ont. C.A.); *Gauvreau & Associates Professional Corp. v. Pelton & Co. Professional Corp.*, 2016 ONSC 2583; *Telford v. Holt*, [1987] 2 S.C.R. 193; *Jamieson v. Loureiro*, 2010 BCCA 52; *Dr. C. Sims Dentistry Professional Corporation v. Cooke*, 2024 ONCA 388

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

KHALADKAR J.:

INTRODUCTION

[1] This case concerns a dispute between the Vendors and Purchaser of the assets of an optical dispensary business. The First and Second Plaintiffs/Second and Third Defendants by Counterclaim, Smith Kielly Professional Optometric Corporation and Avalon Peninsula Professional Optometric Corporation, being two professional corporations and an optometrist, First Defendant by Counterclaim, Mark Smith, in his personal capacity, allege that the First Defendant/Plaintiff by Counterclaim, Foreyes Optical Ltd., and the Second Defendant, Heather Power, guarantor of the First Defendant's obligation, have reneged on payments of $30,000 pursuant to a promissory note that was executed in conjunction with an asset purchase agreement ("APA").

[2] For ease of reference, I will refer to the First and Second Plaintiffs/Second and Third Defendants by Counterclaim as the "Plaintiffs"; the First Defendant/Plaintiff by Counterclaim as "Foreyes", the Second Defendant as "Power", and the First Defendant by Counterclaim as "Smith".

[3] Foreyes counterclaimed on the basis that Smith breached, or caused to be breached, a restrictive covenant preventing him from carrying on business within the towns of Conception Bay South, Witless Bay and Bay Bulls in the Province of

Newfoundland and Labrador. Foreyes argued that it paid the first instalment under the promissory note to one of the optometrists on behalf of the Plaintiffs and claims a right of set off in respect of the remaining $15,000 payment.

[4] The parties agreed that there was no threshold issue relating to Rule 17A of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D. However, if judgment was forthcoming in Foreyes' favour, there would need to be an assessment of damages. The summary trial was conducted, as far as the Plaintiffs are concerned, for a liquidated demand for the principal amount claimed, interest and costs on a solicitor and his own client basis in accordance with the terms of the APA.

FACTS

[5] The Plaintiffs, through their professional corporations, were carrying on business as optometrists and opticians in Conception Bay South and Witless Bay. They approached Foreyes with a view to selling it the optical dispensary portion of their business enterprise.

[6] The parties agreed upon a purchase price of $255,000. Of that amount $50,000 was earmarked for goodwill. Foreyes paid $225,000 in cash. The balance was secured by a promissory note executed by Foreyes and guaranteed by its principal, Power.

[7] Power caused $15,000 to be paid by Foreyes to Dr. Nadine Kielly, one of the optometrists, in her personal capacity. Some time thereafter, Dr. Kielly sold her interest in the optical dispensary to Smith for $1.00. By virtue of the agreement an action brought by Smith against Dr. Kielly for oppression was resolved. Dr. Kielly kept the $15,000 and Smith became the sole director and shareholder of both professional corporations.

[8] The parties disagreed with respect to the nature of the consideration flowing between Dr. Kielly and Smith that allowed Smith to assume ownership of the businesses. It is not relevant to my decision.

[9] The APA contained a provision by virtue of which the execution of contracts of employment and a non-competition agreement by the Plaintiffs were made a condition precedent to the APA. However, these documents were never executed by the Plaintiffs and were never provided to Foreyes = who proceeded with the transaction despite the lack of performance with any of the requirements of the condition precedent.

[10] The APA closed on December 31, 2015. By its terms two equal payments of $15,000 were to be made on December 31, 2016 and on December 31, 2017.

[11] In March 2016 Smith gave notice to Foreyes that he was leaving the practice to move into Mount Pearl. On April 29, 2016, Smith left the practice and, for nine months thereafter, he advertised in a newspaper distributed, among other places, in Conception Bay South that he was practicing optometry in the Vogue Optical Building on Topsail Road in Mount Pearl. He invited his patients to contact him there.

[12] The business conducted by Foreyes was a Peoples Optical franchise. (I do not know for certain whether it was a franchise operation or not, I am using the term “franchise” loosely).

[13] Foreyes never paid the $15,000 that was due on December 31, 2017. There is a dispute as to whether the $15,000 payment to Dr. Kielly was the payment that was due on December 31, 2016.

[14] Section 5.01 of the APA, which contained the restrictive covenant, states as follows:

> The Vendors and their principals, namely Nadine Kielly and Mark Smith, shall not, for a period of 3 years following the close of this transaction, without prior written consent of the Purchaser, either individually or in partnership or in conjunction with any person or persons, firm, association, syndicate, company hold an equity interest in, or permit the Vendors' names or their principals' names or any part thereof be used or employed by any such person, persons, firm, association, syndicate, company or corporation holding an equity interest in a business which is similar to that of the Vendors within the Towns of Witless Bay, Bay Bulls and Conception Bay South.

[15] The APA also has an "entire agreement" clause that negates the effect of any representation, warranty, undertaking, promise, covenant, condition, term, agreement or inducement that is not contained within the APA itself.

[16] All the parties were represented by legal counsel in negotiating and drafting the APA that they eventually executed.

[17] The relationship between Smith (and or his professional corporation) and Foreyes was not one of employee/employer. Rather, Smith would bill his patients – who would pay using Foreyes' point of sale terminal. Foreyes would turn over the entire amount to Smith without any deduction. Smith did not pay for the use of the point of sale terminal, and he did not pay any rent for occupying the premises or using Foreyes' equipment. I gather that the *quid pro quo* was that Smith's patients would likely purchase the glasses, sunglasses and contact lenses that they required from Foreyes.

ISSUES

A. Is this a suitable matter to proceed by way of summary trial?

B. Are any amounts owing under the promissory note and, if so, how much?

C. Did Smith breach the restrictive covenant relating to non-competition contained in section 5.01 of the APA?

D. Did Foreyes establish that the Plaintiffs breached the APA and, therefore, that it has a right to set off the damages it suffered against the amount that it owes?

ANALYSIS OF PROCEDURAL ISSUE

A. Is this a suitable matter to proceed by way of summary trial?

[18] The Plaintiffs' demand is for liquidated damages. It is a sum certain that is easily calculated from the application of the terms of the APA between the parties.

[19] Foreyes' counterclaim is based upon the alleged breach of the provisions of section 5.01 of the APA. There is little dispute as to the conduct of the parties. There are no issues of credibility.

[20] Both parties agreed that, at least as far as the issues of liability are concerned, the matter is amenable to resolution by way of a summary trial. I agree.

[21] The trial went ahead on the basis that I would render a decision relating to liability. The successful party would then be allowed to return to Court for the assessment of damages if the parties are unable to calculate the amount owing. *Hennessey v. Eastern Regional Integrated Health Authority*, 2022 NLCA 45, at para. 34.

THE PLAINTIFFS ARGUED

[22] This is a case of a breach of contract. Foreyes was bound to pay $30,000 by virtue of the terms of a promissory note. Foreyes did not pay the Plaintiffs the $30,000. Foreyes is liable, by the terms of the promissory note, to pay the principal, interest at 10% and solicitor-client costs accrued for collection. Power is responsible, as guarantor, for the principal debtor's default.

[23] The APA, by its terms, has a clause that voids the effect of any collateral representations, terms, warranties, promises and so on – the entire APA between the parties is contained within the four corners of the written APA.

[24] Smith never agreed to work for Foreyes, or to provide services through Foreyes' business premises for any period. He did promise to refrain from carrying on business as an optician, on his own accord or in conjunction with others, in the communities of Witless Bay, Bay Bulls and Conception Bay South for a period of three years following the execution of the APA.

[25] The Plaintiffs argued that Smith was not a party to, and never breached the terms of, section 5.01 of the APA and his advertisements in the local newspaper advising his new location in Mount Pearl are not a breach of section 5.01. The Plaintiffs said that is so because Smith was not advertising as an optician, he was advertising as an optometrist. Foreyes' business was that of an optician. Smith was not presuming to compete as an optician.

[26] In summary the Plaintiffs said:

a. The promissory note required the payment of $30,000 plus contractual interest and solicitor-client costs;

b. The APA did not require Smith to work at Foreyes' clinic for any length of time;

c. The APA did not prohibit Smith from working in Mount Pearl;

d. The APA did not prohibit Smith from advertising anywhere;

e. The APA had an "entire agreement clause";

f. Foreyes did not plead a collateral contract or, at least, the claim of repudiation and the counterclaim referenced in the APA;

g. The Plaintiffs and Smith agreed not to run, or be involved with, an optical dispensary in Witless Bay, Bay Bulls and Conception Bay South. They did not agree to refrain from advertising non-dispensary optometry services in these locations. The APA is silent in relation to advertising; and,

h. That Foreyes' view that Smith's requests for his patient's charts was in breach of his APA obligations is incorrect. His requests for patient charts were in furtherance of his practice as an optometrist. He did not sell his optometry practice to Foreyes; he sold his interest in an optical dispensary.

FOREYES ARGUED

[27] Smith did not bargain in good faith and fundamentally breached the terms of the APA, including a non-solicitation clause, within months of closing. As a result, Foreyes withheld the payment of $15,000 pursuant to a promissory note, guaranteed by Power, that had been provided as a part of the transaction.

[28] The optical dispensary industry is competitive and relies upon the services of optometrists to conduct eye exams – which translate into profitable sales of products such as eyeglasses, sunglasses and contact lenses.

[29] Foreyes assumed that Smith and Dr. Kielly would continue to provide services to its enterprise as optometrists.

[30] By virtue of section 5.01 of the APA, Smith and Dr. Kielly agreed that they would not, for three years, within the geographic areas of Witless Bay, Bay Bulls and Conception Bay South, publicly associate themselves with Foreyes' competitors.

[31] The unfulfilled employment and non-competition agreement evidences the parties' reasonable understanding that Smith and Dr. Kielly would provide ongoing services at both locations.

[32] Smith's departure from Foreyes' clinic in April 2016 seriously impacted the viability of the business – which required two full time optometrists in order to survive. Smith's departure was compounded by his placing advertisements in the Shoreline News on behalf of direct competitor – Vogue Optical. The ads ran for nine months.

[33] Smith regularly requested optometry charts for his former clients from Foreyes – which viewed this behaviour as active solicitation of its customers.

[34] In December 2016, Foreyes paid $15,000 to Dr. Kielly personally in honour of Dr. Kielly's fulfilment of her contractual commitment.

[35] Foreyes sold its business, which was foundering, to Cowan's Optical in September 2018. Cowan's Optical assumed Foreyes' debt to the Business Development Bank. There was no other consideration for the purchase and sale.

ANALYSIS OF THE SUBSTANTIVE ISSUES

B. Are any amounts owing under the promissory note and, if so, how much?

[36] The promissory note required that the sum of $30,000 be paid in two equal instalments. The first on December 31, 2016, and the second on December 31, 2017.

[37] It is agreed by the parties that the second instalment was never paid. Accordingly, at least $15,000 is due and owing under the promissory note.

[38] It is agreed by the parties that Foreyes paid Dr. Kielly in her personal capacity the sum of $15,000 in December 2016. The payment is characterized by Foreyes as having been made to her in recognition of the fact that she had continued to provide optometric services to Foreyes' enterprise after Smith had left the practice.

[39] The payees of the promissory note were the two professional corporations that were owned by Smith and Dr. Kielly. Neither Smith nor Dr. Kielly were entitled to receive, or retain, the payment in their personal capacities. Upon receipt of the funds by Dr. Kielly, presuming that it was in payment under the promissory note, the money should have been deposited in the Plaintiffs' bank account. I am assuming that it was not because Smith was not informed about the payment and, in fact, he brought an action for shareholder oppression against Dr. Kielly.

[40] Payments that are due and owing under promissory notes need to be made to the payee – not to a third person. The payment to Dr. Kielly cannot be characterized as a payment to the Plaintiffs. Foreyes admitted in the pleadings that the payment was not made to the Plaintiffs. Foreyes had also stipulated that the payment was made to Dr. Kielly in consideration of her continuing to provide optometric services to Foreyes. Dr. Kielly was not obligated under the terms of the APA to continue providing services to Foreyes. Any payment made in consideration of her doing so

was made *ex gratia* and, therefore, not in accordance with the terms of the agreement between the parties.

[41] I find that Foreyes had not made any payments to the Plaintiffs in accordance with the terms of the promissory note and that the full amount of $30,000 is due and owing.

C. Did Smith breach the restrictive covenant relating to non-competition contained in section 5.01 of the APA?

[42] Foreyes alleged that it agreed to purchase the Plaintiffs' assets based on their commitment to continue providing services to Foreyes' customers and not to compete for a period of three years. Let's deal with each of these allegations in turn.

Commitment to continue providing services

[43] There may well have been discussions surrounding the continuous provision of optometric services by the optometrists who wished to divest themselves of the optician dispensing portion of their business.

[44] However, during negotiations no agreement was reached concerning either an employment contract or a non-competition agreement even though both were mentioned as conditions precedent in section 7.01(c)(vii) of the APA.

[45] Foreyes had every right, upon closing, to bring the agreement to a halt because the required agreements and documentation concerning employment and non-competition had not been provided.

[46] However, Foreyes did not insist upon the specific performance of the condition precedent and, because it proceeded with the purchase, must be taken to have waived the condition precedent.

[47] Foreyes asserts that, by purchasing the goodwill of the optical dispensary, it was understood that the optometrists would stay on with Foreyes for at least three years and would not lend their name to a competing business within Witless Bay, Bay Bulls and Conception Bay South for the same period of time.

[48] The first portion of this assertion is incorrect. There is no evidence that the optometrists agreed to stay on with Foreyes for at least three years. To the contrary, there is evidence that they did not enter into an employment agreement. While Foreyes might have wished that the optometrists stayed with the enterprise, and while the business plan of the enterprise might have been predicated upon them staying, in fact there was no obligation upon them by the terms of the APA, or otherwise, to remain.

Non-competition

[49] As to the second assertion, Foreyes argued that Smith entered into both a non-competition and a non-solicitation agreement. With respect to non-solicitation, Foreyes argued that Smith's advertising clearly demonstrated a concerted effort to move existing clients from Foreyes' business to Vogue Optical. It will be recalled that Smith's advertising indicated that he was located in the Vogue Optical Building in Mount Pearl. Foreyes indicated that there is a Vogue Optical Outlet within a few kilometers of its own location in Conception Bay South.

[50] Foreyes said that the business would not have been purchased if it had been understood that Smith was free to solicit his former patients. Foreyes argued that Smith breached the non-solicitation agreement in two ways. Firstly, he advertised that he was carrying on business with Vogue Optical in a publication distributed within Conception Bay South. Secondly, that he directly solicited his former patients to join him at his new practice by requesting their patient charts from Foreyes.

D. Did Foreyes establish that the Plaintiffs breached the APA and, therefore, it has a right to set off the damages it suffered against the amount that it owes?

[51] Smith advertised in the Shoreline News that he was informing his patients that he had moved his optometry practice to the Vogue Optical Building on Topsail Road. The advertisement provided a phone number and an address where he was located.

[52] Foreyes asked me to infer that Smith would have a similar relationship with Vogue Optical as he had had with Foreyes – that he would be provided space, equipment and the like in the expectation that some of his patients would buy Vogue Optical merchandise. This may well be so because Smith had attested to the fact that he had never paid rent in any of the locations in which he had practiced – and this is due to the symbiotic nature of the relationship between optometrists and optical dispensaries.

[53] However, what I need to concern myself with is whether the advertisements amounted to a breach of section 5.01 of the APA. Distilled to its essence, the meaning that I glean from the clause is as follows:

> Dr. Smith shall not, for three years, in conjunction with anyone permit his name to be used in a business similar to the Vendors within the towns of Witless Bay, Bay Bulls and Conception Bay South.

[54] Foreyes said that because there is a Vogue Optical located near its optical dispensary, Smith breached his covenant to refrain from competing. There is no evidence that Smith was, in any way, connected with the Vogue Optical franchise located in Conception Bay South. Indeed, there is no concrete evidence that Smith was associated with the Vogue Optical on Topsail Road – other than he was located in the Vogue Optical Building.

[55] I am asked to infer that because Smith advertised that his address was in the Vogue Optical Building on Topsail Road, that he breached his covenant to dissociate himself from any business competitor of Foreyes.

[56] Foreyes argued that the words "Individually … or in conjunction with any other person … or permit [his name] or any part thereof [to] be used or employed by any such person … in a business similar to the Vendors, within the towns of Witless Bay, Bay Bulls and Conception Bay South.", means that Smith was not allowed to advertise in the same area where Foreyes carried on business and where Smith's patients resided.

[57] It is necessary to decide what, exactly, was agreed upon.

[58] Smith was restricted from carrying on, or being associated with, a business like the vendors – the business of an optical dispensary – selling glasses, sunglasses and contact lenses. The restriction applied to a specific geographic area.

[59] Smith is an Optometrist. His profession requires him to examine his patients and provide prescriptions for corrective lenses. His profession is not one which provides the frames and lenses.

[60] In my view Smith is not disallowed from carrying on the business of his profession as an optometrist within or without the geographical area listed in the agreement. He cannot do so within the geographical area if he is doing it in conjunction with someone who operates an optical dispensary, and he cannot dispense optical wares of his own accord.

[61] If Smith is not disallowed from practicing as an optometrist, there is no restriction upon him carrying on with his profession within, or without, the geographical area. His advertisements are in relation to his optometric practice and do not, because they name the Vogue Optical Building as being his location on Topsail Road, run afoul of the restrictive covenant.

[62] I do not agree with Foreyes' assertion that Smith was working with Vogue Optical within the restricted geographical area. The advertisement simply read that Smith, Optometrist, had "moved to the Vogue Optical Building, 985 Topsail Road".

[63] But even if this advertisement could be construed as meaning that Smith was associated with Vogue Optical, he was not doing so within the geographic area circumscribed by the APA. The advertisement clearly stated that his office is located at 985 Topsail Road – and that is where he will be meeting his patients from Monday through Friday and on selected Saturdays.

[64] For Smith to be in breach of the restrictive covenant in section 5.01 of the APA, he would have had to be working in concert with the Vogue Optical in Conception Bay South. I was not provided with any evidence that he did so.

[65] Foreyes argued that Smith was soliciting its former clients. I disagree. Smith was soliciting his former patients. There is nothing in the APA restricting Smith from providing optometric consultations to his patients.

[66] The essence of Foreyes' argument is that it bought a business that required two optometrists with existing patient bases to refer them for their optical needs. Foreyes' view is that Smith dishonestly breached the sale agreement by leaving his practice shortly after selling his interest in the optical dispensary to Foreyes.

[67] As I have noted, there is nothing in the APA that required Smith to continue to work for Foreyes. An employment agreement that was mentioned as a condition precedent was never concluded. Foreyes closed the transaction without requiring the execution of an employment agreement at its peril.

[68] I cannot impute bad faith to Smith. While his leaving might have adversely affected Foreyes, it appears that Foreyes had not taken the appropriate steps to secure Smith's ongoing attendance at its business. That failure on Foreyes' part cannot be converted into a breach of trust or bad faith exercise on the part of the Plaintiffs.

[69] Foreyes cited the case of *Dr. P. Andreou Inc. v. McCaig*, 2007 BCCA 159. That case dealt with a non-solicitation clause on the sale of a dental practice from one dentist to another. There was a clause in the agreement prohibiting the vendor from communicating in any manner with former patients for the purpose of solicitation. Ads that were run in a local paper were found by the trial judge to be a form of solicitation.

[70] The British Columbia Court of Appeal took a different view. It held that solicitation required something more than a general informational advertisement to the public. In that case, such as the one before me, a general advertisement in a newspaper that consisted of a photo and information about the location of an office was not found to be "soliciting or communicating for the purposes of soliciting". *Dr. P. Anderou Inc.*, at para. 36.

[71] The case of *Smilecorp Inc. v. Pesin*, 2012 ONCA 853, was referred to me. It can be distinguished from the case before me. It dealt with a situation in which a dentist had entered into an agreement with a management corporation by virtue of which the corporation sought to protect the goodwill it had established. The dentist left the practice managed by the corporation and attempted, in breach of a restrictive covenant, to take patient lists with a view to contacting them and advising of his new office premises.

[72] Smith did not attempt to contact any patients individually as was the case in *Smilecorp*. However, in my opinion, he had every right to contact his patients because his practice of optometry was not restricted by the APA.

[73] In the case before me Foreyes had no proprietary interest in the persons who were "patients" of Smith. The fact that they might also have been clients of Foreyes' optician's practice did not give Foreyes the right to prohibit Smith from contacting these persons in their capacity as patients. Smith, as an optometrist, was not competing with Foreyes, as an optician.

[74] *Dentalcorp Health Services v. Poorsina*, 2023 ONSC 3531, was also referred to me by Foreyes. In that case Ramsay J. set out the test that was approved by the Ontario Court of Appeal in *Tank Lining Corp. v. Dunlop Industries Ltd.* (1982), 140 D.L.R. (3d) 659, 17 A.C.W.S. (2d) 36 (Ont. C.A.), for determining the reasonableness of a restrictive covenant. I outline, in the following subparagraphs, each branch of the test in turn, together with my analysis of how the facts in this case apply or don't apply:

a. *Whether benefit has issued to both sides*: This question would have to be answered in the affirmative. The Plaintiffs received monetary consideration for the sale of the assets of the optician's business operated by it. Foreyes received the stock-in-trade, equipment and goodwill of the business. Both parties benefitted from the transaction.

b. *Whether the covenantee has made a substantial investment worthy of protection*: Foreyes' investment was substantial from its perspective. Perhaps not overly substantial in the big scheme of things. In *Dentalcorp*, for example, the consideration was more than $14 million. Here the purchase price was $255,000.

c. *Whether there was negotiation between the parties of equal bargaining strength*: I do not sense that there was any material imbalance in the bargaining abilities of the parties.

d. *Whether the parties received legal advice*: Both parties were represented by counsel.

e. *Whether the covenantor had expressly acknowledged the importance of the covenant in question*: The agreement to continue to work as an optometrist with Foreyes, and to refrain from competing with Foreyes were vitally important to Foreyes. However, the Plaintiffs refused, or failed to comply with, a condition precedent that required employment contracts and a non-competition agreement to be entered into. Foreyes should have put on the

> brakes and refused to close the transaction in the absence of these vital covenants. It did not do so at its peril.

[75] On this last point it is apparent to me that Smith had no intention of being bound to work in the enterprise being sold to Foreyes, and that he had no intention of entering into a non-competition agreement that would have been any more restrictive and stringent than what appears in section 5.01 of the APA.

[76] Section 5.01 of the APA is weak. It does not prevent the Plaintiffs from carrying on his business as optometrists at all – in any location. It merely seeks to restrain the Plaintiffs from carrying on business within a defined geographical location as optical dispensers or in concert with optical dispensaries.

[77] *Dentalcorp* was a case in which an injunction was being sought. The tests set out above are for the purpose of determining whether injunctive relief is appropriate. They are somewhat useful in the analysis in determining whether the Plaintiffs breached the restrictive covenant, but not overly so.

[78] *Gauvreau & Associates Professional Corp. v. Pelton & Co. Professional Corp.*, 2016 ONSC 2583, was cited to me for the proposition that the transaction between the Plaintiffs and Defendant Foreyes was one for the sale of a business rather than an employment contract. I agree with this characterization. There is no element of employment contract in the case before me.

[79] *Telford v. Holt*, [1987] 2 S.C.R. 193, was referred for the proposition that equitable set-off is available because the debts are in respect of mutual cross obligations. It is not germane to this action because I have found that Foreyes' counterclaim against the Plaintiffs is not sustainable.

[80] In similar vein, Foreyes cited *Jamieson v. Loureiro*, 2010 BCCA 52, for the proposition that cross-obligations need not be debts.

[81] Finally, counsel for Foreyes and Power referred me to a case from the Court of Appeal for Ontario cited as *Dr. C. Sims Dentistry Professional Corporation v. Cooke*, 2024 ONCA 388. The case involved the enforceability of a restrictive covenant that was agreed to in the context of the purchase and sale of a dentistry practice. The case is distinguishable on the basis that it concerned a restrictive covenant given by the selling dentist to the purchasing dentist to refrain from practicing dentistry within a geographical area for a period of five years. Whereas, in the case before me, Smith was not restricted, in any way, from carrying on his practice as an optometrist – he was prohibited by the terms of the APA from being associated with a competing optical dispensary within the geographic bounds of the three communities mentioned in the APA.

[82] The Court of Appeal indicated at paragraph 20 of *Sims* that restrictive covenants are meant to protect the goodwill of a sold business from devaluation by the vendor's action. Goodwill encompasses both the existing customer base and the ability to attract new patients from within the area served by the business.

[83] The principle espoused by the Court of Appeal has no application to the present case. This is a case of apples and oranges. Smith sold his interest in an optical dispensary. He did not, in any way, relinquish his ability to continue his practice as an optometrist. Pursuant to the terms of the APA he could have set up an optometrist's practice next door so long as he did not associate himself with one of Foreyes' competitors. *Sims* is simply not applicable.

CONCLUSION

[84] I find that the Plaintiffs and Smith did not breach the APA. They did not wrongfully repudiate the agreement. The APA, the promissory note and guarantee flowing from the APA remain in full force and effect. Foreyes has no right to withhold payment, and there is no right of set-off.

[85] In accordance with the terms of the promissory note the Plaintiffs are entitled to judgment in the amount of $30,000 together with interest thereon at the rate of

10% per annum calculated from the due dates to the date of this judgment. Thereafter interest will accrue at the legal rate of 3%. The judgment shall also attach as against Power.

[86] The promissory note provides that the Plaintiffs shall have their legal costs on a solicitor-client basis. If the parties are unable to agree upon quantum they have leave to refer the dispute to me for further direction.

[87] Foreyes' counterclaim is dismissed.

VIKAS KHALADKAR
Justice