
CANADA / JUDGMENT

IRIS The Visual Group Western Canada Inc. v. Park

2016 BCSC 2059

COURT

Supreme Court of British Columbia

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2016 BCSC 2059 IRIS The Visual Group Western Canada Inc. v. Park

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

IRIS The Visual Group Western Canada Inc. v. Park,

2016 BCSC 2059

Date: 20161107

Docket: S165879

Registry: Vancouver

Between:

IRIS The Visual Group Western Canada Inc.

Plaintiff

And:

Hannah Park, Dr. Hannah Park, Optometric Corporation

and Affinity Optometry

Defendants

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

Counsel for the Plaintiff:

M.G. Underhill

Counsel for the Defendants:

P.M. Pulver

Place and Date of Hearing:

Vancouver, B.C.

September 13-14, 2016

Place and Date of Judgment:

Vancouver, B.C.

November 7, 2016

Introduction

- [1] The plaintiff, IRIS the Visual Group Western Canada Inc. ("IRIS"), seeks judgment on summary trial against the defendants Dr. Hannah Park and her businesses ("Dr. Park"). The action arises from an employment relationship in which Dr. Park worked at an IRIS business outlet in Vernon, B.C., between October 2007 and March 2016.
- [2] The terms governing the employment relationship were set out in two written agreements called Optometric Services Agreements ("OSA"). The first OSA was dated October 1, 2007, shortly before Dr. Park started to work at the IRIS Vernon location, and was between IRIS and Dr. Park. The second OSA was dated June 8, 2010, and introduced an additional party, IRIS The Visual Group Western Canada Inc., doing business as IRIS 691, referred to as OpCo, apparently an iteration of IRIS licensed by IRIS to operate the IRIS Vernon location. This latter agreement ran for three years, with automatic renewals unless terminated. The last renewal was due to expire in June 2016.
- [3] IRIS is a corporation that delivers eye care services and sells eyewear products through outlets where its customers can have their eyes examined by an optometrist and purchase corrective lenses or eyewear. IRIS says that its customers develop relationships with the optometrist who examines their eyes, and those relationships translate into loyalty to the optometrist. Obviously, IRIS hopes that a customer who has their eyes examined by an IRIS optometrist will purchase any needed eyeglasses from the IRIS outlet where the optometrist works.
- [4] Dr. Park earned two university degrees in Canada and then went to the United States to study optometry. She graduated in 2003 and worked for one year as an optometrist in the United States, then returned to Canada to work in Banff, Alberta. While there, she learned of a job opportunity at IRIS's Vernon location, traveled to Vernon to evaluate the opportunity and community, applied for the job, and was hired.

- [5] Dr. Park recalls receiving the first OSA by email. She says she printed it out, signed it, and sent it back to IRIS without anything in the way of discussion or negotiation, and without seeking legal advice. When Dr. Park started working at the IRIS Vernon location in November 2007 two other optometrists worked there.
- [6] Dr. Park went on maternity leave in September 2009 and when she returned in 2010, IRIS presented her with a new OSA. She recalls discussing the hours she was expected to work, as that was important to her at the time, and that led to a handwritten amendment to the OSA reducing the hours she committed to work. Otherwise, she says that she signed this second OSA on June 8, 2010, without discussing other aspects of it or paying careful attention to the restrictive covenants it contained. The OSA was for a three year term, with automatic three-year renewals unless otherwise terminated, according to section 5.2. The OSA was renewed June 8, 2013, and set to renew again, or be terminated, in June 2016.

- [7] The termination provisions are in section 5.3:

This Agreement may be terminated in writing by either Optometrist or OpCo as follows, unless otherwise mutually agreed to in writing between the parties:

- (a) No advance notice required to terminate within the first 90 days of this Agreement.
 - (b) One week written notice to terminate after 90 days but prior to the expiration of one year from the date of this Agreement.
 - (c) After one year, any party wishing to terminate this Agreement may do so upon written notice to the other party, such notice to be at least one week plus one additional week for every year or partial year passing from the date of this Agreement, to a maximum of 8 weeks total notice.
- [8] In 2015 Dr. Park's personal circumstances changed, and she decided that she wished to leave IRIS to work on her own. In late 2015 she negotiated a five-year lease on commercial office space and in late March 2016 she sent a resignation letter to IRIS. In that letter, Dr. Park said: "I would also ask that the company release me from the non-competition clause of the OSA." Ms. Smallman, who is the IRIS regional manager, told Dr. Park that IRIS would enforce the non-competition clause.
- [9] In early May 2016, Ms. Smallman told Dr. Park that the company had arranged for another optometrist to work in Vernon, and Dr. Park's last working day at IRIS would be May 6, 2016.
- [10] Dr. Park has set up her new optometry practice, Affinity Optometry, on 27th Avenue, approximately 3.5 kilometres from the IRIS outlet. She swears that 27th Avenue is where most of the professional offices are located in Vernon, and that the other major thoroughfare, 32nd Street, is where most of the restaurants and hotels are located. Dr. Park also ran a weekly advertisement in the local newspaper for three weeks that announced the opening of her new clinic. The advertisement also stated that "Dr. Park looks forward to seeing familiar faces and welcoming new patients."

[11] Vernon has a population of approximately 40,000 people, and in its broader catchment area, approximately 58,000 people. Ms. Smallman has deposed that there are some parts of Vernon that are more than five kilometres from the IRIS outlet where Dr. Park could establish her new business, and there are other communities within reasonable driving distance, including Kelowna, which she swears is a 40 to 45 minute drive from Vernon.

[12] The operative terms of the OSA in question are at sections 6 and 7:

7. NON-COMPETITION

7.1 The Optometrist hereby covenants and agrees that during the term of this Agreement and for a period of three (3) years from the date this Agreement is terminated the Optometrist will not, without first receiving the written consent of OpCo and IRIS do any of the following:

- (a) Compete either directly or in partnership or in conjunction with any person or persons, firm, association, syndicate, company or corporation, directly or indirectly carry on or be engaged in any part thereof or be employed by any such person or persons, company or corporation carrying on, engaged in, interested in or concerned with a business that competes with OpCo or IRIS within 5 km of the Location.

For greater clarity, a "business that competes with OpCo or IRIS" is defined as any entity that dispenses performs [sic] any sort or [sic] prescription or non-prescription optical appliances including eye glasses or sunglasses, vision correcting lenses and contact lenses, or is an optical retail dispensary, optometry clinic, an ophthalmology clinic, or any laser eye surgery centre and/or any location that performs optical refractions and/or complete or partial eye examinations or eye health assessments,

- (c) solicit, interfere with or endeavor to entice away any customer, patient, company or organization that is in the habit of dealing with OpCo or IRIS or to interfere with or endeavour to entice away any of OpCo or IRIS's employees or optometrists.

7.2 If the Optometrist breaches the aforementioned conditions of Section 6 or the Section 7.1 non-competition provisions OpCo may demand that the Optometrist pay as damages and not penalty, and the Optometrist, and OpCo agree that the amount is a reasonable estimate of the actual damages which would be incurred by any breach by Optometrist, and Optometrist agrees to pay the higher of the following amounts:

- (a) the sum of Seventy Five Thousand (\$75,000) dollars; or
- (b) the sum of Fifty Thousand (\$50,000) dollars multiplied by the number of years or partial years that the Optometrist practices Optometry from the Location subsequent to the Commencement Date, or

not to exceed a total amount of Two Hundred Fifty Thousand (\$250,000) dollars.

- [13] Section 6 of the OSA deals with ownership of patient files. Under section 6.1 the optometrist owns these files, subject to the terms of section 6.2. Under section 6.2 if OpCo makes a written request or OpCo or IRIS terminates the OSA, then the optometrist must prepare and execute any documents necessary to transfer all patient files, patient lists, clinic files and records, telephone numbers used at the IRIS Vernon location, the clinic name, and goodwill to another optometrist designated by OpCo, on the date specified by OpCo. OpCo agrees to pay an aggregate price of \$10 for the transfer "and other good and valuable consideration as herein contemplated."
- [14] The OSA goes on to provide in section 6.2(d) that the optometrist may, with the written request of a patient, examine a patient's file and request a copy, on prepayment of \$25 per patient file.
- [15] Finally, if the optometrist fails or refuses to transfer a patient file when asked to do so by OpCo, the OSA provides in section 6.2(e) that the optometrist will indemnify OpCo in a fixed amount of \$100 for each patient file the optometrist does not transfer. This is not to affect any other rights OpCo may have for any other breach of the OSA. Most notably, under section 7 of the OSA, OpCo is also entitled to liquidated damages for a breach of section 6.
- [16] The bylaws of the College of Optometrists of British Columbia provide at s. 103:

Ownership of records

103. (1) A registrant must ensure that all records containing personal information of his or her patients are owned by
- (a) the registrant,
 - (b) another registrant by whom the registrant is employed or for whom the registrant is a contractor, or
 - (c) a BC optometric corporation.
- (2) If a registrant employs or is employed by another registrant, or is employed by a BC optometric corporation, the registrant must secure a written agreement with the other registrant or BC optometric corporation establishing which of them owns the records referred to in subsection (1).
- [17] It may be that neither IRIS nor OpCo is a "BC optometric corporation" as defined in the bylaws, thus necessitating the file transfer language of section 6 of the OSA. It seems clear that when Dr. Park moved to Vernon to take up her position with IRIS, she did not bring patient files with her, and I infer that the patient files in existence when she left IRIS in May 2016 were either already there when she arrived in 2007, or had been opened while Dr. Park worked at in the Vernon outlet. There were other optometrists working at the IRIS Vernon outlet while Dr. Park worked there, so it is not safe to assume that every patient file opened during that period stemmed from an optometrist/patient relationship involving Dr. Park.

- [18] The first OSA involved two parties: Iris The Visual Group Western Canada Inc. and Dr. Park. The recitals set out that it is in the best interests of both parties "to record the terms and conditions under which the Optometrist and Iris Western will work together." Section 8 of the first OSA provides that Dr. Park shall own the patient files at the Vernon location, with terms similar to the second OSA requiring Dr. Park to transfer the files on termination of the agreement.
- [19] Dr. Park has sworn that eight other optometrists worked at the IRIS Vernon outlet for various lengths of time while she worked there. Ms. Smallman, IRIS's regional manager, has sworn that when Dr. Park started working at the IRIS Vernon location, two other optometrists already worked there. Ms. Smallman does not say whether either of those two optometrists signed an OSA relating to the IRIS Vernon location, although both worked there for 14 months or more. One of the other six optometrists who worked at the IRIS Vernon outlet during Dr. Park's tenure signed an OSA, worked for six months, then "transferred all of his patients to Dr. Park" when his agreement was terminated. The five other optometrists who worked at the IRIS Vernon outlet during this period did so without OSA's specific to that location, though they all had OSA's tied to other IRIS outlets in British Columbia.
- [20] The non-competition covenant in the OSA states that its geographic coverage is five kilometres from the IRIS Vernon outlet, and its operative length is three years from the end of the OSA. There is no doubt that almost immediately after the OSA ended, Dr. Park opened her new optometry business less than five kilometres from the IRIS Vernon location, in space she had arranged to lease before the OSA terminated, in apparent breach of the non-competition clause.
- [21] Dr. Park's response to this apparent breach is to argue that the non-competition covenant is not valid or enforceable because it is unreasonable and overly broad.

Approach to Interpretation

- [22] From the authorities cited by counsel, I take these excerpts, which will guide my analysis of enforceability of the non-competition clause.

A restrictive covenant in a contract is what the common law refers to as a restraint of trade: *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at para. 15.

A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest: *Elsley et al. v. J.G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916 at 923.

in exceptional cases the nature of the employment may justify a covenant prohibiting an employee not only from soliciting customers, but also from establishing his own business or working for others so as to be likely to appropriate the employer's trade connection through his acquaintance with the employer's customers: *Elsley* at 926.

Whether a restriction is reasonably required for the protection of the covenantee can only be decided by considering the nature of the covenantee's business and the nature and character of the employment: *Elsley* at 926.

despite the presumption that restrictive covenants are *prima facie* unenforceable, a reasonable covenant will be upheld: *Shafron* at para. 17.

The interpretation of restrictive covenants requires the application of different rules depending on whether the covenants are found in commercial agreements or in contracts of employment. These rules will be more generous in the commercial context, but much stricter in the context of contracts of employment or service: *Payette v. Guay Inc.*, 2013 SCC 45 at para. 2.

the legal framework applicable to contracts of employment takes account of the imbalance of power that generally characterizes an employer-employee relationship, and it is designed to protect employees. In relationships between vendors and purchasers in the commercial context, on the other hand, there is ordinarily - with some exceptions - no such imbalance: *Payette* at para. 3.

As a general rule, according to Dickson J. in *Elsley*, at p. 925, the geographic coverage of the covenant and the period of time in which it is effective have been used to determine whether a restrictive covenant is reasonable. The extent of the activity sought to be prohibited is also relevant: *Shafron* at para. 26.

The agreement sued upon is the employment agreement. It would be wrong, in my opinion, to test that agreement by the criteria applicable in the case of a vendor/purchaser agreement, or by some hybrid test. The restrictive covenant, if enforceable, must stand up to the more rigorous tests applied in an employer/employee context: *Elsley* at 925.

However, for a determination of reasonableness to be made, the terms of the restrictive covenant must be unambiguous. The reasonableness of a covenant cannot be determined without first establishing the meaning of the covenant. The onus is on the party seeking to enforce the restrictive covenant to show the reasonableness of its terms: *Shafron* at para. 27.

if the covenant is ambiguous, in the sense that what is prohibited is not clear as to activity, time, or geography, it is not possible to demonstrate that it is reasonable: *Shafron* at para. 43.

[23] The first question is whether the restrictive covenant in this case should receive the closer scrutiny given to restraints arising from employment contracts. IRIS did not suggest that Dr. Park was selling anything, especially goodwill, and concedes that the covenant here did not come from the sale of a business. However, IRIS argues that Dr. Park's relationship with IRIS clients was that of a medical practitioner with patients. IRIS thus contends that the restrictive covenant should be interpreted more like one contained in a purchase-sale agreement and less like one in an employment agreement.

[24] The short answer to that argument is that there are no hybrid tests, as established in *Elsley* at 925. The longer answer is that the OSA, viewed as a whole, is much closer to an employment contract than anything else. In spite of categorizing Dr. Park as an independent contractor, the OSA establishes her working hours, limits her vacation time, including how much of it she can take at any one time, and provides for transfer of patient files on termination of the working relationship. At least for present purposes I conclude that Dr. Park was in an employee-employer relationship with IRIS, and I will construe the agreement governing her employment relationship accordingly.

The Non-Competition Covenant

- [25] The covenant in question prohibits Dr. Park from competing with the IRIS Vernon location in fairly broad language. The covenant sets a time of three years from termination of the OSA, and a geographic area of five kilometres from the IRIS Vernon location.
- [26] Dr. Park challenges the reasonableness of all three aspects of the non-competition covenant: the activities precluded, the temporal duration of the restrictions, and the geographic area over which the covenant extends.
- [27] Starting with the prohibited activities, the covenant covers a wide range of activities beyond direct competition. The clause also covers legal relationships that include being "in conjunction with," directly or indirectly carrying on, and being engaged in or employed by persons or entities "carrying on, engaged in, interested in or concerned with a business that competes with OpCo or IRIS within 5 km of the Location." The covenant then goes on to define a business that competes with IRIS or its Vernon location as:

[A]ny entity that dispenses performs [sic] any sort or [sic] prescription or non-prescription optical appliances including eye glasses or sunglasses, vision correcting lenses and contact lenses, or is an optical retail dispensary, optometry clinic, an ophthalmology clinic, or any laser eye surgery centre and/or any location that performs optical refractions and/or complete or partial eye examinations or eye health assessments.

- [28] Dr. Park argues that the prohibition set out in the covenant is so broad that she would be in breach if she went to work at a nearby food market, drug store, gas station, or convenience store that sold sunglasses or non-prescription reading glasses. IRIS argues that it would not seek to prevent Dr. Park from clerking at a supermarket or other retail facility such as those used by Dr. Park as examples because such activities would not constitute direct or indirect competition with IRIS. IRIS further submits that its sole intent is to prevent Dr. Park from competing as an optometrist within the area and for the time agreed to.
- [29] After leaving her employment with IRIS, Dr. Park should not be left to wonder whether IRIS would insist on a literal interpretation of the restrictive covenant. That would discourage her, for three years, from looking for employment within five kilometres of the IRIS Vernon location for any employer "interested in or concerned with" the sale of non-prescription reading glasses or sunglasses - the sorts of products often found near the sales terminals of

businesses having nothing to do with optometry. Any connection between the employment relationship and the broad prohibition in this covenant is tenuous, as is the economic interest IRIS might wish to protect by a covenant this broad. In that last regard, one might accept that IRIS had a reasonable economic interest in its patients who required regular eye examinations and new prescription vision products, but the evidence falls short of persuading me that IRIS had a similar reasonable interest in protecting its ability to sell non-prescription reading glasses or sunglasses to its patient base. That makes the non-competition covenant unreasonable in the scope of employment activities it purports to prohibit.

- [30] This finding is enough for me to conclude that the non-competition covenant is unenforceable. Further, notional severance and blue-pencil severance are not appropriate steps for this Court to take to convert this restrictive covenant into a reasonable one: Shafron at para. 2. However, since the parties made submissions on the geographic and temporal scopes, I will address these aspects as well.
- [31] The Court of Appeal has suggested that "[t]he permissible geographic scope of a restraint is to be measured by the reasonable mutual expectations of the parties at the time of making the contract" (Canadian American Financial Corp. (Canada) Ltd. v. King, 1989 CarswellBC 75 at para. 17). However, there is little evidence on what the parties' reasonable mutual expectations were when they entered into the second OSA in June 2010.
- [32] More generally, "[w]hether a restriction is reasonably required for the protection of the covenantee can only be decided by considering the nature of the covenantee's business and the nature and character of the employment": Elsley, at 926. For IRIS, Ms. Smallman said that for smaller communities IRIS considers the distance to other communities where the optometrist could reasonably travel to practice. Ms. Mainville, the manager of IRIS' Vernon location, has provided some evidence of locations that are still within Vernon but outside the five kilometre radius, where she says commercial and retail outlets exist. She has also given some evidence about neighbouring communities and their distances from Vernon. Dr. Park simply says that her new location is in a new building on the same main street as a number of other medical and related offices, and across the street from the school attended by her child who has special needs, which makes it more convenient for her to go to the school if needed. She does not say how often she has been called to her son's school. She also says there are six optometrists aside from herself practising within five kilometres of the IRIS Vernon location. Dr. Park also deposes that setting up a practice in the locations identified by Ms. Mainville is not financially viable given the small populations or difficulty in drawing sufficient patient traffic.
- [33] Even if I accept that Dr. Park could not feasibly work within Vernon but outside of the five kilometre radius, or in one of the small communities falling within Vernon's broader catchment area, I find that the scope of the geographic restriction is reasonable. IRIS has a legitimate interest in protecting its patient base for the Vernon location, which I infer is primarily drawn from the population of Vernon and the surrounding catchment area. The

five kilometre range does not go beyond what is necessary to protect this patient base. The restrictive covenant does not preclude Dr. Park from working in a larger centre nearby, such as Kelowna or Kamloops. While I appreciate that relocating or commuting to such a location would be inconvenient or disruptive for Dr. Park, this is not the test for assessing geographic reasonableness.

- [34] As to the length of the restriction, Ms. Smallman has sworn that IRIS settled on three years because it has determined that there is an average of two years between optometric appointments, and in IRIS's experience, it takes an average of six to 12 months to recruit and train a new optometrist, most of that taken up in recruitment.
- [35] Dr. Park says the restriction is overly long, arguing that the evidence does not sufficiently establish that three years is a reasonable length of time. With the recruitment time in particular, Dr. Park notes that in the Vernon location, replacement optometrists have commenced work immediately after someone else departs.
- [36] Ms. Smallman's evidence satisfies me that the length of the prohibition against competition is reasonably defensible.

The Non-Solicitation Covenant

- [37] As noted above, Dr. Park ran an advertisement in three editions of a local newspaper which provided information about the opening of her new clinic and included the words, "Dr. Park looks forward to seeing familiar faces and welcoming new patients." IRIS alleges that Dr. Park has breached the non-solicitation covenant with this advertisement and that the reference to "familiar faces" is a clear invitation to the patients with whom Dr. Park had developed a professional relationship while working at IRIS. Dr. Park denies soliciting or attempting to solicit IRIS patients, and also suggests the clause is ambiguous given the uncertainty around the phrase "in the habit" in section 7.1(c) of the OSA. Dr. Park submits the non-solicitation clause is therefore unenforceable.
- [38] IRIS also tendered evidence that four or more of its clients had asked to have their patient files moved to Dr. Park's new business after seeing Dr. Park's advertisement and that another patient had said that someone at Dr. Park's new business had contacted her. This evidence is hearsay, and not admissible on a summary trial: *L.E.W. v. United Church of Canada*, 2005 BCSC 564.
- [39] The general principles applicable to non-competition clauses also apply to non-solicitation clauses. The clause in this case prohibits soliciting, interfering with or endeavouring to entice away any customer, patient, company or organization "in the habit" of dealing with OpCo or IRIS. Counsel for IRIS argued that anyone who had done business, as a patient, with IRIS a single time would qualify as being "in the habit" of dealing with IRIS. I do not agree. "Habit" connotes repetition, and in the context of this agreement, must surely mean a patient who, through prior usage, has become accustomed to returning to IRIS for their eye care needs, and not a single-transaction patient. The OSA offers no help in determining

which IRIS patients have become habituated to the company's offerings, and the non-solicitation provision is for that reason so vague as to make enforcement problematic.

- [40] It is not necessary to decide this aspect of the case on that basis, however. The real issue, as I see it, is whether Dr. Park's advertisements breach the non-solicitation clause, assuming the clause is sufficiently clear and thus enforceable.
- [41] In *Dr. P. Andreou Inc. v. McCaig*, 2007 BCCA 159, dentists who had been associated in a dental practice signed agreements that contained similar terms prohibiting them from communicating with the patients of the employer's practice for the purpose of soliciting their dental business after leaving their employment. The dentists who left placed an advertisement in one edition of a newspaper announcing that they had opened a new dental practice and ran weekly "business card" advertisements for several months in the same newspaper.
- [42] The court considered a number of authorities dealing with communicating and soliciting by way of advertising, and concluded that "something more than a general informational advertisement to the public" was needed to constitute a breach of a non-solicitation covenant (at paras. 22, 35).
- [43] Similarly, the court in *Dr. Alain Nourkeyhani Dentistry Professional Corporation v. Pakroo*, 2008 CanLII 27480 (Ont. S.C.J.), considered a non-solicitation clause almost identical to the one in the case at bar. The court concluded at para. 18:

It is generally recognized that a non-solicitation clause in an agreement does not prevent a person from doing general advertising in the media. If advertising of a general nature is carried out, it is irrelevant that information with respect to the defendant's new location may come to the attention of his former customers and irrelevant that they might therefore seek him out. That does not constitute solicitation. It is only where a defendant makes use of confidential information or targets specific members of the former client base that advertising efforts have traditionally been found to be objectionable. [Citations omitted.]

- [44] The advertisement's invitation to "familiar faces" might include those customers whose faces became familiar to Dr. Park through professional contact at the IRIS outlet in Vernon. However, it would also include anyone else Dr. Park had become familiar with in the almost nine years she had lived in the city.
- [45] It is possible to construe the impugned advertisement as targeted at repeat IRIS customers, whose faces had become familiar to Dr. Park through repeat business. However, such an interpretation is so unlikely in my view as to be fanciful.
- [46] The claim based on breach of the non-solicitation clause fails because I am not persuaded that the advertisement complained of solicits or endeavours to entice away any IRIS patients.

Liquidated Damages

- [47] If I am wrong, and Dr. Park has breached a valid non-competition covenant or non-solicitation covenant, I should deal with the liquidated damages provision in section 7.2 of the OSA. At this stage of the proceedings, IRIS only seeks declarations that these provisions are enforceable and will later elect between damages and a permanent injunction against Dr. Park.
- [48] Dr. Park says she paid no attention to this provision when she signed the second OSA in 2010, and was not told that the OSA's provisions had been expanded to provide that it would operate if she breached the conditions of section 6 as well as section 7.1. Dr. Park says the only negotiation leading to the second OSA concerned the minimum number of hours she would commit to each week. As she had just had a child, she bargained for a reduction in her working hours.
- [49] But Dr. Park wisely does not argue that she should not be held to the terms of the damages clause based on her cavalier approach to the agreement. I say wisely because Dr. Park is a well-educated person who must take the consequences of signing an agreement without reading it through.
- [50] The real issue here is whether the damages clause is a genuine pre-estimate of damages in the event of a breach, or a penalty.
- [51] IRIS submits that this "modest estimate of the lost profits over a three year period" constitutes liquidated damages and is not extravagant or unconscionable. In the alternative, IRIS argues that even if the amount is a penalty, the court should not grant Dr. Park relief from it given her deliberate actions to breach the non-competition clause despite IRIS's objections.
- [52] Dr. Park submits that the liquidated damages clause is actually a penalty and the amount contemplated is unreasonable and unconscionable. Accordingly, Dr. Park argues that the clause is unenforceable. Dr. Park argues that many potential breaches of the OSA, including insignificant ones, could trigger the clause. Further, Dr. Park submits that there is no evidence that the amounts are a genuine pre-estimate of damages or that they are tied to the profits she generated while working at the Vernon outlet.
- [53] Justice Newbury in *Maxam Opportunities Fund v. Greenscape Capital Group Inc.*, 2013 BCCA 460, set out the approach to resolving this issue:
- [53] This court has ruled that the following approach is to be taken to payments that are stipulated to be payable on a breach of contract:

where the issue is whether a contractual clause is for liquidated damages or is a penalty:

- (1) The question of "penalty" or "liquidated damages" is to be answered as at the date of the making of the agreement;

- (2) If the answer is "liquidated damages", that is the end of the matter, but, if the answer is "penalty"; then,
- (3) There arises the next question: should relief be granted against the penalty?
- (4) The answer to that question depends upon whether to enforce the penalty would be unconscionable, and that unconscionability has to be determined at the date of the invocation of the clause.
- (5) Sec. 21 [now s. 24] of The Law and Equity Act only applies if and when stage 3 has been reached.

[54] The Supreme Court of Canada in *H.F. Clarke Limited v. Thermidaire Corp. Ltd.*, [1976] 1 SCR 319, affirmed at 338, that a "sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach."

[55] Similarly, the Court of Appeal in *Newman, Hill, Duncan & Lacoursiere v. Murray*, 1987 CarswellBC 1103, cited *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.*, [1915] A.C. 79 (H.L.), for the following proposition, at para. 14:

There is a presumption (but no more) that it is a penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.'

[56] The court in *Murray* at para. 15 also cited with approval the following extract from *McGregor on Damages*, 14th edition, which is at para. 342 on page 247 of the text:

The same sum cannot in the same agreement be treated as a penalty for some purposes and as liquidated damages for others, for if the same sum is extravagant and unconscionable in relation to one breach to which it applies it cannot be a genuine pre-estimate and the sum becomes branded as having a penal nature which it cannot lose in relation to other more serious breaches to which it also applied. It adds nothing to say that it would not have been a penalty as to the other breach or breaches or that it is the other breach or breaches that have in the event occurred.

[57] Applying these principles to the case at bar, I note that under section 7.2 of the OSA, the agreed-upon maximum sum of \$250,000 is payable if Dr. Park breaches the patient file transfer provisions in section 6 or the non-competition/non-solicitation provisions in section 7. Section 6 provides for an "indemnity" of \$100 payable to OpCo for each patient file that Dr. Park refuses or is unable to transfer. I find it extravagant and unconscionable that a single breach of section 6, which would result in a \$100 payment under that section, could also expose Dr. Park to a claim for \$250,000 in damages under section 7. In light of this, I conclude that section 7 provides for a penalty and not liquidated damages.

- [58] However, I must go on and determine whether I should grant relief against the penalty. According to Maxam this hinges on whether section 7.2 is unconscionable at the date of its invocation. The court in *Habitat for Humanity Canada v. Hearts and Hands for Homes Society*, 2015 BCSC 1182, aff'd 2016 BCCA 217, set out the test for unconscionability:
- [138] The test is whether "the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded": *Hughes v. Gibson*, 2012 BCCA 172 at para. 28, approving of *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166 (C.A. per Lambert J.A.). This broad test encompasses the two traditional components of unconscionability: inequality in bargaining positions due to the needs and distress of the weaker party leaving them vulnerable to the power of the stronger, and a substantially unfair bargain to the benefit of the stronger: *Hughes* at para. 29.
- [59] While the penalty called for in the OSA is so disproportionate to any genuine pre-estimate of current damages, the parties have not sufficiently presented evidence or argument on the question of relief against the penalty that it would be fair to decide the matter. As it is not necessary to do so, given my earlier conclusions, I decline to decide whether Dr. Park should be relieved from the penalty.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston

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