
CANADA / JUDGMENT

IRIS The Visual Group Western Canada Inc. v. Park

2017 BCCA 301

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 301 IRIS The Visual Group Western Canada Inc. v. Park

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

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

2017 BCCA 301

Date: 20170821

Docket: CA44103

Between:

IRIS The Visual Group Western Canada Inc.

Appellant

(Plaintiff)

And

Hannah Park, Dr. Hannah Park, Optometric Corporation

and Affinity Optometry

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated November 7, 2016 (IRIS The Visual Group Western Canada Inc. v. Park,

2016 BCSC 2059, Vancouver Docket No. S165879).

Counsel for the Appellant:

M.G. Underhill

Counsel for the Respondents:

P.M. Pulver

Place and Date of Hearing:

Vancouver, British Columbia

June 6, 2017

Place and Date of Judgment:

Vancouver, British Columbia

August 21, 2017

Written Reasons by:

The Honourable Mr. Justice Hunter

Concurred in by:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Fitch

Summary:

The appellant appeals a decision refusing to enforce a non-competition clause in an agreement between the parties. Held: Appeal dismissed. The clause was overbroad and could not meet the test of being reasonable as between the parties. Severance to narrow the clause was not appropriate. The clause was unenforceable.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

- [1] The appellant, IRIS the Visual Group Western Canada Inc. ("IRIS"), appeals a decision of trial judge dismissing its application to enforce a non-competition clause contained in an agreement with the respondent, Dr. Park.

- [2] The appellant raises two issues on this appeal. First, IRIS argues that the trial judge erred in concluding that the non-competition clause was unenforceable as being overbroad in the activities it purported to prohibit. If the trial judge did not err in finding the clause overbroad, IRIS submits that the trial judge erred in not severing the offending language in order to render the clause enforceable.
- [3] In my opinion, the trial judge did not err in his conclusion that the non-competition clause was unenforceable as being in restraint of trade, and did not err in declining to use the device of severance to save the clause. For the reasons that follow, I would dismiss the appeal.

I. Background

- [4] 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.
- [5] To deliver these services and sell these products, IRIS contracts with individual optometrists. The contract is prepared by IRIS and is called an Optometric Services Agreement ("OSA").
- [6] IRIS considers itself to be in a vulnerable position if the optometrists who have been working at IRIS locations leave to set up competing businesses. Accordingly, IRIS now includes in all of its contracts non-competition, non-solicitation and non-disclosure provisions.
- [7] Dr. Park is an optometrist who provided services at an IRIS business location in Vernon, B.C. between 2007 and 2016, when she resigned to set up her own optometry practice in Vernon.
- [8] When Dr. Park joined IRIS in 2007, she and IRIS executed an OSA ("the 2007 OSA") to govern their relationship. The 2007 OSA was for a three-year term, with automatic three-year renewals unless the agreement was terminated by either party. It set out the terms and conditions of the working relationship. On termination of the agreement, Dr. Park was required to transfer any patient files to an optometrist to be designated by IRIS.
- [9] The 2007 OSA did not contain a non-solicitation or non-disclosure clause, but did contain a non-competition clause in these terms:

9. NON-COMPETITION

9.1 During the term of this agreement and for a period of three (3) years following the termination of this Agreement the Optometrist hereby agrees not to practice Optometry, other than as provided for within this Agreement, within five (5) kilometers of the Location.

[10] Dr. Park went on maternity leave in 2009. When she returned to work in 2010, IRIS presented her with a new OSA, which she signed ("the 2010 OSA"). The 2010 OSA characterized the role of the optometrist as one of independent contractor. The description of the terms and conditions of the working relationship was similar to that contained in the 2007 OSA, but the obligations on termination were considerably more detailed. The 2010 OSA contained the following term:

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,
- (b) disclose to any person, firm or corporation any information concerning the business or affairs of OpCo or IRIS at the Location, including, without limitation, the customer list for the Business.
- (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.

[11] The reference to OpCo is to an affiliate of IRIS licensed to operate the Vernon location. Nothing turns on its inclusion in the 2010 OSA.

[12] In 2015, Dr. Park decided to set up her own practice in Vernon. In late March 2016, she sent a letter of resignation to IRIS and asked to be released from the non-competition clause. IRIS refused. Dr. Park went ahead anyway and set up an optometry practice approximately 3.5 kilometres from the IRIS location.

[13] IRIS then brought an action against Dr. Park, seeking a declaration that the non-competition and non-solicitation provisions were valid and enforceable, and for an injunction to prevent Dr. Park from soliciting its customers and from competing with IRIS within a five kilometre radius of the IRIS location in Vernon.

- [14] The claim in relation to the solicitation of IRIS's customers was based on advertising Dr. Park had done in connection with the opening of her practice. The trial judge concluded that this advertising did not constitute solicitation of IRIS's customers. No appeal is taken from that finding.
- [15] The claim based on the non-competition clause turned on the enforceability of that clause. It was clear that by setting up her practice within five kilometres of the IRIS location, Dr. Park was in breach of the clause, if it was enforceable.

II. Enforcement of a Non-Competition Clause

- [16] A covenant not to compete is a restraint of trade and presumptively unenforceable. However a restraint of trade will be enforceable if it is reasonable as between the parties and with reference to the public interest: *Elsley v. J.G. Collins Insurance Agencies*, [1978] 2 S.C.R. 916 at 923-924.
- [17] Where the enforceability of a non-competition clause is put in issue, the burden to establish that it is reasonable as between the parties is on the party seeking to enforce the clause. If the clause meets that requirement, the burden of establishing that the clause is unreasonable by reference to the public interest falls on the party resisting enforcement: *Green v. Stanton* (1969), 6 D.L.R. (3d) 680 (B.C.C.A.).
- [18] In this case, it is only the first test, whether the clause is reasonable as between the parties, that is at issue.
- (a) The Heightened Scrutiny Test
- [19] In determining whether a covenant not to compete is reasonable as between the parties, the first step is to look at the context of the clause to assess the degree of scrutiny to be applied to the clause. Courts have consistently drawn a distinction between non-competition clauses found in an agreement to sell a business and those found in employment contracts.
- [20] The rationale for the different approach was explained in *Shafron v. KRG Insurance brokers (Western) Inc.*, 2009 SCC 6:
- [21] The sale of a business often involves a payment to the vendor for goodwill. In consideration of the goodwill payment, the custom of the business being sold is intended to remain and reside with the purchaser. And as stated by Dickson J. (as he then was) in *Elsley v. J. G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916, at p. 924:

A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition.

See also *Burgess v. Industrial Frictions & Supply Co.* (1987), 12 B.C.L.R. (2d) 85 (C.A.), per McLachlin J.A. (as she then was), at p. 95.

- [22] The same considerations will not apply in the employer/employee context. No doubt an employee may build up a relationship with customers of the employer, but there is normally no payment for goodwill upon the employee leaving the employment of the employer. It is also accepted that there is generally an imbalance in power between employee and employer. For example, an employee may be at an economic disadvantage when litigating the reasonableness of a restrictive covenant because the employer may have access to greater resources (see, for example, *Elsley*, at p. 924, and *Mason v. Provident Clothing and Supply Co.*, [1913] A.C. 724 (H.L.), per Lord Moulton, at p. 745, quoted below at para. 33).
- [21] The distinction between these two categories reflects common sense principles. In the case of the sale of a business, the seller is normally being paid for the assets of the business including its goodwill. It is not only reasonable that the seller be held to a bargain not to compete with the purchaser in the same business, it is in the best interests of the seller to be able to provide a reliable assurance to the purchaser that the promise not to compete in the same business can be enforced.
- [22] By contrast, it has long been recognized that there is an imbalance of power between an employer and employee in negotiating employment agreements. It is that imbalance that provides the underlying rationale for the "more rigorous scrutiny" applied by the courts to restrictive covenants contained in employment agreements.
- [23] In *Elsley*, at 924, Dickson J. (as he then was) pointed out that in the negotiation of a contract of employment,
- an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and his own interest, knowledge and skills obtained during employment.
- [24] In *Shafron*, Rothstein J. referred at para. 19 to Lord Macnaghten's comments in the seminal decision in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535:
- In *Nordenfelt*, Lord Macnaghten pointed out that there is greater freedom to contract between buyer and seller than between employer and employee.
- [25] Once the degree of scrutiny to be applied to the non-competition clause has been determined, three questions must be addressed: Does the claimant have a proprietary interest worthy of protection (*Elsley* at 925)? If so, can that interest be adequately protected by other less restrictive measures than a covenant prohibiting competition (*Valley First Financial Services Ltd. v. Trach*, 2004 BCCA 312 at para. 49)? If not, is the non-competition clause in the agreement reasonable by reference to the activity prohibited, the geographical area of the prohibition and the duration of the prohibition (*Shafron* at para. 26)?
- (b) The Interest to be Protected
- [26] In *Elsley*, Dickson J. began his analysis at 925 with this question:

In assessing the reasonableness of the clause with reference to the interests of the parties, several questions must be asked. First, did Collins have a proprietary interest entitled to protection?

[27] The types of interests worthy of protection in employment contracts were illustrated in *Elsley* in these terms at 924:

Although blanket restraints on freedom to compete are generally held unenforceable, the courts have recognized and afforded reasonable protection to trade secrets, confidential information, and trade connections of the employer.

[28] In the case at bar, it is the trade connections of IRIS that are sought to be protected. No allegation of trade secrets or confidential information is made. Existing trade connections of a business will in most cases be viewed as legitimate interests worthy of protection.

(c) Less Restrictive Modes of Protection

[29] Once the interest worthy of protection has been identified, the next question is whether a non-competition clause is necessary to protect the interest, or whether the interest can be protected by less restrictive means.

[30] In many cases, existing trade connections can be protected by a non-solicitation clause.

[31] In *Valley First*, this Court summarized at para. 49 the approach to be taken to determine whether a non-solicitation clause would offer adequate protection:

A non-solicitation covenant aims to prevent a departing employee from soliciting the customers of the former employer. It does not otherwise prevent the departing employee from competing. A non-competition covenant, on the other hand, seeks to keep the former employee out of the business completely. The courts will generally refuse to enforce a non-competition covenant when a non-solicitation covenant would adequately protect the employer.

[32] There may be exceptional circumstances in which because of the nature of the particular business, a non-solicitation clause would not provide adequate protection. *Dickson J.* discussed this exception in *Elsley* at 926:

an employer could not have a proprietary interest in people who were not actual or potential customers. Nevertheless, 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. This may indeed be the only effective covenant to protect the proprietary interest of the employer. A simple non-solicitation clause would not suffice.

(d) Scope of the Non-Competition Clause

- [33] If the circumstances are such that a non-solicitation clause would be insufficient to protect the interest of the claimant and a non-competition clause is necessary, the final step is to examine the scope of the non-competition clause to determine whether it is no broader in terms of spatial, temporal and activity restrictions than is necessary to protect the interest of the claimant.
- [34] In *Elsley*, the Court enforced a non-competition clause on the basis that "the impugned covenant is no wider than reasonably required in order to afford adequate protection to [the employer]" (at 928).
- [35] In *Salloum v. Thomas* (1986), 12 C.P.R. (3d) 251 (B.C.S.C.), Toy J. (as he then was), cited the House of Lords judgment in *Deacons v. Bridge*, [1984] 2 All E.R. 19 in these terms at paras. 35-37:

at p. 21 of the judgment, Lord Fraser of Tullybelton, after quoting from Lord Macnaghten in *Nordenfellt*, quoted with approval a passage of Lord Parker's judgment in *Herbert Morris Ltd. v. Saxelby*, [1916] 1 A.C. 688 at p. 707, where he had explained that:

"for a restraint to be reasonable in the interests of the parties it must afford no more than adequate protection to the party in whose favour it is imposed."

- [36] Secondly, after recognizing the differing considerations applicable to "employee" and "sale of business" type of cases, Lord Fraser of Tullybelton in addressing the case before the House of Lords, said at p. 22:

The agreement, in the present case, being one between partners, does not conform exactly to either of the types to which reference has just been made, although it has some resemblance to both. Their Lordships are of opinion that a decision on whether the restrictions in this agreement are enforceable or not cannot be reached by attempting to place the agreement in any particular category, or by seeking for the category to which it is most closely analogous. The proper approach is that adopted by Lord Reid in the *Esso Petroleum* case [1967] 1 All E.R. 899 at 709, [1968] A.C. 269 at 301, where he said:

"I think it better to ascertain what were the legitimate interests of the appellants which they were entitled to protect, and then to see whether these restraints were more than adequate for that purpose.

(Emphasis by Toy J.)

- [37] I am satisfied that like in the *Deacons v. Bridge* situation, I must ascertain what legitimate interest that Salloum, Doak and Company had that they were entitled to protect and whether the restriction that was imposed upon the defendant was more than adequate for that purpose.
- [36] A restriction that goes beyond what is adequate to protect the legitimate interest of the claimant is not reasonable as between the parties, and will not be enforced.

III. The Trial Judgment

[37] The trial judge reviewed the applicable legal principles and correctly concluded that because the non-competition clause was a restrictive covenant, the onus was on IRIS to show that it was reasonable as between the parties. He reviewed the terms of the 2010 OSA and held that it was "much closer to an employment contract than anything else." Accordingly, he gave the contract the "closer scrutiny" applicable to employment agreements.

[38] The trial judge held that the temporal and spatial limitations in the clause were reasonable, but that the clause failed because of the very broad description of the proscribed activities.

[39] The central conclusion of the trial judge is expressed in this passage, taken from paras. 27 and 29 of the trial judgment:

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."

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.

[40] Accordingly, the trial judge declined to enforce the non-competition clause.

[41] IRIS appeals the determination that the non-competition clause is unenforceable, and raises three issues:

- (i) whether the trial judge erred in characterizing the 2010 OSA as an employment agreement and construing the restrictive covenants more strictly in light of that conclusion;
- (ii) whether the trial judge erred in finding that the non-competition clause was unreasonable in the scope of employment activities it purports to prohibit; and
- (iii) whether, if the non-competition clause was unreasonable as drafted, the trial judge erred in declining to use "blue-pencil" severance to convert the clause to a reasonable one.

IV. Analysis

- (a) Application of the Heightened Scrutiny Test

[42] The trial judge began his analysis by considering whether the relationship between the contracting parties was more akin to an employment agreement or a contract for the sale of a business in order to determine whether to apply a more rigorous scrutiny to the assessment of the clause. He concluded at para. 24 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.

[43] IRIS challenges this finding, pointing out that the 2010 OSA contains a provision in the following terms:

2. NATURE OF RELATIONSHIP

2.1 OpCo and the Optometrist agree and acknowledge that the Optometrist is an independent contractor and nothing in this Agreement shall create an employer-employee relationship, principal-agent relationship or a partnership.

[44] IRIS argues that the relationship between the parties embodied in the 2010 OSA can be characterized as an "association agreement" distinguishable from either an employment agreement or the sale of a business, and cites the analyses in Salloum and Green to support a case-by-case approach rather than a categorical one.

[45] In my view, this argument misconceives the purpose of the threshold question concerning the degree of scrutiny to be applied to the restrictive covenant in order to assess its reasonableness. The rationale for the traditional distinction is concisely expressed by Rothstein J. in Shafron:

[23] The absence of payment for goodwill as well as the generally accepted imbalance in power between employee and employer justifies more rigorous scrutiny of restrictive covenants in employment contracts compared to those in contracts for the sale of a business.

[46] The rigorous scrutiny referred to in Shafron applies whenever the agreement contains the elements that support the close scrutiny required of an employment contract, namely, the absence of payment for goodwill and the power imbalance normally present between employee and employer.

[47] This principle has been applied in other cases where the party sought to be restrained was defined as an independent contractor rather than employee, as illustrated by the judgment of the Manitoba Court of Appeal in Winnipeg Livestock Sales Ltd. v. Plewman, 2000 MBCA 60, citing with approval a decision of Green J.A. (as he then was) of the Newfoundland Court of Appeal:

[23] In *Dynamex Canada Inc. v. Miller* (1998), 161 Nfld. & P.E.I.R. 97 (Nfld. S.C.-C.A.), Green J.A., for the court noted (at para. 38):

It was argued in this case that this restrictive approach in employment situations should not apply, given the fact that the parties had agreed that the relationship was not of employer-employee but one of principal and independent contractor. I do not place much emphasis on these distinctions. Whether Miller was an employee or an independent contractor, he was, in the circumstances, a person who faced an imbalance of bargaining power. The policy of protecting against an imbalance of bargaining power that applies in the employer-employee situation also applies here.

[24] In my opinion, the rigorous "reasonability test" is as applicable with respect to independent contractor relationships such as this as with employer-employee relationships.

[48] IRIS argues that the heightened scrutiny standard should not have been applied in this case because there was no power imbalance between the parties when the contract was negotiated. I do not agree. When Dr. Park joined IRIS in 2007, she had been practising optometry for only four years. She had just moved to Vernon to take up a position with IRIS and had no existing patient base. IRIS, by contrast, is a large national organization which has been in business for more than 25 years. The power imbalance in this relationship is no different than would be the case in an employment relationship.

[49] One of the practical indications of a power imbalance is the use of standard form contracts drafted by one of the parties and presented to the other party without any negotiations. The evidence before the trial judge was that "non-competition, non-solicitation and non-disclosure provisions are included in all OSAs" by IRIS. There was no negotiation of these clauses in either agreement between the parties.

[50] The 2010 OSA set the minimum hours of work required of Dr. Park, specified that her weekly schedule had to be approved by IRIS, set vacation days which required approval of IRIS, set the fees that must be charged, and required that upon termination of the agreement all patient files had to be turned over to another IRIS optometrist.

[51] None of the features of a sale of business agreement that supports a more benign scrutiny of a restrictive covenant are present in the circumstances of this case.

[52] In my view, the trial judge was correct to give this clause the more rigorous scrutiny given to non-competition clauses in employment contracts.

(b) Breadth of the Non-Competition Clause

- [53] IRIS challenges the trial judge's conclusion that the non-competition clause is unreasonable in the scope of the employment activities it purports to prohibit. It asserts that the trial judge erred by not giving proper meaning to the concept of competition embedded in the covenant, and accepting what IRIS characterizes as the "fanciful argument" that the clause might be applied in a wide range of circumstances unnecessary for the protection of the company's trade connections.
- [54] The test IRIS must meet is whether the restriction in the clause is no broader than is necessary to protect the legitimate interests of the company. As indicated earlier in these reasons, this question will normally have two elements. First, is a restriction on competition necessary at all or would less restrictive measures such as a non-solicitation covenant suffice? Second, if a non-competition clause is required, is the scope of that clause no broader than is necessary to protect the asserted interest?
- [55] The 2010 OSA contained two provisions which provide protection of IRIS's trade connections. A non-solicitation clause is included in the OSA prohibiting the solicitation of IRIS's customers. This clause was also drafted broadly, and the trial judge expressed the concern that the provision was "so vague as to make enforcement problematic." It is unnecessary for the purposes of this appeal to determine whether the non-solicitation clause would have been enforceable on its own. For present purposes, it is sufficient to note that IRIS has included in this OSA a non-solicitation clause which has the effect of offering a degree of protection of its trade connections.
- [56] As well, the 2010 OSA included detailed provisions requiring a departing optometrist on request of IRIS to "transfer all accumulated patient lists and files, clinic files and records" to an optometrist designated by IRIS. Such a provision would also assist IRIS in protecting its customer base.
- [57] The trial judge did not find it necessary to consider whether these provisions would have afforded IRIS adequate protection and we do not have the benefit of his assessment of the evidence on that point. Given the breadth of the restrictive covenant, it is not necessary for us to make this determination. The enforceability of the non-competition clause can be determined on a consideration of whether it is no broader than is required to provide the necessary protection.
- [58] In this case, the trial judge concluded that the spatial and temporal restrictions of the non-competition clause were reasonable. It is the description of the prohibited activity that raises the issue of reasonableness.
- [59] By any standard, the scope of the activities caught by the non-competition clause in the 2010 OSA is very broad. It is noteworthy that the 2007 OSA contained the simple restriction that an optometrist could not practise optometry within five kilometres of the IRIS location for three years. Although a non-solicitation commitment is the most obvious (and least intrusive) way to protect a company's existing trade connections, a case could be made that the only practical way to protect IRIS's proprietary interest in its customer base is to prohibit

the departing optometrist from offering her services as an optometrist within the geographical market in which IRIS operates.

- [60] The non-competition clause in the 2010 OSA goes considerably further. In his affidavit, the Vice President of Medical Affairs of IRIS stated that the intent behind the change in scope of the non-competition clause in 2010, as compared to the 2007 OSA, was "to prevent an optometrist from not only directly competing with IRIS by practising optometry in a nearby clinic, but also indirectly competing by having any sort of financial interest in (or obtaining any benefit from) an optometric practice, wherever it may be located."
- [61] The impugned clause achieves this objective by prohibiting the departing optometrist from being in partnership with, or "in conjunction with" or employed by any person or company "carrying on, engaged in, interested in or concerned with a business that competes with" IRIS.
- [62] A definition of such a competing business is provided, and extends to "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".
- [63] This clause fails the reasonableness test on two bases. First, it is ambiguous. What is the nature of the connection required to compete "in conjunction with" another person? How is one to determine whether an individual is "concerned with" a business that competes with IRIS?
- [64] An ambiguous clause cannot be a reasonable clause, as pointed out by Rothstein J. at para. 27 of Shafron:

An ambiguous restrictive covenant will be *prima facie* unenforceable because the party seeking enforcement will be unable to demonstrate reasonableness in the face of an ambiguity.

- [65] Second, to the extent that the constraint is adequately clear, it goes well beyond what is necessary to protect IRIS's interests.
- [66] The trial judge pointed out that if the clause is enforceable, Dr. Park would be prohibited for three years from seeking any kind of employment within five kilometres of IRIS's location from any business that is "interested in or concerned with" the sale of non-prescription reading glasses or sunglasses. Such a restriction would prevent Dr. Park from engaging in a wide range of work, including work that had nothing to do with the practice of optometry. This cannot be described as "no wider than reasonably required in order to afford adequate protection" to IRIS's existing trade connections.

[67] We have been invited to interpret the clause on the footing that IRIS would not enforce it unless the effect of the business relationship was that the departing optometrist was in fact competing directly with IRIS in areas in which she had previously provided services for IRIS. This would require reading down the clause by the device of notional severance. For the reasons discussed in the next section of this judgment, that is not a solution available to IRIS.

[68] For these reasons, the restrictive covenant in the 2010 OSA is not reasonable as between the parties and accordingly is not enforceable.

V. The Severance Issue

[69] The most obvious illustration of the overbreadth of the impugned clause is the prohibition against working with a business that dispenses non-prescription eyeglasses or sunglasses. Many retail establishments that do not offer optometry services do so.

[70] IRIS argues in the alternative that if the non-competition clause is found to be unreasonable, it can be saved by the device of severance. The Company proposes that the words "or non-prescription" be excised to narrow the list of prohibited activities to businesses that dispense prescription optical appliances.

[71] The law has traditionally been disinclined to fix a defective restrictive covenant by severing offending language to create a reasonable restriction. In *Elsley*, Dickson J. made these comments at 925-926 about overbroad restrictions on competition:

The next and crucial question is whether the covenant is unenforceable as being against competition generally, and not limited to proscribing solicitation of clients of the former employer. In a conventional employer/employee situation the clause might well be held invalid for that reason. The fact that it could have been drafted in narrower terms would not have saved it, for as Viscount Haldane said in *Mason v. Provident Clothing and Supply Co.*, *supra*, p. 732, "... the question is not whether they could have made a valid agreement but whether the agreement actually made was valid."

[72] The issue was considered more recently in the Supreme Court's judgment in *Shafron*. Speaking for a unanimous court, Rothstein J. held that:

[36] blue-pencil severance may be resorted to sparingly and only in cases where the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant. However, the general rule must be that a restrictive covenant in an employment contract found to be ambiguous or unreasonable in its terms will be void and unenforceable.

[37] However, I am also of the view that notional severance has no place in the construction of restrictive covenants in employment contracts.

- [73] There are two difficulties with the proposal to excise "or non-prescription" from the clause. First, it is not at all clear that removing the reference to non-prescription optical appliances is "trivial and not part of the main purport of the restrictive covenant." The intent behind the expansion of the clause in 2010, as explained by IRIS's Vice President of Medical Affairs, was to spread the net widely to catch business operations that would not have been included in the prohibition against the practice of optometry included in the 2007 OSA. This was the "main purport of the restrictive covenant." Thus severance of this term does not meet the test set out in Shafron.
- [74] The breadth of this clause is similar to the one considered in *Jordon v. Pacific Sign Group Inc. et al*, 2007 BCSC 574, when Frankel J. (as he then was) rejected severance in these terms:
- [32] I should indicate that, having regard to *KRG Insurance Brokers (Western) Inc. v. Shafron*, I have considered, but rejected, the concept of "reading down" as a means of giving some effect to the restrictive covenant. Pacific Sign clearly intended to prevent Mr. Jordon from competing with it in any way. To now attempt to impose more moderate restrictions would require me to rewrite, as opposed to interpret, the contract. This I cannot do.
- [75] In a similar fashion, IRIS clearly intended to prevent Dr. Park from competing with it in any way, however remotely. It would not be appropriate to rewrite the contract to create a more moderate restriction that does not reflect the intention of either party.
- [76] Second, elimination of the words "or non-prescription", while addressing the most obvious overreach of the clause, does not resolve the ambiguity raised by words of association such as "in conjunction with" or "concerned with a business".
- [77] If an employer or a business in a position comparable to an employer wishes to protect its trade connections by restricting competition, it is essential that the scope of the restriction be clear as well as reasonable. I agree with the trial judge that this is not one of those rare cases where the court will assist one of the parties by re-writing an overbroad clause so that it can meet the test of reasonableness.
- [78] In the view that I take of this case, it is not necessary to address the question of liquidated damages arising from the 2010 OSA.
- [79] For these reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Mr. Justice Fitch"

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