

CANADA / JUDGMENT

WJ Packaging Solutions Corp. v. Park

2021 BCSC 316

COURT

Supreme Court of British Columbia

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2021 BCSC 316 WJ Packaging Solutions Corp. v. Park

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

WJ Packaging Solutions Corp. v. Park,

2021 BCSC 316

Date: 20210225

Docket: S189258

Registry: Vancouver

Between:

WJ Packaging Solutions Corp.

Plaintiff

And

Sunyoung Park

Defendant

Before: The Honourable Madam Justice Humphries

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

September 21-24,

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Place and Date of Judgment:

Vancouver, B.C.

February 25, 2021

Table of Contents

Background. 3

Ms. Park's employment with WJP. 3

Post-employment with WJP. 7

Nature of the at Work at WJP Versus Work at Champion. 10

Overview of Issues. 12

1. Is There A Reason Not To Enforce the NDA?. 14

The Plaintiff's Position. 14

The Defendant's Position. 14

Analysis. 15

2. Did the Defendant Owe a Fiduciary Duty to the Plaintiff?. 16

The Plaintiff's Position. 16

The Defendant's Position. 18

Analysis. 19

3. Did The Defendant Breach the NDA?. 20

The Plaintiff's Position. 20

The Defendant's Position. 22

Analysis. 23

4. What Damages Flow from the Breach/Pleadings. 24

Plaintiff's Position. 24

Defendant's Position. 27

Plaintiff's Reply. 30

Analysis. 31

Damages for the Breach. 31

Disgorgement of Profits. 35

Punitive Damages. 36

Result. 37

Costs. 37

- [1] The plaintiff, WJ Packaging Solutions Corp. ("WJP"), sues the defendant Sunyoung Park ("Ms. Park") for breach of contract and breach of fiduciary duty arising out of an agreement she signed upon leaving the employment of WJP.

Background

Ms. Park's employment with WJP

- [2] WJP is a company incorporated in British Columbia, with offices in Richmond, B.C. Andrew Lee is president of WJP. Christopher Cho is Vice President of Operations.
- [3] Mr. Cho testified at trial; Mr. Lee did not, although he was examined for discovery and many of his answers were read in. Ms. Park testified on her own behalf. Both witnesses seemed to be honestly recalling events to the best of their ability, and there was little material conflict in their respective testimony. Some of Mr. Cho's recollections were successfully challenged on cross-examination, but there are few, if any, important conflicts in the evidence. Most of the evidence related to documents put to each of the witnesses.
- [4] The defendant says an adverse inference should be drawn from the plaintiff's failure to call Mr. Lee, as he had material evidence to give. The plaintiff says Mr. Lee testimony was unnecessary as he had no evidence that would not duplicate Mr. Cho's. I agree that Mr. Lee had material evidence to give but there was no particular issue that was not addressed by Mr. Cho, so the failure to call Mr. Lee is not of great significance.
- [5] WJP could loosely be termed a broker (a term resisted by Mr. Lee, according to Ms. Park) between its customers requiring packaging for their respective products and manufacturers in Korea who would supply the packaging. That is, WJP's customer would provide WJP with all the specifications they required for packaging their product and WJP would forward the information to the manufacturer in Korea, and would ensure, with the customer, that the packaging met the specifications. WJP also handled the shipping to Canada of the packaging

material, its entry through customs, and its delivery to the customer.

- [6] WJP hired Ms. Park, who is fluent in English and Korean, as a customer services representative in July of 2008. She was the only customer services representative at that time, replacing a woman who was on maternity leave. She did not sign an employment agreement upon commencing employment.
- [7] Ms. Park became a very valuable employee for WJP. Her main customer was Champion Petfoods LP. ("Champion"), who, according to Mr. Cho, was responsible for 70-75% of WJP's revenue. Champion has offices in Edmonton and Kentucky. Champion produces many varieties of pet foods in bags of various sizes and designs.
- [8] Ms. Park was the liaison between Champion and Dongwon, the Korean manufacturer who created and supplied the packaging for Champion's products.
- [9] Over the years, Ms. Park developed a good working relationship with both Champion and Dongwon. There was very little direct contact between Champion and Dongwon, although they met occasionally on press-proofing trips to Korea (trips to Dongwon's manufacturing facility to ensure the packaging specifications were correct before the pet food bags were actually produced) and rare meetings in Edmonton.
- [10] According to both Mr. Cho and Ms. Park, Mr. Lee was a hands-on manager, and no decisions were made without his approval. No meetings in Canada, the United States, or Korea were held without his attendance, although he did not always go the press-proofings outside of Seoul when he was in Korea, instead requiring an immediate debriefing at dinner the same day. Ms. Park attended the press-proofings.
- [11] In 2016, Mr. Lee's son Jonathan joined WJP and Ms. Park was asked to train him in respect of her duties for Champion and Dongwon. She did so. She realized she was being phased out of her position in favour of Jonathan Lee. Her duties were reduced to buying office supplies and groceries, as well as packing strawberries for another of Mr. Lee's enterprises. She gave one month's notice of her resignation in early April 2017. Mr. Cho asked her to extend her notice to May 31, 2017 and she agreed.
- [12] Near the end of April or early May, Mr. Lee called Ms. Park into his office and asked her about her plans for the future. She told him she was not sure what she was going to do. Mr. Lee told her he was concerned about her working for competitors, and mentioned Dongwon. Within a day or two, he called her into his office again to say he could not let her go without her signing an agreement. He told her he did not want her in the office after that day and would pay her about \$500,000, expressed in Korean currency, (approximately 5 years' salary) in exchange for her signature on an agreement. Ms. Park testified that she told Mr. Lee she did not want to maintain a connection to WJP and did not want to be paid for doing nothing. She did not want his money. However, Mr. Lee said his lawyer would contact her with an NDA, which she should get signed and notarized and return.

- [13] Mr. Lee told Ms. Park he did not want anyone to know about the agreement and the money would come from his personal account and would go into his lawyer's trust account.
- [14] Mr. Lee mailed her a draft agreement, entitled "Non-Disclosure, Non-Competition and Non-Solicitation Agreement", and told her to get legal advice.
- [15] Ms. Park testified that she discussed the situation with her husband. Both were shocked and did not understand Mr. Lee's rationale.
- [16] Ms. Park met with a lawyer whose name she found online. He reviewed the agreement with her. She said she felt a lot of pressure as she felt Mr. Lee would not let her go without signing the agreement. She said he often threatened to sue people and she was sure he would sue her, although it was not clear what she thought she could be sued for.
- [17] In any event, after a couple of minor changes to the agreement, she signed it on May 11, 2017 ("the NDA"). The amount of consideration had by this time become \$610,000 ("the Resignation Payment"). Ms. Park reported the payment to CRA and paid tax on it. After tax, the amount she received was \$427,350.
- [18] The NDA provides, in part:
2. Non-Competition and Non-Solicitation
 - a. The Employee acknowledges that:
 - i. the industry in which the Company operates is highly competitive;
 - ii. the Employee has developed close relationships with customers, employees and suppliers of the Company during her course of employment and the goodwill of the Company depends upon the development and maintenance of such relationships; and
 - ii. the preservation of the Company's goodwill, the protection of the business and the Company's relationship with its customers, employees and suppliers are proprietary rights the Company is entitled to protect.
 - b. The Employee covenants and agrees that for a period of five (5) years following her resignation, the Employee shall not, directly or indirectly, whether individually or in partnership or jointly or in conjunction with any person or persons, as principal, agent, shareholder, officer, employee or in any other manner whatsoever:
 - i. solicit any person or entity who was a customer of the Company during the Employee's employment, and with the Employee had dealings in the course of such employment, to:
 1. purchase or otherwise obtain products, technology or services of a nature of kind that are developed, manufactured or sold by the Company, from any person or entity other than the Company, or

2. transfer their business from the Company to the Employee or to any other person or entity;
or
 - ii. sell, directly or indirectly, assist any other person or entity to sell, products, technology or services of a nature and kind that are developed, manufactured or sold by the Company, to any person or entity who was a customer of the Company during the Employee's employment with the Company, and with whom the Employee had dealing in the course of such employment;
 - iii. carry on any business, or be engaged or employed in an executive, management, design, engineering, marketing or sales capacity in any business, that competes with the Company in
1. any Canadian province

In which the Company conducts the Business."

[emphasis added]

[19] Ms. Park's evidence on the formation of the NDA is unchallenged because Mr. Lee did not testify, although, as mentioned, he was examined for discovery and a series of his answers were read in. Mr. Cho was not, of course, able to speak to Mr. Lee's motivations or concerns leading up to his insistence on having Ms. Park sign the NDA.

Post-employment with WJP

[20] Shortly after leaving WJP, Ms. Park took employment with an import/export firm which is not related to this action.

[21] In early January 2018, the Chief Brand Officer of Champion contacted Ms. Park to ask her to send them her resume. Ms. Park told him she had another job and mentioned the NDA. She said she could not work for Champion.

[22] Over the next few months, Ms. Park was pursued further by Champion. The Champion representatives expressed skepticism about the agreement preventing her from working with them, telling her they are pet food manufacturers and are not in competition with WJP.

[23] Ms. Park testified that she did not get legal advice at that point because she liked the import company she was working for and was not looking for another job. She did not want to work for Champion as they were working with WJP.

[24] While on a family trip to Korea in March, Ms. Park learned from a former colleague that Champion was possibly moving away from WJP. In April she asked a representative of Champion what was going on, and she was told that a lot of things were changing there under new management. They were getting price quotes from other manufacturers. She was asked if she was interested in joining, and said she was, but would need legal advice. She said she was confused because she did not know if she could talk about the NDA to anyone.

- [25] In late April and early May of 2018, Champion ended its relationship with WJP. This was a result of a dispute over the proposal process and it is not contended that this was in any way caused by Ms. Park. This is expressly stated in the Second Amended Notice of Civil Claim.
- [26] In late April, Ms. Park was told Champion was moving its business away from WJP; 70% of the business would go to Dongwon directly and 30% to domestic suppliers. Ms. Park had by this time sought legal advice from two firms in respect of the possibility of working for Champion and thought she was okay to do so, but she testified that she did not want to do anything that would be bad for WJP or would harm their relationship. She said when she realized Champion had left WJP, there was nothing she could harm.
- [27] On May 2, 2018, the Senior Vice President called Ms. Park, who was on holiday in Korea, to ask her to join Champion as a contract consultant. Ms. Park agreed.
- [28] On May 7, 2018, Champion told WJP that they were awarding the primary portion of their packaging needs to Dongwon directly.
- [29] In the middle of May, while Ms. Park was still in Korea, she attended Dongwon's manufacturing facility to assist in translating for Champion. During the meetings, Dongwon was informed that Ms. Park would be working for Champion. Dongwon's Director of Sales suggested to Ms. Park that she work for Dongwon instead, and told her he would talk to Mr. Lee about getting her released from the NDA, if Dongwon was considered by Mr. Lee to be a competitor. Ms. Park asked Champion if they would wait for the outcome of that discussion, and they agreed.
- [30] Ms. Park obtained a third legal opinion respecting the NDA on June 5, 2018. On June 7, 2018, Dongwon told her they could not assist her in negotiating her way out of the NDA as Mr. Lee would not agree to it. Ms. Park testified that she realized she could not work for Dongwon if Mr. Lee would not agree to release her from the NDA.
- [31] On June 8, 2018, Ms. Park told Champion of Dongwon's inability to assist her, and on June 20, 2018, Ms. Park signed a Consultant Agreement ("the CA") with Champion.
- [32] The Scope of Work, an Exhibit attached to the CA, provides:

External Packaging Coordinator

Summary

The External Packaging Coordinator (contractor) will be responsible for managing the development and execution of Champion Petfoods' retail packaging supply with suppliers as directed. External Packaging Coordinator (contractor) will coordinate activities between Marketing, SI&OP, Production, Regulatory, Finance, and suppliers to efficiently and cost effectively provide all required packaging in a timely manner.

Scope of Work:

- Direct and administer the development of new packaging products with all approved suppliers.
- Manage inventory levels to reduce working capital, minimize write-off risk and maintain production efficiencies at each Kitchen.
- Act as a liaison between Champion Petfoods and Dongwon.
- o Facilitate on Champion's behalf on all orders and ongoing projects
- o Track status of all orders (from beginning to shipment) until delivery to their respective warehouses
- o Assist Custom brokers as necessary on clearing of packaging products at ports
- Coordinate with Champion's Marketing, R&I, Regulatory, SI&OP, Sales, and Operations on new product launches, packaging changes, and revision tracking.
- Generate regular reporting on pricing, inventory levels, upcoming changes, exposure and projects related to packaging.
- Run interface with the Kitchen Production Planners to facilitate cost effective and efficient delivery of packaging to support operations.
- In conjunction with Vendor Quality, ensure that all required audits, certificates and processes are in place.
- Pursue alternate packaging option in conjunction with Marketing, R&I, and Procurement.
- Perform other job duties or tasks as required.

[33] WJP filed the Notice of Civil Claim against Ms. Park on August 24, 2018. Ms. Park filed her Response on September 14, 2018.

[34] Since the NOCC was filed, Ms. Park has signed two subsequent CA's for the years 2019 and 2020, with no change except that the preamble now refers specifically to Dongwon:

The External Packaging Coordinator (contractor) will coordinate activities between Marketing, SI&OP, Production, Regulatory, Finance, and Dongwon to efficiently and cost effectively provide all required packaging in a timely manner.

[35] Mr. Cho testified that WJP did not downsize after Ms. Park left. He, Mr. Lee and Mr. Lee's son Jonathon kept up the relationship with Champion. However, in March of 2018, Champion told them they were going to launch a request for proposal from three manufacturers including Dongwon. At first WJP did not want to participate. They did submit a bid later, with the support of Dongwon, but were not successful.

- [36] At discovery, Mr. Lee testified that WJP ended their relationship with Dongwon in March or April of 2018, after Champion and Dongwon decided to deal directly with each other. He said previously WJP and Dongwon were co-workers and he had passed on his know-how as a packaging technical technician to Dongwon; he said now they are competitors, although he never considered them as such. He said Champion was never a competitor of WJP.

Nature of the at Work at WJP Versus Work at Champion

- [37] Ms. Park was asked about many documents, mostly emails, sent by her and to her while she worked at WJP. She was also referred to a number of emails sent to her and from her during her work at Champion. Champion was concerned that confidential information might be disclosed during her testimony and thus had counsel present at the trial. However, no issues arose in respect of their documents that required argument.
- [38] While working for WJP, Ms. Park was under Mr. Lee's direction and control. Every email she sent was copied to him, and she made no decisions on her own. Although she received many emails from Champion about art files and package design, she was directed by Mr. Lee to make no changes whatsoever to packaging. She was to refer all queries to Dongwon, obtain their answer, and then send the answers to Champion.
- [39] Ms. Park testified that a large portion of each day at WJP was spent handling inventory, incoming and outgoing from the warehouse. This involved keeping a close eye on shipping schedules, inventory arrivals either by sea or air, requests from Champion for particular bags, and giving instructions to the warehouse manager to send out the appropriate packaging to Champion's facility.
- [40] Mr. Cho and Mr. Lee also communicated with Champion and Dongwon and were closely involved in all meetings and decisions. Ms. Park, although given the title of Manager of Customer Services by the time she left WJP, managed nothing. No one reported to her. She had to clear everything, including use of the company credit card, with Mr. Lee. However, she was the daily contact for and liaison for all practical purposes between Champion and Dongwon.
- [41] At Champion, where she now works part time as a consultant, earning about the same remuneration she received at WJP, she has the opportunity to become more involved in discussions about art work, and has more hands-on knowledge of Champion's requirements. She described herself as part of the Champion team, although she is not an employee. However, she is, for all practical purposes, the liaison between Champion and Dongwon.

Overview of Issues

- [42] The plaintiff alleges that Ms. Park provides the same services for Champion and Dongwon that were previously provided to them by WJP; that is, she acts as a liaison between Champion and Dongwon.

[43] Specifically, it is alleged that, as an independent contractor, she:

iv. Sell[s] services of a nature and kind that are developed, manufactured or sold by the Company, to any person or entity who was a customer of the Company during the Employee's employment with the Company, and with whom the Employee had dealing in the course of such employment.

[44] As well, it is alleged she carries on a business that competes with WJP in the areas restricted by the agreement, that is in areas where WJP conducts business (British Columbia and Alberta). It is also alleged that Ms. Park solicited Champion to purchase or obtain from her services of a nature or kind that are sold by WJP, and to transfer their business from WJP to her.

[45] Thus the plaintiff says Ms. Park breached the agreement as well as the fiduciary duties that arose from her position as liaison between Champion and Dongwon while employed by WJP. Damages should either be the amount she received under the agreement, or disgorgement of the profits she has received by breaching the agreement. Those profits are the remuneration she has received from Champion. In addition or in the alternative, the plaintiff seeks punitive damages.

[46] The plaintiff acknowledges that it suffered no actual damages as a result of the breach, and several claims were abandoned prior to or at trial (conversion, breach of confidence, breach of confidential information). As referred to earlier, a claim for damages arising from the termination of the working relationship with WJP and Champion was also expressly abandoned in the Second Amended NOCC.

[47] The defendant disputes the plaintiff's interpretation of the clauses relied on by them as set out above, and says in any event such restrictive covenants must be given a high degree of scrutiny before they can be enforced. This agreement does not withstand such scrutiny and the offending sections should be severed and not enforced.

[48] Furthermore, the defendant says Ms. Park did not breach the agreement, nor was she in a fiduciary position to WJP.

[49] The defendant also submits that, although WJP takes the position that Ms. Park repudiated the contract, the plaintiff did not elect to accept repudiation of the NDA; they still want the NDA to stand, and the case has been improperly pleaded. The defendant says her position is strengthened because the NOCC contains a claim for an injunction, thereby showing an intent to continue to enforce the agreement, as does the claim for an ongoing disgorgement of profits.

[50] As well, the defendant says the plaintiff did not properly plead or claim rescission, and therefore repayment of the \$610,000, which would put the parties back into the position they would have been had there been no contract, is not available.

[51] The defendant also argues that, even if there was a properly pleaded breach, there have been no actual damages. Thus damages, if awarded, should be nominal.

[52] In reply, the plaintiff says the prompt filing of the original NOCC, alleging a breach, clearly shows that the plaintiff accepted the defendant's repudiation of the contract. The original claim for damages included a claim for repayment of the moneys paid under the NDA. Although they did plead an injunction, no steps were taken to obtain one and it was never pursued as the relationship with Champion was already gone. In any event, an injunction would simply have been a remedy for breach of contract, and not an affirmation of the contract.

[53] The plaintiffs did, however, obtain an order a year before trial for continual disclosure of documents by Ms. Park, an order that was ended by consent at trial.

[54] Thus, the issues are:

1. Is there a reason not to enforce the NDA?
 2. Did the defendant owe a fiduciary duty to WJP?
 3. Did the defendant breach the NDA and/or her fiduciary duty?
 4. If there was a breach, what remedy flows from the breach and the pleadings?
1. Is There A Reason Not To Enforce the NDA?

The Plaintiff's Position

[55] The plaintiff says this agreement should not be subject to a higher level of scrutiny when the overall context is taken into account (*Payette v. Guay Inc.*, 2013 SCC 45). In an employment contract, such scrutiny is to protect the employee. There is a concern about unequal bargaining power. This contract is a commercial contract following Ms. Park's resignation. Both parties were advised by competent professionals and no imbalance of power was created. As well, Ms. Park was paid a large amount of money expressly in consideration for the promises she made in the agreement; that is, she agreed, for a payment of \$610,000, to give up the opportunity to capitalize on the relationship she had developed with Champion in the course of her work for WJP. She agreed to these terms six weeks after she had given notice of her intention to end her employment at WJP; these obligations are not ancillary to an agreement about employment. Therefore there is no basis upon which to refuse to enforce this agreement.

The Defendant's Position

[56] The defendant says this is essentially an employment contract and rigorous scrutiny of the relevant provisions is required because of the potential for an imbalance of power between employee and employer. She says the provisions of the NDA relied upon by the plaintiff are void as unenforceable and unlawful, and should be severed from the agreement in their entirety. They are *prima facie* unenforceable as being against public policy, unless they can be shown to be reasonable (see *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6). These clauses are not reasonable because they are uncertain, overbroad, and

unnecessary to protect the plaintiff's business interests.

- [57] The defendant says the clauses are overbroad because they purport to limit for five years her freedom in the employment sphere in relation to all entities who were customers of WJP in the nine years of her employment with the company. As well, she cannot be expected to remember with whom she "had dealings", an ambiguous phrase that should be construed against the drafter of the NDA. If the plaintiff meant Champion, they should have said so. The agreement even purports to restrict her for five years from activities she was never involved in, such as the sale of products, technology or services developed, manufactured or sold by WJP. As an example of how overbroad the NDA is, the defendant points out that WJP had a strawberry business while she was employed there. This agreement would prohibit her working at a strawberry farm anywhere in Canada, the United States, or Korea.
- [58] The defendant says the NDA, which arose out of an employment relationship, cannot withstand such scrutiny and should be held to be unenforceable. No submissions were made regarding the effect on the plaintiff's continued retention of the Resignation Payment if the NDA were held to be illegal or unenforceable.

Analysis

- [59] The Supreme Court of Canada in *Shafron* confirmed that restrictive covenants are prima facie unenforceable as being against public policy, unless they can be shown to be reasonable. Agreements that restrict a person's right to work can be seen as being in restraint of trade, or contrary to public policy. Employment contracts are particularly subject to scrutiny because of the potential for an imbalance of power between the parties.
- [60] What takes this agreement out of the usual employment agreement context, however, is not only its timing, that is, post-resignation, but its generous terms. This agreement was signed after Ms. Park had given notice to leave WJP. She was under no obligation or coercion to sign it, except for her perception that Mr. Lee would not give up if she did not sign it. Since she had already decided to leave, it is difficult to understand what she meant by that. Whether there was a cultural component to her perception was not the subject of argument.
- [61] The agreement states it is in effect for five years, which is a lengthy period, but Ms. Park was paid five years' salary to sign the agreement. She did so after receiving legal advice. This is an agreement signed by two entities, both of whom stood to benefit from it. Its purpose was clear to both of them, subject to the arguments that have now been made about construction of its terms.
- [62] Ms. Park received the money and she understood she was not to work for Champion or Dongwon. She was content not to do so until Champion approached her a year later, and even then, she told them could not work for them because of the NDA, a position she maintained until Champion and WJP ceased doing business together.

[63] In my view, there is no reason to refuse to enforce the agreement. The term is long, but the compensation was large enough to cover five years. The circumstances of its making have been fully examined, insofar as that can be done without Mr. Lee's testimony.

[64] I conclude that the impugned sections of the agreement should not be declared unenforceable.

2. Did the Defendant Owe a Fiduciary Duty to the Plaintiff?

The Plaintiff's Position

[65] The plaintiff pleads a breach of the NDA, a breach of duties at common law (disclosure of confidential information) and says Ms. Park breached her fiduciary duties to WJP by that conduct.

[66] The plaintiff says the defendant, although a lower level employee, was nevertheless a key employee of WJP and therefore owed it fiduciary duties, including a duty not to solicit former customers. The plaintiff refers to the factors to be considered as referred to in *GasTOPS Ltd. v. Forsyth*, [2009] O.J. No. 3969, 2009 CanLII 66153 (S.C.J.), aff'd 2012 ONCA 134:

- i. what were the employee's job duties with the former employer?
- ii What was the extent or frequency of the contact between the employee and the former employer's customers and/or suppliers?
- iii. Was the employee the primary contact with the customers and (or) suppliers?
- iv. To what extent was the employee responsible for sales or revenue?
- v. To what extent did the employee have access to and make use of, or otherwise have knowledge of, the former employer's customers, their accounts, the former employer's pricing practices, and the pricing of products and services?
- vi. To what extent was the former employee's information as regards customers, suppliers, pricing etc. confidential?

[67] There are other factors listed in that case, including the exercise of discretion so that its effect is to render the beneficiary vulnerable, knowledge of contact information, needs and preferences, playing a role in market development, knowledge of confidential information, direct and trusted relationship with existing customers, and whether the employee's functions are essential.

[68] The plaintiff says it was vulnerable to the defendant in such a way that a fiduciary duty arises. The defendant used the knowledge she acquired at WJP to secure the Champion engagement. Champion sought her out and retained her because of her abilities and their relationship with her, developed while she was at WJP. The fact that WJP insisted on the NDA is an indication of how vulnerable they were to the defendant. They knew that her knowledge of Champion's packaging needs would allow them to consider using suppliers

other than Dongwon. If she provided services to Champion, it might eliminate Champion's need to do business with WJP.

- [69] The plaintiff says it is irrelevant that Champion and Dongwon would not have continued to deal with WJP in any event. The doctrine of fiduciary duties does not attach only to opportunities the corporation is willing and able to pursue (*Pan Pacific Recycling Inc. v. So*, 2006 BCSC 1337). The fiduciary may not make personal use of an opportunity even where the corporation is unable to take it up or has declined to pursue it (*Sateri (Shanghai) Management Limited v. Vinall*, 2017 BCSC 491).

The Defendant's Position

- [70] The defendant emphasizes the following criteria as the source of fiduciary duties (*Frame v. Smith*, [1987] 2 S.C.R. 99 at paras 40-42, 42 D.L.R. (4th) 81):
- (a) the fiduciary has scope for the exercise of some discretion or power
 - (b) the fiduciary can unilaterally exercise that power so as to affect the beneficiary's legal or practical interest; and
 - (c) the beneficiary is peculiarly vulnerable to or at the mercy of the person holding the discretion or power.
- [71] The defendant says an ex-employee is permitted to use their skills, knowledge, and experience post-termination of employment (*Ebco Industries Ltd. v. Kaltech Manufacturing Ltd.* (1999), 24 B.C.T.C. 241, [1999] B.C.J. No. 2350 (S.C.); *Altam Holdings Ltd. v. Lazette*, 2009 ABQB 458; *Barton Insurance Brokers Ltd. v. Irwin* (1997), 42 B.C.L.R. (3d) 169, 32 C.C.E.L. (2d) 160, *aff'd* 1999 BCCA 73).
- [72] The defendant says she had no discretion, was not part of senior management, had no access to financial information or business strategy, had to produce all her work to Mr. Lee, and had to have everything vetted and approved by him. She was essentially an executive assistant to Mr. Lee, a mere employee of WJP.
- [73] The defendant submits that in any event, even if there were a fiduciary duty, it would subsist only for so long as is reasonable to allow the former employer to contact its clients and attempt to retain their loyalty (*Anderson, Smyth & Kelly Customs Brokers Ltd. v. World Wide Customs Brokers Ltd.*, 1996 ABCA 169). These periods are usually in the range of one year (e.g. *Imperial Sheet Metal Ltd. v. Landry*, 2007 NBCA 51; *CRC-Evans Canada Ltd. v. Pettifer* (1997), 26 C.C.E.L. (2d) 294 v, 197 A.R. 24 (Q.B.), *aff'd* 1998 ABCA 191. Even if Ms. Park had owed a fiduciary duty to WJP, such an obligation would have lasted only a few months, certainly prior to her commencing work for Champion.

- [74] In the circumstances here, WJP and Champion continued to do business for more than a year after Ms. Park left WJP, and Champion terminated its involvement with WJP without Ms. Park's knowledge or involvement. Even if there had been a duty it would have been ended by then so there could be no breach.

Analysis

- [75] I am not inclined to find that Ms. Park had a fiduciary duty to WJP. She had a good relationship with the people at Champion and at Dongwong but she had no inside knowledge or discretion to exercise. Although given the title of "Manager of Customer Relations", she could make no decisions with respect to the customers; every question submitted by Champion had to be forwarded to Dongwon for an answer, and everything she did was vetted by Mr. Lee. To perform her duties at WJP, she had her personality, her skills, her ability to speak English and Korean fluently, and her general knowledge. What emerged from the many emails put before the court was Ms. Park's friendly relationship with the people at Champion, who counted on her and relied on her to communicate with Dongwon in Korea. The only valuable "inside" information Ms. Park had about Champion while she worked at WJP was that she knew what WJP charged Champion because she typed up the quotes for Mr. Lee. She had no input into pricing. Mr. Lee was questioned at length at discovery about confidential information Ms. Park might have divulged to Champion but could not identify anything.
- [76] As well, I accept the defendant's argument that even if some limited form of fiduciary duty were found to exist, it is irrelevant to the circumstances here because WJP and Champion and Dongwon continued their relationship for more than a year after Ms. Park left WJP. Any fiduciary relationship would have expired before Ms. Park went to work for Champion, and by that time, Champion had moved away from WJP. The practical considerations underlying the "reasonable" time limitation set out in the cases referred to by the defendant is clearly demonstrated here. Business relationships change, and thus fiduciary obligations are subject to a reasonable shelf life. Such a duty, even if it existed, would not have continued for the five years provided for in the NDA; one year is a reasonable period.
- [77] In addition, it is clear from all the circumstances that Ms. Park did nothing to interfere with customer loyalty. She had nothing to do with Champion or Dongwon for a year after she left WJP (except to refuse Champion's initial request to send in her resume), and when the relationship ended because WJP refused to participate in the bidding process Champion wished to use, and was subsequently an unsuccessful bidder, it was independent of Ms. Park.
3. Did The Defendant Breach the NDA?

The Plaintiff's Position

[78] The plaintiff's argument centered on an alleged breach of the NDA. Put simply: the defendant was paid \$610,000 and promised not to do something; she broke her promise. Specifically, she sold services to Champion that WJP had been selling to them during the time she worked for WJP.

[79] Although the claims as originally pleaded were quite broad, the plaintiff focussed its case on certain words and phrases in s. 2.b of the NDA which provides that Ms. Park, for a period of 5 years, shall not:

i. solicit any person or entity who was a customer of the Company during the Employee's entitlement, and with [whom] the Employee had dealings in the course of such employment to:

1. purchase .services of a nature or kind that are .sold by the company, from any person or entity other than the Company, or

2. transfer their business from the Company to the Employee

ii. sell services of a nature and kind that are .sold by the Company, to any person or entity who was a customer of the Company during the Employee's employment with the Company, and with whom the Employee had dealings in the course of such employment;

iii. carry on any business that competes with the Company in

1. any Canadian province

in which the Company conducts the Business.

[80] The plaintiff says the defendant could have worked for Champion in many capacities, but she could not sell services to them that WJP had previously sold to them. That is, WJP sold their services as a "middleman" between Champion and Dongwon, and Ms. Park now fulfills that role. She is the competitor WJP was concerned about, not Champion or Dongwon.

[81] The plaintiff submits that with Ms. Park doing the work she now does for Champion, WJP would no longer be useful to Champion if their relationship had not otherwise ended. Champion decided to retain her because of her abilities and their relationship with her. She had intimate knowledge of the details of their work with Dongwon because of her position and duties at WJP.

[82] WJP says it was worried that Ms. Park would do exactly what she ended up doing. By signing the NDA and accepting a large amount of money, she gave up the opportunity to capitalize on the relationship she developed with Champion in the course of her work for WJP. Ms. Park knew that the NDA provided that she could not usurp WJP's role between Champion and Dongwon, which is why she turned down Champion's offer at first.

- [83] The plaintiff acknowledges, as it must, given the evidence, that Ms. Park did not cause the relationship between Champion and WJP to end. However, it says she breached the NDA because, by becoming a consultant to Champion, she sold them services that formerly had been provided by WJP.
- [84] The plaintiff says Ms. Park contracted not to sell the services that WJP provided, not just the daily tasks she performed herself, so the details of her daily employment are not determinative, even though they were gone through in detail.
- [85] The plaintiff says this detailed comparison of the duties Ms. Park performed for WJP and now performs for Champion demonstrates the similarities between the two positions. She acted as a liaison between Champion and Dongwon while employed by WJP and she acts as a liaison between the two entities now that she is a consultant with Champion. Even though her work responsibilities while at WJP may have been more circumscribed than those she now fulfils at Champion, she has taken over the services WJP provided as a company, something she contracted and was paid not to do. Her work for Champion constitutes the sale of services of a nature and kind that were sold by WJP to Champion while she was employed at WJP, and she carries on a business that competes with WJP in B.C. and Alberta. This is a clear breach of the agreement.
- [86] As well, although Champion made the initial approach to her and she declined on the basis of the NDA, she followed up later and sought the contract with them. Thus she solicited Champion to buy services from her and to transfer its business from WJP to her.

The Defendant's Position

- [87] The defendant says she did not breach the NDA. Champion decided to buy packaging directly from Dongwon, independently of Ms. Park. She performs duties entirely on behalf of Champion. While she may liaise with Dongwon, she does not sell or assist them to sell any products. Dongwon is selling, and Champion is buying, independent of Ms. Park.
- [88] The defendant says the duties she outlined in her work at Champion, including attending meetings, coordinating, facilitating, travelling, translating, and taking notes, are those of a project manager. Those were not services sold by WJP. The services previously provided by WJP to Champion had been moved to Dongwon itself. While there may be an overlap, it would be for a very small part of Ms. Park's work at WJP and an even smaller part of her work at Champion. She is substantially performing the NDA.
- [89] The defendant says the only alleged breach that is reasonably at issue in this proceeding is the alleged breach of the defendant's obligation not to sell services of a nature and kind sold by WJP to Champion. If that is a breach at all, it is incidental, not fundamental.

Analysis

- [90] The central issue in this case is: did Ms. Park breach the NDA by taking the consulting job with Champion?
- [91] In my view, there is no basis upon which to hold that Ms. Park solicited Champion to purchase services or to transfer business. Champion pursued her, not the other way around. She resisted, but eventually, after discussion and legal advice, and learning that Champion and WJP were no longer in a business relationship, she accepted their offer. There was no business from WJP left to transfer as the relationship between Champion and WJP was already concluded.
- [92] I will therefore concentrate on the clause prohibiting selling services to Champion of a nature or kind sold to them by WJP.
- [93] The plaintiff's case rests on the wording of the NDA, which is very broad, and the one provision they concentrate on is the sale of services to "any person or entity who was a customer of the Company during the Employee's employment, and with who [sic] the Employee had dealings in the course of such employment", which clearly applies to Champion.
- [94] According to her CA with Champion, Ms. Park's scope of work includes a list of tasks that seem to encompass everything she did for WJP and more, although she says she does not actually do most of those things.
- [95] Although the NDA deals with many things and the CA contains clauses that might relate to some of the provisions, I accept Ms. Park's evidence that her role at CA is more limited than the Scope of Employment provides. I will not delve into a detailed comparison of the two documents because it is unnecessary to do so and such an approach was not pressed at trial.
- [96] The NDA prohibits Ms. Park from doing many things, but claims under those provisions were abandoned at trial or before. It is the entirety of the services provided by WJP, not the specific tasks done daily by Ms. Park, that is covered by the agreement. Although her daily tasks at WJP overlap a great deal with her daily tasks at Champion, a comparison between Ms. Park's precise day to day duties at WJP and Champion is not determinative of whether she breached the agreement. One of the purposes of the NDA is to prohibit Ms. Park from selling the same services to Champion that WJP had been providing to them while Ms. Park was employed by WJP. In fact, that is exactly what she contracted to do in her CA with Champion.
- [97] The defendant's argument that she does not assist Dongwon to sell is irrelevant as it is Ms. Park, not Dongwon, who is the competitor with WJP.
- [98] Under the CA, Ms. Park sells services to Champion that WJP previously sold to them during the time she worked for WJP. I conclude that she has breached the NDA.

4. What Damages Flow from the Breach/Pleadings

Plaintiff's Position

[99] The plaintiff says Ms. Park should not be permitted to profit from her malfeasance.

[100] The plaintiff says there is a repudiatory breach of contract, in fact, each day is a continuing breach, and thus they should be put in the position they were in before the contract was made. Ms. Park received the Resignation Payment; WJP thus fulfilled their end of the contract but received no benefit from it. She must pay back the money she received under the NDA. The innocent party in the case of a repudiatory breach of contract may seek to recover damages to put them in the position they were in before the contract was made.

[101] The plaintiff acknowledges that they have suffered no actual loss from the breach, because the NDA was of no further use to the plaintiff by the time Ms. Park went to work for Champion. However, WJP had already paid the defendant in full and had therefore completed their obligations under the agreement. They seek return of the \$610,000.

[102] The plaintiff refers to the following excerpts from the 5th edition of S. Waddams, *The Law of Contracts*, 5th ed. (Aurora: Canada Law Book, 2005) as cited at 454, 522 in *Bhullar v. Dhanani*, 2008 BCSC 1202 at para. 42:

The innocent party in the case of a repudiatory breach may seek to recover damages not according to the ordinary measure of the value of expected performance but according to the measure of the out-of-pocket loss. That is, the party may say not: "put me in the position I would have been in if you had performed", but: "put me in the position I was in before the contract was made." The choice of the latter rather than the former measure of damages is often referred to as "rescission" but quite clearly it is a different choice altogether from the others mentioned above. The innocent party on receiving notice of the repudiation may choose, first, to stop performance rather than to perform and seek damages, secondly, to sue at once rather than to wait for the date fixed for performance, and thirdly, to seek damages measured by the loss rather than by the expectation.

Where the defendant's breach is substantial and the plaintiff has received no substantial benefit under the contract, the plaintiff is entitled to recover the benefits transferred to the defendant. The typical case is a payment of money, for example, an advance payment to the defendant. If the defendant fails substantially to perform the agreement the plaintiff can claim repayment on the basis of a total failure of consideration.

[103] Although the plaintiff did not plead a fundamental breach, I take it from their submissions that they consider the breach of contract by Ms. Park to be a fundamental breach, going to the very root of the contract. WJP says she deprived them of the whole or substantially the whole of the benefit which the parties intended should be conferred and obtained (see *Karimi v. Gu*, 2016 BCSC 1060 at para. 190).

[104] The plaintiff also referred to the following passages from Bhullar, where the court considered an alternative claim for restitution rather than damages for breach (at para. 430, quoting from Peter D. Maddaugh & John D. McCamus, *The Law of Restitution*, looseleaf (Aurora: Canada Law Book, 2007) at 19:200:

As a matter of Canadian law, it seems doubtful that the total failure of consideration requirement would be applied to money claims. Certainly, it is clearly established in the context of contracts for the sale of goods that interim enjoyment of the goods will not preclude the buyer from "rescinding" for repudiatory breach and claiming to recover moneys paid. In one such case, where the interim enjoyment was substantial, an appropriate deduction from the award was made.

[105] The court noted a similar approach in *Waddams* at 433 of 7th ed, 423:

Any benefits received by the party seeking restitution should be valued and brought into account. There appears to be no insuperable obstacle to making such valuations. Equity has had less difficulty than the common law with the notion of a monetary adjustment in lieu of specific restoration of benefits, and there seems no reason why the modern court should not adopt the flexible rules of equity in this respect.

[106] Despite the references to this approach of discounting the amount the damages, the plaintiff seeks return of the entire Resignation Payment. A discounted amount of damages was not proposed.

[107] The plaintiff says, in the alternative, that Ms. Park must disgorge her profits (her salary under the CA) because she cannot keep both the Resignation Payment and her profits. Damages should be the money she receives from Champion, which is about \$7000/month.

[108] The plaintiff acknowledges that such an award requires exceptional circumstances, but says such a remedy lies in "aligning the remedy with the injustice it corrects" (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19). According to *Attorney General v. Blake* (2000), 1 A.C. 268 (H.L.), [2000] 4 All E.R. 385 (C.A.) relevant considerations are the subject matter of the contract, the purpose of the provision breached, the circumstances of the breach and the consequences of the breach. A general guide is as set out in *Blake* at 285:

whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and hence, in depriving him of his profit.

[109] The plaintiff says such an award is justified by the need to deter wrongful conduct, and to prevent a wrongdoer from profiting from their wrong. Ms. Park knew she could not work for Champion; she obtained legal advice from several sources but was still concerned enough to let the Dongwon representative try to get Mr. Lee to release her from the NDA. Nevertheless, she entered into the CA with Champion, a self-interested and deliberate breach.

- [110] WJP says the consequences of this breach are severe for them because they are forced to try to recover their \$610,000 through this litigation. Compensatory damages may not adequate or appropriate to deter such wrongful conduct. Even if WJP has suffered no loss beyond the \$610,000, they have a legitimate interest in preventing Ms. Park's profit-making activity because she expressly contracted not to do the particular thing that constitutes the breach.
- [111] In the further alternative, the plaintiff says that if the court is unable to conclude that damages flow from either of these approaches, it could assess punitive damages to achieve deterrence for this type of reprehensible conduct. The plaintiff acknowledges that in breach of contract cases, punitive damages are only available if, apart from the breach sued upon, the defendant has committed an independent actionable wrong (*Whiten v. Pilot Insurance Co.*, 2002 SCC 18). Here, the plaintiff relies on breach of fiduciary duty as the independent actionable wrong.

Defendant's Position

- [112] The defendant points out that this claim was originally quite different - WJP was concerned about disclosure of confidential information, conversion, non-disclosure, non-competition and non-solicitation. None of these claims were pursued at trial, except the latter two, even though the defendant was still producing documents in compliance with the order obtained in October of 2019, an order which was ended at trial by consent.
- [113] As well, the damages claim for loss of Champion's account was abandoned in the second amended NOCC, filed August 28, 2020, a month before the trial commenced. The only claims remaining now are breach of contract and breach of fiduciary duty.
- [114] The defendant's argument on the sufficiency of pleadings concentrates on the claim for breach of contract. The defendant says a party can accept repudiation, treat the contract at an end and sue for damages, or can seek to enforce the agreement. WJP's pleadings say they are seeking to enforce the agreement. WJP never said "we'll accept the breach and we'll sue you". Instead, they sought an injunction and obtained an order for continual document production from Ms. Park. The defendant says the claim for disgorgement of profits is at odds with the claim for repudiation of the contract because that claim seems to presuppose enforcement of the agreement.
- [115] The defendant says that in this case, there was no acceptance of repudiation. There is no basis upon which the court can terminate the agreement, state that repudiation was accepted, and order repayment of the consideration for the contract as if the contract never existed. The defendant says that is actually a claim in rescission: the plaintiff wants to be put back into the position they were in before the contract was made. There is no claim for rescission in the pleadings, and the plaintiff has failed to establish any claim to repayment of the consideration as a basis for compensation arising from the alleged breach by Ms. Park.

- [116] The defendant points out that there is no penalty provision in the contract that would require repayment in light of the defendant's breach.
- [117] Therefore, the defendant submits, the plaintiff's claim for damages must be assessed in accordance with the accepted common-law principles.
- [118] The ordinary measure of damages in a breach of contract is expectation damages. If the court were to find a breach, the defendant submits that damages should be nominal. The plaintiff paid consideration for the defendant's promise, but consideration is not a measure of damages. The plaintiff has tendered no evidence of loss arising from the breach. The defendant refers to Jamie Cassels & Elizabeth Adjin-Tettey, *Remedies: the Law of Damages*, 3rd ed (Toronto: Irwin Law, 2014), at 18:

The ordinary measure of damages in actions for breach of contract is the expectation measure. Expectation damages are forward-looking. They do not merely compensate persons for positive losses suffered as the result of a wrong, but give to the plaintiff the benefits expected as a result of a promise. Expectation damages aim to put the plaintiff in the position she would have been in had the contract been performed.

Most generally, they can be calculated by determining the difference between the position that the plaintiff would have occupied, had the contract been performed, and the position that the plaintiff is actually in as a result of breach or non-performance of the contract.

- [119] The defendant says the difference between those positions in this case is zero. The plaintiff cannot simply assert that the payment of the consideration under the NDA is a measure of loss arising from the breach. In fact, the plaintiff has proven no loss arising from the breach.
- [120] In any event, the defendant says Ms. Park performed all the obligations under the contract for 13 months, and even after starting to work for Champion, she performed all the other obligations under the NDA up to the current day. Any breach is narrow and resulted in no damage to the plaintiff. Thus compensatory damages, if awarded, should be nominal.
- [121] As for disgorgement of profits, the defendant submits that there would be no point in her continuing to work, since she would have to turn over her income to the plaintiff. She has provided and continues to provide valuable service for her income at Champion and should not be deprived of it. The plaintiff has no legitimate interest in preventing Ms. Park from earning income from Champion.
- [122] The defendant refers to *Atlantic Lottery Corp* at para. 61: "[disgorgement] is an exceptional relief; it is not available at the plaintiff's election to obviate matters of proof." The defendant submits that compensatory damages based on the extent of the plaintiff's loss is the proper remedy, and the plaintiff's failure to prove its entitlement to compensatory damages is not sufficient to require further and alternative damages in the form of disgorgement of profits.

[123] Turning to the alternative claim for punitive damages, the defendant says there are no aggravating factors that would warrant an award of punitive damages. Ms. Park was careful in going to work with Champion, obtaining three legal opinions on the scope and enforceability of the NDA. Champion made the decision to cease its relationship with WJP without influence from or involvement of Ms. Park. Champion is not a competitor to WJP. Ms. Park has never disclosed any confidential information or engaged in any reckless acts that would justify an award of punitive damages.

Plaintiff's Reply

[124] The plaintiff says the breach is clearly pleaded in para. 14 of the NOCC ("the Defendant breached the duties that she owed to the Plaintiff under the Resignation Agreement by, inter alia "). The terms of para. 2.(b) of the NDA are then reproduced. As well, repayment of the Resignation Payment is expressly sought in the prayer for relief.

[125] Although the prayer for relief contained a request for an injunction, no steps were taken to pursue that relief as it was too late. It was pleaded at an early stage to preserve the option.

[126] The plaintiff acknowledges they did not indeed plead rescission, which is an equitable right to set the transaction aside and be restored to the previous position, relying on misrepresentations or undue influence. This claim is in breach of contract.

[127] The plaintiff says the defendant repudiated the contract when she accepted the position with Champion. The plaintiff clearly accepted the repudiation when they filed the NOCC. In *Karimi* at paras. 202-203, bringing the action was held to equal acceptance of repudiation.

[128] Therefore the defendant must pay damages. She breached the contract and cannot profit by her actions. Either she must pay back the Resignation Payment, or she must disgorge the profits she has made working for Champion, or in the further alternative, punitive damages should be assessed against her.

Analysis

Damages for the Breach

[129] The NOCC contains a recitation of the facts and, at para. 14, states:

The Defendant breached the duties that she owed to the Plaintiff under the Resignation Agreement by, inter alia [para 2 of the agreement is set out].

[130] As well, a breach at common law is alleged in para. 15, in respect of divulging or disclosing or failing to return Confidential Information after the cessation of her employment.

[131] Paragraph 20 states: "By reason of the Defendant's actions in paragraphs 14 and 15 herein, the Defendant earned profits to which the Defendant was not lawfully entitled ("the wrongful profits")."

[132] Under "Relief sought", the Plaintiff claims:

- a. General and special damages
- b. Aggravated, punitive and exemplary damages
- c. Repayment of the Resignation Payment
- d. An interim, interlocutory and permanent injunction .restraining the Defendant from breaching the Resignation Agreement and from using or otherwise exploiting the Confidential Information or any part thereof
- e. An order for delivery up to the plaintiff of any and all copies in any form of the Confidential Information
- f. An accounting of the Wrongful Profits, an order that the Defendant disgorge the Wrongful Profits, and an order that the Defendant make payment to the Plaintiff of the Wrongful Profits

[133] The plaintiff did not pursue the claim in para. 15 in relation to the Confidential Information, or the claim for an injunction.

[134] As mentioned earlier, the plaintiff's claim, by the time of final argument at trial was: (a) the defendant promised not to do something and was paid \$610,000 for her promise; (b) she broke her promise; (c) she cannot keep both the \$610,000 and the profits she has received from breaking her promise (her salary from Champion). A claim for punitive damages is advanced in the alternative.

[135] I note that fundamental breach was not pleaded, and the claim for relief of the return of the entire Resignation Payment implies a total failure of consideration, which is not supported by the evidence. The agreement was complied with in full for a year, and is still, in large part, being complied with.

[136] The plaintiff did not put forward any evidence of actual loss arising from the breach, and in their submissions acknowledged that the only loss to WJP is the Resignation Payment.

[137] The pleadings are not a model of drafting, and do seem to go off in two directions: on the one hand, allegation of a breach, acceptance of the defendant's conduct bringing an end to the contract, and pursuit of a claim for damages; on the other hand, an injunction to restrain a further breach, or from using Confidential Information.

[138] By the time of trial, it was clear that the focus of the NOCC is an acceptance of repudiation following a breach, and a claim for damages. The cause of action is clear. The injunction to prevent use of information is not inconsistent with this, although the injunction to restrain a further breach could be seen as inconsistent. This was never pursued and both aspects of the injunction were abandoned at trial.

[139] The words "repudiation" or "rescission" or "fundamental breach" are not used in the NOCC. However, para. 14 makes it clear that a breach is alleged. The plaintiff says that breach goes to the very root of the contract, depriving the plaintiff of the whole or substantially the whole of the benefit (*Abraham v. Coblenz Holdings Ltd.*, 2013 BCCA 512 at para. 17). The NDA is very widely worded and most of it is no longer in issue, given the abandonment of many of the claims for relief originally sought. As well, most of the terms have not been breached, and in fact, the relevant one here, sale of services, was not breached for a year following the signing of the NDA and Resignation Payment. Nevertheless, considering the nature and purpose of the contract, obviously understood by Ms. Park as evidenced by her original refusal to work for Champion, acceptance of the position with Champion in order to act as a liaison with Dongwon is a breach of an important clause in the NDA.

[140] In my view, the issue at trial was clear, and is set out in the pleadings. The defendant was not prejudiced by the lack of focus. The pleadings are adequate to support a claim for a breach arising out of the acceptance of the plaintiff's repudiation of the contract, by agreeing to sell the same services to Champion that WJP had previously provided to them.

[141] I accept the plaintiff's submission that the filing of the NOCC constitutes acceptance of repudiation, despite the dual approach in the pleadings. According to *Abraham* at para 28, as cited in *Karimi* at para. 203:

What matters is whether, in all of the circumstances, the tenants acted reasonably in communicating their course of action so as not to prejudice the other party by inducing it to act as it its repudiation of the agreement had not been accepted.

[142] There was no danger in these circumstances of the defendant being induced to act in a certain way through misunderstanding of the plaintiff's intention, since WJP's relationship with Champion was already at an end.

[143] This leaves the difficult question of the quantum of damages.

[144] The difficulty arises because no evidence was led of actual damages arising from the breach. The substance of the NDA was rendered irrelevant because the relationship between Champion and WJP ended through no involvement of Ms. Park's. That is, by the time she breached the agreement, it was academic in practical terms, as Champion was dealing directly with Dongwon and WJP was no longer involved with either entity. Ms. Park has caused no harm to WJP through her breach of the agreement, even if her retention of the entire Resignation Payment may seem unfair in the circumstances.

[145] The purpose of awarding damages for breach of contract is compensatory, with the intent being to place the innocent party in the position it would have been if the contract had been performed, not to place it in the position it would have been in had the contract never been made. That is rescission and is not appropriate here. Aside from the fact it was not pleaded, the plaintiff had the advantage of the defendant's full compliance with the contract for 13 months, and her current compliance to date with most of the terms, even though the

contract is now at an end. Claims related to those terms or potential causes of action centered around disclosure of confidential information were abandoned either at or before trial.

- [146] This agreement turned out to be an unfortunate one for the plaintiff in that it did not contain a penalty clause that would have protected it from failure by the defendant to perform her obligations, but the plaintiff is responsible for drafting it. It is true that the defendant has paid the plaintiff \$610,000, and in that sense is out of pocket to some extent, although it did, as mentioned, receive considerable benefit from the agreement. As well, given Ms. Park's limited role at WJP, which was not that of a fiduciary, the dangers of disclosure of confidential information anticipated by Mr. Lee when he insisted that she sign the agreement (which, in light of his evidence at discovery appeared to be more focussed on Dongwon), has not and could not materialize.
- [147] The defendant received what now appears to be, in part, a windfall through the Resignation Payment (although there was by no means a total failure of consideration), but there is no difference between the position the plaintiff would presently be in if the contract had been fully performed for five years, and the position the plaintiff is now in. To be recoverable, damages must arise from the breach, not from entering into the contract. In this case there are no damages arising from the breach.
- [148] In the circumstances here, the plaintiff has not proven any damages as a result of the breach. Nevertheless, the claim should not be dismissed. A legal right has been infringed and nominal damages are appropriate (see, e.g., *Restauronics Services Ltd. v. Nicolas*, 2004 BCCA 130 at para. 78).
- [149] I award \$500 in nominal damages to the plaintiff for the breach of the agreement.

Disgorgement of Profits

- [150] The plaintiff says this case requires the extraordinary form of relief or disgorgement of profits to prevent Ms. Park from profiting from her deliberate wrong. WJP says even if it has suffered no loss as a result of the breach, the consequences of the breach are severe for them because they are forced to try to recover their \$610,000 through this litigation. Compensatory damages may not be adequate or appropriate to deter such wrongful conduct. WJP says it has a legitimate interest in preventing Ms. Park's profit-making activity because she expressly contracted not to do the particular thing that constitutes the breach.
- [151] However, WJP has the advantage of Ms. Park's compliance with most of the terms of the NDA, and had the advantage of her compliance with the "sale of services" term during the first year after the payment. In fact, that was the only period that mattered, as their relationship with Champion ended at that point, through no involvement of Ms. Park's. Ms. Park did not go to work for Champion until their relationship with WJP had ended. She has not used any knowledge or information gained in her former position to WJP's disadvantage.

[152] There is no direct link between the entirety of Ms. Park's salary at Champion and the services she provides that underlie the breach. Her duties at Champion overlap her duties at WJP and encompass some of the services sold to Champion by WJP, but her role at Champion is different, and she has abided by most of the NDA. Disgorgement of her entire salary would be inappropriate, even if I were inclined to order it.

[153] Counsel admitted during argument that Ms. Park could work for Champion in a number of capacities as long as she did not breach the agreement. Ms. Park provides value to Champion for the salary they pay her. If she were forced to turn that amount over to the plaintiff she would be working for nothing. She would likely quit, and thereby cease paying anything over to the plaintiff. There is no legitimate benefit to the plaintiff in forcing Ms. Park to work for nothing, or in forcing her to quit. The contract could have been differently drafted, and serves as an example of why this type of contract should only be entered into with care.

[154] In *Atlantic Lottery Corp.*, the Supreme Court of Canada said at para. 59:

disgorgement is available for breach of contract only where, at a minimum, other remedies are inadequate. Circumstances of inadequacy arise when the nature of the claimant's interest is such that it cannot be vindicated by other forms of relief. This may arise where, for example, the plaintiff's loss is "impossible to calculate" or where the plaintiff's interest in performance is not reflected by a purely economic measure.

[155] WJP has no legitimate interest in preventing Ms. Park from working at Champion. Her work for Champion does not harm them, cause them any loss, or deprive them of anything. This is a case where the plaintiff is using disgorgement of profits because it cannot prove actual loss. In my view, that is inappropriate.

Punitive Damages

[156] I have found that Ms. Park did not have a fiduciary duty to WJP, and therefore there is no independent actionable wrong to use as a basis for punitive damages, even if I were inclined to award them, which I am not. It was not argued that she breached a contractual obligation of good faith, and the evidence would not support such an approach.

[157] According to *Whiten*, punitive damages are imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. Ms. Park's conduct was not of such a character and would not warrant such an award. She did not solicit the job with Champion; she was initially reluctant to consider it. She changed her position once she knew WJP and Champion no longer had a working relationship. She let Dongwon attempt to negotiate a release for her so she could work for them, but Mr. Lee would not agree to that, and according to his evidence on discovery he now considers them to be a competitor. She sought legal advice several times before doing taking the job with Champion and thought she was "okay" to work for them.

[158] In my view, Ms. Park's conduct does not rise to the level of reprehensible.

Result

[159] The NDA is enforceable. The defendant was not under a fiduciary duty to the plaintiff. The defendant breached the NDA, but no loss has been proven. Nominal damages of \$500 are awarded to the plaintiff. The claims for disgorgement of profits and punitive damages are dismissed.

Costs

[160] Counsel wished to address costs after the reasons were delivered. If costs cannot be agreed upon, this can be arranged through correspondence with the Registrar, but will be determined by another judge in light of my retirement.

"Humphries J."

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