

Unfair Competition in the Employment Context

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|---|----|
| Unfair Competition in the Employment Context | 2 |
| 1. Introduction | 2 |
| 2. Employer’s Protectible Interests | 2 |
| 3. The Enforceability of a Non-Competition Covenant | 3 |
| a. Introduction | 3 |
| b. The Four – Pronged Test | 7 |
| i. Employer’s Proprietary Interests | 7 |
| ii. Time and Spatial Restrictions | 9 |
| iii. Reasonableness of the Protection Provided to the Employer..... | 12 |
| iv. Public Interest | 13 |
| c. Effect of Unreasonable Covenant | 16 |
| 4. Remedies for an Employee’s Breach of the Non-Competition Covenant..... | 16 |
| a. Injunctions | 16 |
| b. The Anton Pillar Order | 18 |
| c. Damages | 20 |
| d. Liquidated Damages | 23 |
| 5. Conclusion..... | 23 |

Unfair Competition in the Employment Context

1. Introduction

The purpose of this paper is to examine critical issues surrounding unfair competition in the employment context. The focus will be on written employment contracts, as there has been an increasing tendency on the part of both employers and employees to set out their contractual arrangements in writing.

While the tendency towards more written contracts of employment should add more certainty to the legal aspects of the employment relationship over time, it would appear that there has been a tendency of parties to work from “standard form” employment agreements, many of which have a sample “restrictive covenant and confidentiality” clause. Although many of the aspects of such clauses are anticipated and dealt with by the common law, the existence of such clauses in written contracts of employment have led to increased litigation surrounding the issue of the right of an employee to compete with his former employer after the contract has been terminated. I examine trends and recent developments in this rapidly expanding and demanding area. In particular, I will outline the employer’s protectible interests in a non-competition covenant; the legal criteria for determining the validity or enforceability of a non-competition covenant, and the remedies available to an employer whose former employee breaches a non-competition covenant.

2. Employer’s Protectible Interests

Employment contracts frequently contain post-employment non-competition covenants. These covenants enjoin the former employee from either establishing a competing business or working for a competitor within a specified geographical area and for a stipulated period of time.

Non-competition covenants are usually intended to protect the employer from competitive harm where the employer’s former employee:

- (i) had access to the employer’s trade secrets or confidential business information which she could use at her new job or competing business;
- (ii) has access to confidential customer lists or had close relationships with customers leading to the risk that the employee may be able to divert the employer’s customers to her new job or competing business; or
- (iii) performed services which are deemed special, unique or extra-ordinary by virtue of her expertise such that if she took her expertise to a competitor or set up her own business, the employer would suffer serious injury because the employer’s customers would follow the employee.

3. The Enforceability of a Non-Competition Covenant

a. Introduction

Historically, a non-competition covenant, by its very nature, had been characterized by the common law as a covenant in restraint of trade and *prima facie* void and unenforceable. However, there developed exceptions to this general rule starting with the House of Lords' decision in *Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Company, Limited*, [1984] A.C. 535, wherein Lord MacNaghten stated, at p.565:

“The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraint of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is sufficient justification, and indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.”

The test in *Nordenfelt, supra*, for determining whether a non-competition covenant is or is not enforceable was more firmly established after the trilogy of cases in: *Attwood v. Lamont*, [1920] 3 K.B. 571; *Mason v. Provident Clothing & Supply Co.*, [1913] A.C. 724; and *Morris (Herbert) Ltd. v. Saxelby*, [1916] 1 A.C. 688. The legal principles developed in these cases are briefly summarized by Stacey Ball in *Case Comment: Jostens Canada Ltd. v. Zbieranek* (1992), 42 C.C.E.L. 271 at p.272, as follows:

1. All contractual restraints restricting a person from earning a livelihood are *prima facie* void;
2. The onus is on the former employer to prove that the restraint is no more than necessary to protect a legitimate proprietary interest that it enjoys and which is recognized by the Court;
3. The covenant must be reasonable between the parties. Reasonableness is determined not only from the employer's perspective; but also from the employee's perspective;
4. It must be demonstrated that the covenant is reasonable from the perspective of the public interest.”

The principles or tests set out in the English cases above were first embraced by the Supreme Court of Canada in *Maguire v. Northland Drug Co.*, [1935] 3 D.L.R. 521.

There the employee covenanted with his employer not to engage in the business of a retail drug store within 25 miles of the Flin Flon Mine except on behalf of, or with the consent in writing of the employer. The Court, in determining whether the covenant was enforceable, considered the English authorities on this subject and stated, at p.524:

“Public policy, as interpreted by the Courts, requires on the one hand that employers be left free to protect from violation their proprietary rights in business, and on the other hand, that every man be left free to use to his advantage his skill and knowledge in trade. ... *Prima facie* all covenants in restraint of trade are illegal and therefore unenforceable. ... The illegality being a presumption only, is rebuttable by evidence of facts and circumstances showing that the covenant is reasonable, in that it goes no further than is necessary to protect the rights which the employer is entitled to protect while at the same time it does not unduly restrain the employee from making use of his skill and talents. The onus of rebutting the presumption is on the party who seeks the enforcement, generally the covenantee. Reasonableness is the test to be applied in ascertaining whether or not the covenant is a fair compromise between the two opposing interests.”

The Court then went on to discuss the rights the employer is entitled to protect and the proper breadth of a covenant at p.525:

“... proprietary rights, such as secrets of manufacturing processes, secret modes of merchandising clearly come within the group of rights entitled to protection. So also is the right of an employer to preserve secret information regarding his customers, their names, addresses and tastes and desires ... competition as such is something which will not be restrained. ... The information and training which an employer imparts to his employee becomes part of the equipment in skill and knowledge of the employee, and so are beyond the reach of such a covenant ... The covenant in any event must not go further than is reasonably adequate to give the protection that is to be afforded; if it goes too far or is too wide, either as to time or place or scope, it will not be enforced; and if bad in any particular, it is bad altogether....”

The principles delineated in *Maguire, supra*, and the English authorities were subsequently applied by the Supreme Court of Canada in *Cameron v. Canadian Factors Corporation Limited*, [1971] S.C.R. 148. In this case, the employee, upon being re-hired by the employer who was in the factoring business, signed a contract of employment containing non-competition covenants. Under paragraph 2 of the contract, the employee was prohibited, while employed and five years after that, to induce any client or prospect of the employer to take their business elsewhere. Paragraph 3 of the contract prohibited him during the same period to accept employment with any factoring concern in Canada. The Court, in finding the covenants in question invalid, stated, at pp.162-164:

“It is the case both under the *Civil Code* and under the common law that employee restraint covenants may be held invalid because of their unreasonable duration or because of their unreasonable territorial ambit, having regard in each respect to the range of businesses or activities covered by the restraining covenants. [The present case raises simply] the principle on which the Courts act against contractual undertakings by

an employee not to compete. ... That principle ... [is] the application of a rule of reason to a balancing of the interests of the employer and the erstwhile employee in respect of the need of the former for protection and of the latter for economic mobility, in the light of a policy that discourages limitations on personal freedom, and, specifically, on freedom of economic or employment opportunity.”

The Court then went on to state that the employee had an undoubted right to take his experience with him and that a one year protection for the employer would have been sufficient and two years would be an outside limit for protection. The five year prohibition, the Court held, was therefore quite unreasonable and, hence, contrary to public order. Further, paragraph 3, the Court stated, was offensive to public order by reason of its Canada-wide ambit which exceeded any reasonable requirement of the employer for the protection of its business interests which were centred in the Province of Quebec.

As the reality of “globalization” in commerce comes more to the attention of our learned judges, I expect to see wider geographic limits tests in detail and a fundamental re-examination of this factor.

Subsequent to the *Cameron* decision, *supra*, the Supreme Court of Canada considered the principles delineated in *Maguire, supra*, and the English authorities in *Elsley v. J.G. Collins Insurance Agencies Limited*, [1978] 2 S.C.R. 916. This is now considered to be the leading Canadian authority on the subject of non-competition covenants. In this case, the defendant had sold his general insurance business to the plaintiff and agreed to continue on as a manager. The sale agreement contained a non-competition covenant restricting the defendant, for a period of ten years, from carrying on the business of a general insurance agency in three locations within the County of Welland in Ontario. The employment agreement also contained a non-competition covenant which enjoined the defendant from competing with the plaintiff for a term of five years after the termination of employment and covered the field of general insurance in the same three localities in the County of Welland. When the defendant left the plaintiff company after seventeen years, he took two hundred customers with him. The Court, in finding the non-competition covenant in the employment agreement valid, stated at pp.5-6:

“A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest. As with many of the cases which come before the Courts, competing demands must be weighed. There is an important public interest in discouraging restraints on trade, and maintaining free and open competition unencumbered by the fetters of restrictive covenants. On the other hand, the Courts have been disinclined to restrict the rights to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power. In assessing the opposing interests the word one finds repeated throughout the cases is the word ‘reasonable’. The test of reasonableness can be applied, however, only in the peculiar circumstances of the particular case”

“It is important, I think to resist the inclination to lift a restrictive covenant out of an

employment agreement and examine it in a disembodied manner, as if it were some strange scientific specimen under microscopic scrutiny. The validity, or otherwise, of a restrictive covenant can be determined only upon the overall assessment, of the clause, the agreement within which it is found, and all of the surrounding circumstances.”

The Court then went on to make a distinction between non-competition covenants in an agreement for sale of a business and those found in a contract of employment. The Court set out that the latter are subject to a stricter test than the former.

“The distinction made in the cases between a restrictive covenant contained in an agreement for the sale of a business and one contained in a contract of employment is well-conceived and responsive to practical considerations. 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

“A different situation, at least in theory, obtains in the negotiation of a contract of employment where 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 in his own interest, knowledge and skills obtained during employment. Again, a distinction is made. 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

“The employment agreement was negotiated subsequent to and independent of the sale agreement. The agreement sued upon is the employment agreement. It would be wrong, in my opinion, to test the agreement by the criteria applicable in the case of a vendor/purchaser agreement, or by some hybrid test. The restrictive covenant, if enforceable, must stand up to the more rigorous tests applied in an employer/employee context.”

The Court then delineates the guidelines, in the form of questions, for consideration in assessing the reasonableness and thus, the enforceability or validity of a non-competition covenant. These questions are as follows:

1. Does the employer have a proprietary interest entitled to protection?
2. Are the time and spatial restrictions in the non-competition covenant reasonable?
3. Are the restrictions reasonably required for the protection of the employer or do they provide the employer with more protection than it is reasonably necessary?
4. Is the non-competition covenant contrary to the public interest?

Let us consider each of these questions in light of judicial authority.

b. The Four – Pronged Test

i. Employer's Proprietary Interests

As indicated earlier, an employer's business may be subject to a competitive harm from its former employee where the employee had access to the employer's trade secrets or confidential business information; where the employee has access to confidential customer lists or had close relationships with customers; or where the employee's services are deemed special, unique or extraordinary by the employer's customers or clients.

The Supreme Court of Canada has recognized the employer's proprietary interest may in and right to protect its clients from solicitation by its former employee, especially where that employee was in a position where he "acquire(d), a special intimate knowledge of the customers of his ... employer and the means of influence over them": see *Elsley, supra*, at pp.7-8. The Supreme Court of Canada, in *Elsley*, has also recognized that an employer has a proprietary interest in and the right to protect its trade secrets or confidential business information, including customer lists from being revealed and/or used by its former employee. At p.6, in *Elsley*, the Court stated:

"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."

Finally, the Court in *Elsley* also recognized that the employer's proprietary interests need to be protected when (even if the employer's former employee did not actively solicit its customers) the customers would likely go to the former employee if he set up a similar business because they relied upon his skill or judgment. This point was made at p.8 of the judgment wherein the Court stated:

"... Lord Parker made the point that it is of importance: whether 'the defendant ever came into personal contact with the plaintiff's customers'. The same point is made in the following passage from Cheshire & Fifoot, *The Law of Contract*, 8th ed., p.369:

'A restraint is not valid unless the nature of employment is such that customers will either learn to rely upon the skill or judgment of the servant or will deal with him directly and personally to the virtual exclusion of the latter, with the result that he will probably gain their custom if he sets up business on his own account.'

"In the view which I take of this case a covenant against non-solicitation will not have been adequate to protect the proprietary interest entitled to protection. Exhibit 10 is telling support of that view. *Elsley* testified that he did not solicit former clients; notwithstanding, two hundred clients switched their custom to him."

It should be noted that in the case of senior executive or management level employees,

the employer may be entitled to protection of its proprietary interest independent of any non-competition covenant in the contract of employment. That is, at common law, there is a duty owed by former senior or executive management level employees, and perhaps all employees, not to solicit the latter's clients' business or to make use of confidential information received while in the employ of the former employer to advance his own interests at the expense of his former employer.

A case that illustrates this point and is often considered by Courts because it thoroughly reviews authorities on the subject of fiduciary duties of employees to their former employers is *Alberts v. Mountjoy*, (1977), 79 D.L.R. (3d) 108 (Ont. H. Ct.). In this case, the defendants M and B were formerly employed by the plaintiff, M as a general manager and a member of the board of directors of the plaintiff and B, as a salesman. When a change in the ownership of the plaintiff company occurred, M and B both resigned. M immediately established his own insurance agency and employed B as a salesman. Both M and B proceeded to solicit and obtain business from clients of the plaintiff, many of whom were persons M and B had previously dealt with or had introduced to the plaintiff. As a result, the plaintiff lost substantial commission income during the first year of the defendant's operation and brought an action for damages or for accounting for commissions. The Court, in allowing the plaintiff's claim, stated at p.115:

“[While a former employee has a right to compete with his former employer] ... the ex-employee is not entitled to make ‘an unfair use’ of information acquired in the course of his employment, nor may he use confidential information so acquired to advance his own business at the expense of his former employer.”

The Court further stated, at p.119:

“In this case the defendant [M] stood in a fiduciary relationship to the plaintiff and there was accordingly imposed upon him a ‘larger, more exacting duty’ than a duty simply to respect his former employer's trade secrets and confidentiality of its customer lists.

“As well, where the defendant of a lower rank such as the defendant [B] might have claimed immunity from the duties attaching to a fiduciary, he lost that advantage in joining with [M] in the new business venture which successfully diverted the business opportunity of his former employer and fixed him with the same fiduciary duty as [M].”

The Court in *Alberts, supra*, referred to the decision of the Supreme Court of Canada in *Canadian Aero Service Ltd. v. O'Malley et al*, (1974), 40 D.L.R. (3d) 371, in its judgment and extensively quoted from it. The *Canadian Aero* case deals with the consequences of a finding of a fiduciary obligation and is reviewed by Peter Wardle in his article “*Post-Employment Competition - Canaero Revisited*” (1990) 69 Can.Bar Rev. 233.

See also the following cases on the subject of fiduciary duties of employees to their former employers:

Herff Jones Canada Inc. v. John G. Todd and Todd Agencies Corporation (December 15, 1994), Doc. 9403-10368 (Alta. Q.B.).

Voyages Robillard Inc. v. Consultour/Club Voyages Inc. et al (1993), 54 C.P.R. (3d) 553 (Que. C.A.).

Dufresne v. Groupe Christie Ltee., [1992] R.D.J. 548 (Que. C.A.).

Barton Insurance Brokers Ltd. Irwin [1999] B.C.J. no. 220 (B.C..C.A.)

ii. Time and Spatial Restrictions

Levitt in the *Law of Dismissal in Canada*, 2d ed (1992), refers to numerous cases on the issue of time restrictions and generally concludes, at p.444:

“The period of the covenant cannot be too long. From the current case law it is submitted that a non-competition provision for longer than twelve to eighteen months will not be protected. However, the length of time required to legitimately protect the company will be dependent upon the facts and vary with the circumstances of each company and each employee.”

In *Friesen v. McKague*, [1992] 74 Man. R. 155 (Man. Q.B.), partly varied (1994) 96 D.L.R. (4th) 341 (Man. C.A.), for example, the trial court upheld a non-competition covenant of a three year duration given the particular circumstances. There the plaintiffs, the defendant veterinarian’s former employers, sued the veterinarian for breach of the non-competition covenant in his employment contract and sought an interim injunction pending trial of the action. The non-competition covenant required the plaintiff not to practice veterinary medicine within a 25 mile radius from Steinbech for 3 years from the date of termination. The radius did not include Winnipeg. The employers gave the veterinarian the specialized area of treating small animals and referred work to him which allowed him to develop a close relationship with the clients. After 5 years, the veterinarian quit and set up a practice in the same town. The trial court, in granting an interim injunction, stated at p.157:

“The restrictive covenant is, I think, reasonable as to time and area. Steinbech is not a large town, and the majority of the plaintiffs’ customers reside in an area within a radius of 25 miles of the town. The distance of 25 miles from Steinbech does not include the City of Winnipeg or any of the cities or towns west of the Red River. As well, the defendant obviously acquired close personal relationship with the plaintiffs’ customers and clients. The defendant was given by the plaintiffs the specialized area of treating small animals, and the plaintiffs, in conducting their business, referred work to the defendant relying upon the restrictive covenant. It is reasonable, I think, for the plaintiffs to stipulate for a period of three years to break the ties which are likely to exist between the defendant and the customers of the plaintiffs.”

The Court further stated, at p.158:

“In my view, however, the circumstances of this case justified the scope of the restrictive covenant. Here, the defendant had the opportunity to obtain ‘personal knowledge of and influence over’ those clients of his employer whose animals he treated. A mere covenant against solicitation of clients of the plaintiffs would not adequately protect the plaintiffs from the harm which the defendant would do to them by setting up his own practice in the designated area.”

On appeal by the defendant, the Manitoba Court of Appeal dismissed the appeal on the merits as to the grant of the injunction.

The *McKague* decision, *supra*, illustrates that the reasonableness of the geographical or spatial restrictions depend on the reasonableness of the particular restriction in view of the facts and circumstances of the case, rather than on the actual geographical scope. In addition, it should be noted that generally the geographical area covered in the non-competition clause must be unequivocally defined. It must not be larger than is necessary to protect the employer’s proprietary interests. Moreover, the Court will consider the mutual expectations of the parties at the time of the execution of the agreement containing the non-competition covenant.

I will now take a flavouring of principals from judicial comment on ___ and special cases.

A three year restriction failed in *Creditel of Canada Ltd. v. Faultless* (1977), 81 D.L.R. (3d) 567 (H.C.J.)

There, the defendants, former employees of the plaintiff, had during their employment with the plaintiff, entered into agreements with the plaintiff’s undertaking, *inter alia*, that during the period of their employment or for a period of 3 years thereafter, they would not divulge any name, address or requirement of any customer of the plaintiff or of any person, firm or customer likely to become a customer of the plaintiff. The defendants, since leaving the employ of the plaintiff, took employment with a rival company and they contacted a number of customers of the plaintiff. Consequently, the plaintiff brought an application for an interim injunction to restrain the plaintiff from their agreement above. The Court in referring to the words “likely to become a customer” in the agreement stated, at pp.572-573:

“... the area covered by the said paragraph would be all of Canada. The business covered by the terms of the paragraph include not only business carried on by the plaintiff at the time of execution of the agreement, but also any other business which the plaintiff might carry on during the period of employment of the respective defendants. At the time of the execution of the agreement, it would not be possible for the employee to know what other business or businesses the plaintiff might carry on during his employment. The reasonableness of the agreement must be determined as of the date of its execution. The number and kind of other businesses which the plaintiff might engage during the period of employment is unlimited. I am of the

opinion that a covenant to restrain an employee with respect to so vast an area and so unlimited in number and kind of businesses over a period of three years is not reasonable as between the parties.”

Similarly another three year prohibition failed in *Reed Shaw Osler Ltd. v. Wilson* (1982), 17 Alta. L.R. 82 (Alta. C.A.)

There, W, an insurance broker, sold his insurance agency to RSO Company and entered into a contract of employment with its wholly owned subsidiary RSS whereby he was to remain with the business as an accounts executive. The employment contract contained a non-competition covenant prohibiting W from engaging in “the business of insurance” or working for a competitor for a period of 3 years following termination. There was no geographical limitation imposed on the latter prohibition. The purchase contract contained a non-competition covenant of a 3 year duration as well. Three years into his employment with RSS, W decided to leave his employment and opened up a new insurance agency with an ex-employee of RSS. RSS and RSO were unsuccessful at trial in obtaining an injunction to restrain W and his partner from breaching the non-competition covenant. RSS and RSO appealed to the Alberta Court of Appeal. The Court of Appeal dismissed the appeal.

In its reasons for judgment, the Court, at the outset, indicated that the non-competition covenants associated with the sale of a business were to be more strictly and widely enforced than those contained in contracts of employment. The Court stated that in this case, however, the sale and employment contracts were with different parties and the sale contract which contained its own non-competition covenant had expired. Thus, the more rigorous tests relating to an employment relationship was applicable. The Court then went on to state, at pp.87-88:

“[The non-competition covenant] in my view prohibits much more than soliciting. It has the effect of preventing the respondent from being employed anywhere with a firm serving any customer of the appellant if the employment is related in any way to the business of insurance ...

“The definition would purport to preclude the respondent from engaging in any aspect of the field that encompasses a wide range of functions....

“[The covenant] has no geographic limit. ... the covenant, in my opinion, grossly exceeds the limits of providing more than adequate protection to (RSS), for whose benefit the covenant was imposed.”

And a two-year covenant failed in *Canadian American Financial Corp. (Canada) Ltd. v. King* (1989), 36 B.C.L.R. (2d) 257 (B.C.C.A.)

The plaintiff operated a business selling registered scholarship savings plans. The plaintiff employed the defendant to market the plan in specified areas of Vancouver and British Columbia. The agreement between the plaintiff and the defendant

contained a non-competition covenant restraining the defendant from engaging in any similar business for two years after the expiry of the agreement in Canada or Bermuda. Following the expiry of the agreement, the defendant accepted a position with a competitor and sold similar plan in British Columbia and Alberta. The plaintiff unsuccessfully applied for an interim injunction to restrain the defendant from breaching the non-competition covenant. The plaintiff appealed, but the British Columbia Court of Appeal dismissed the appeal and stated, at p.262:

“The permissible geographic scope of a restraint is to be measured by the reasonable mutual expectations of the parties at the time of making the contract. In this case, the Court held that the protection from competition sought by the plaintiff was excessive and not reasonable. Further, the Court held that the plaintiff’s argument that the non-competition covenant would be reasonable if it were read down to only include the areas the defendant was actually carrying on business was not tenable because the Court would have to substitute a restrictive covenant which was different than the one the parties agreed to and it was not the Court’s function to create new agreements between the parties.”

And the Court stated at p.270:

“... It is only if the covenant is not valid that a question of severance arises. The Courts have always resisted rewriting a contract that the parties have made. No doubt they will continue to do so. So whether the reason for the invalidity is because the covenant as it stands is void for uncertainty or because it is unreasonable either in reference to the interests of the parties or the interests of the public, the Courts will only sever the covenant and expunge a part of it if the obligation that remains can fairly be said to be a sensible and reasonable obligation in itself and such that the parties would unquestionably have agreed to do it without varying any other terms of the contract or otherwise changing the bargain. It is only when they had been told when they made the contract that they could not have what they had drafted but could have a portion that would remain after the severance and expungement, and, only if in those circumstances they would both have readily agreed to the severance and expungement without any other change in the contract, that any request for severance can succeed. It is in that context that reference is made in the cases to severing and expunging merely trivial or technical parts of an invalid covenant, which are not part of the main purport of the clause, in order to make it valid. ... The purpose of the severance is to retain the bargain made by the parties, not to impose a new bargain on them.”

See also *Terra Engineering Ltd. v. Stuart* (1994), 56 C.P.R. (3d) 177 (BCSC), described under the heading “Public Interest”, *infra*, for a review of this case.

iii. Reasonableness of the Protection Provided to the Employer

If the nature of the activities prohibited in the non-competition covenant goes beyond what is legitimately or reasonably required to protect the proprietary interest of the employer, then the non-competition clause may be struck down and the employer may get no protection at all: see *Creditel, supra*; *Reed Shaw Osler Ltd., supra*; *Canadian American Financial Corp. (Canada) Ltd., supra*; *Terra Engineering Ltd., infra*; and

Salloum et al v. Thomas (1986), 12 C.P.R. (3d) 251 (BCSC) which is reviewed under the heading “Public Interest”, *infra*, and the trial decision in *Jostens v. Gibsons*, [February 13, 1996] No. 94/2904 Victoria Registry, reversed on other grounds in the British Columbia Court of Appeal (1999 BCCA 273).

iv. Public Interest

Once the employer has established the reasonableness of the non-competition covenants under the foregoing headings, the employee may still be able to persuade

the Court to strike it down if the clause is not reasonable with respect to public interest.

The Supreme Court of Canada in *Elsley, supra*, stated, at p.5:

“There is an important public interest in discouraging restraints on trade and maintaining free and open competition unencumbered by the fetters of restrictive covenants.”

And at p.9, the Court stated:

“After the party relying on a restrictive covenant has established its reasonableness as between the parties, the onus of proving that it is contrary to the public policy lies on the party attacking it.”

The Court in *Elsley* found that the non-competition covenant there was not unreasonable with respect to the public interest because:

“There were twenty-two general agents in Niagara Falls according to the evidence as of the date of trial, employing 80 to 90 employees. There was nothing to suggest that people of Niagara Falls would suffer through the loss, for a limited period, of the services of *Elsley* in the general insurance business.”

Elsley, supra, was considered by British Columbia Supreme Court in *Henriksen v. Tree Island Steel Co. Ltd.* (1983), 45 B.C.L.R. 114 on the question of public interest. In this case, upon termination of the employment of the Plaintiff, the Defendant agreed to pay the Plaintiff a salary for one year but the payments were to cease under the agreement if the Plaintiff engaged in an activity “detrimental to the well being of (the Defendant)”. The Plaintiff became president of the Defendant’s main competitor and the Defendant stopped payment under the agreement. Consequently, the Plaintiff brought an action for the monies owing under the settlement agreement. The Court dismissed the Plaintiff’s application holding that the covenant in the settlement agreement was reasonable and it was designed to protect the Defendant from having to continue the salary payments if the Plaintiff got into competition. The Court also stated at p.118:

“The covenant posed no threat to (the Plaintiff’s) livelihood. On the contrary, the settlement would supplement the income from whatever employment he chose to take. The covenant did not deprive the community of the services of the Plaintiff, and thus was not prejudicial to the public interest.”

In *Salloum v. Thomas, supra*, the Plaintiffs and the Defendant were partners in a law firm practicing in Kelowna, a city of about 80,000 souls. The law firm serviced a clientele of about 5,000 persons in the City. The Defendant, who was a partner in the Plaintiffs’ law firm, left to become an associate in another firm practicing in the same City. The Defendant had signed a non-competition covenant when he became a partner in the Plaintiffs’ law firm whereby he promised not to practice in the same city or within a radius of three miles for one year after terminating his relationship. As a result, the Plaintiffs brought an action to enforce the non-competition covenant. The Court dismissed the Plaintiffs’ action stating, at p.260:

“In the case before me, whatever justification there may be for the Plaintiffs trying to protect themselves from having clients moving on with partners and/or associates that withdraw, the restrictive covenant as drawn is so wide as to include all 80,000 citizens in the Kelowna area, only 5,000 of whom the Plaintiffs may require protection for.”

And at p.262:

“... I find that the total prohibition to practice one’s profession in that area far exceeds the partnership’s entitlement to protection for whatever interest it has in present or future business from past or present clients. ”

And at p.263:

“... (the non-competition covenant) is unreasonable on the basis that it is contrary to public policy in that it unreasonably purports to preclude the Defendant from earning a livelihood as a lawyer in the Kelowna area.”

The *Salloum* decision was followed in *Terra Engineering Ltd., supra*. In Terra, the Defendant was a materials engineer and one of only 15 such practicing professionals in British Columbia. The Defendant commenced employment with the Plaintiff in 1990 and had purchased some corporate shares in the Plaintiff’s company. In 1992, the Plaintiff’s Board of Directors passed a resolution requiring all employees of the Plaintiff, including the Defendant to sign a shareholder’s agreement containing a non-competition covenant. The non-competition covenant contained a restriction against carrying on business which was carried on by the Plaintiff for a period of 20 months after ceasing to be a shareholder or an employee within a radius of 150 kms. of the Plaintiff’s offices. The Defendant objected to the covenant but signed it in the end. Subsequently, he arranged to sell his shares in the Plaintiff’s company to the majority shareholders and the Plaintiff’s company thereafter dismissed him. After his dismissal, the Defendant wrote to the Plaintiff advising that he intended to work in his profession. The Plaintiff sought to enforce the non-competition covenant by applying for an interim injunction. The Defendant argued, *inter alia*, that the covenant was

unreasonable and contrary to public policy. The Court, in dismissing the Plaintiff's application for an interim injunction, stated at pp.82 - 83:

“In my view, the restrictive covenant is overly broad in two respects.

1. The clause would prevent the Defendant from working in his profession. It is not simply limited to the protection of clients of the applicant with whom the Defendant may have developed some level of influence.
2. ... the clause is overly broad in terms of geographical limitation. The clause purports to prohibit the Defendant from working within 150 kms. of the applicant's offices in Vancouver, Kamloops, Abbotsford, Whistler and Williams Lake. This geographic prohibition effectively denies the Defendant the ability to work in most of the major population centres in British Columbia.”

And at p.84:

“It is generally not in the public interest to prevent a person from pursuing his or her profession merely for the purpose of limiting competition. This is not the same as a person contracting to sell a business with a clientele where the vendor could immediately after set up a similar business and take away the goodwill and the customers which he sold to the purchaser. The situation here is more that of an employer/employee relationship and the employer is seeking to prevent the defendant from practicing his profession.”

Terra Engineering, supra, considered *Ernst & Young v. Stuart* (1993), 79 B.C.L.R. (2d) 70 (BCSC); (appeal allowed in part) (1994), 92 B.C.L.R. (2d) 335 (BCCA). In the latter case, the Defendant, a partner in the Plaintiff's accounting firm had signed a partnership agreement which contained a restrictive covenant, *inter alia*, prohibiting the Defendant for a period of one year from carrying on a practice within 50 miles of the Plaintiff's office and from providing services similar to those provided by the Plaintiff or by the Defendant himself while a partner. The Defendant left his employment with the Plaintiff and joined another professional firm in the same city as the Plaintiff's office. The Plaintiff brought an action against the Defendant claiming damages for breach of, *inter alia*, the non-competition covenant. The trial Court found that the covenant was in restraint of trade and contrary to public policy. The covenant would prevent the Defendant from practicing his professional specialty in the area of insolvency in the region in which he had established his practice. Moreover, the Court held that the Defendant did not take any clients, or work-in-progress and had no real means of influence to lure insolvency clients away from the Plaintiff due to the size of the clientele of the Plaintiff and their needs. The Court found that the non-competition covenant went beyond the reasonable protection of the Plaintiff's interest in present or future business from past or present clients.

c. Effect of Unreasonable Covenant

The issue of whether or not the unreasonable portion of a covenant should be severed or whether the entire covenant should be struck has been addressed directly. The courts have adopted a restrictive approach to severing covenants in the context of employment relationships, and typically will not engage in the re-writing of a contract, or what has been called the “blue pencil” rule, in order to make it reasonable. Mr. Justice Hinkson writing on behalf of the British Columbia Court of Appeal in *Canadian American Fin. Corp. v. King*, *supra*. stated as follows on this subject:

“I conclude that the weight of the authority in Canada prevents the court from rewriting a covenant which by its terms is unreasonable to make the restraint by it reasonable”.

Accordingly if only a portion of a restrictive covenant contained in an employment agreement is unreasonable, it is most likely that the entire covenant will be struck by a court.

See also *Ernst & Young v. Stuart* [1993] B.C.J. No. 1043 (B.C.S.C.), and *McGuire*, S.C.C., *supra*, at p. 525

4. Remedies for an Employee’s Breach of the Non-Competition Covenant

Remedies available to an employer for the employee’s breach of a non-competition covenant may take the form of an injunction, general damages or liquidated damages. In addition, in certain cases interlocutory measures for the detention, preservation and recovery of property, commonly known as the Anton Pillar order, may also be necessary.

a. Injunctions

The most commonly sought remedy for a breach of a non-competition covenant is an injunction that requires an employee to refrain from competing against his former employer. Employers usually seek interim and/or interlocutory injunctions pending trial of the matter because the actual date of the trial may be some time after the expiry of the covenant (see *Terra Engineering Ltd.*, *supra*.) and the employer, by then, may have already suffered irreparable harm that may be intangible and thus unquantifiable. The Courts, in such cases, favour injunctions as an appropriate remedy (see: *Apotex Fermentation Inc. v. NovoPharm Ltd.*, [1994] 7 W.W.R. 420 (Man. C.A.).

In British Columbia, the law governing whether an interim injunction will be granted is set out in *Attorney General of British Columbia v. Wale* (1987), 9 B.C.L.R. (2d) 333 (BCCA), *aff’d* [1991] 1 S.C.R. 62 (SCC). It is important to note that the case was affirmed by the Supreme Court of Canada. This is important to note for cases where

the law of the contract is stated to be that of a Province other than British Columbia.

The Court of Appeal, in the *Wale* case, set out a two prong test which an applicant for an interim injunction must show:

1. That there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof;
2. That the balance of convenience favours the granting of the injunction.

The first prong of the test was considered in great detail by the British Columbia Supreme Court in *Alnor Services Ltd. v. Sawyer et al*, (1990), 31 C.C.E.L. 34. At p.46 the Court stated:

“It has long been the law in British Columbia ... that an applicant seeking an interlocutory injunction is not required to make out a *prima facie* case which will entitle him at all events to relief at trial - it is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges.”

The Court then went on to define what constitutes “a fair question” at p.53:

“In British Columbia, an applicant for an interlocutory injunction must establish more than the fact that his claim is not frivolous or vexatious. He must make out a *prima facie* case - such reasonable probability of success as would warrant the case proceeding to trial.”

With respect to the second prong of the test, the Court in *Wale, supra*, stated at p.345:

“... In determining where the balance of convenience lies is to examine the adequacy of damages as a remedy for the respective parties. In most cases, an interlocutory injunction should not be granted unless there is doubt whether damages would be an adequate remedy in the event the applicant succeeds at trial. In other words, it must be shown that the applicant may suffer irreparable harm in the sense that “the remedy by damages is not such a compensation as will in effect, though not in specie, place the parties in the position in which they formerly stood”: *Kerr on Injunction*, 6 ed. (1927) at pp.17-18 applied in *MacMillan Bloedel Ltd. v. Mullin* (1985), 61 B.C.L.R. 145 (1985) 3 W.W.R. 577 [1985] 2 C.N.L.R. 28 (C.A.), per Seaton, J.A.”

The second prong of the test was further explained by the British Columbia Court of Appeal in *Canadian Broadcasting Corp. v. CKPG Television Ltd.*, [1992] 3 W.W.R. 279. The Court stated, at pp.285-286 that the following points should be considered by a Court in assessing the balance of convenience:

- The adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted.

- The likelihood that if damages are finally awarded they will be paid.
- The preservation of contested property.
- Other factors affecting whether harm from granting or refusal of the injunction would be irreparable.
- Which of the parties has acted to alter the balance of their relationship and so affect the status quo.
- The strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.

See also the following cases which consider the two prong test in *Wales, supra*: *Waste Management Inc. v. Great Canadian Recycling Corp.* (1991), 37 C.P.R. 434 (BCSC); *Terra Engineering Ltd., supra*; *Ernst & Young v. Stuart, supra*; *Baker v. Pedret* (1993), 47 C.P.R. (3d) 233; *780 Holdings Ltd. v. Bodwal*, [1992] B.C.J. No. 1277; *Telecredit Inc. v. Lewsey*, [1990] B.C.J. No. 2824; *Napier v. Sea to Sky*, July 18, 2001 No. S013795 Vancouver Registry.

In addition to the above, see also *Herff Jones Canada Inc., supra*, wherein the Alberta Court, having decided to grant the employer's application for an injunction, decided to curtail the scope of the injunction, not because the non-competition covenant was too broad and the Court decided to "read it down", but because the Court considered the employer largely to blame in this matter due to its conduct which essentially drove the employee away. More specifically, the Court noted that an injunction is an equitable remedy and "he who seeks equity must do equity". The employer had placed the employee salesperson in a difficult position due to the quality control problems with products which it expected the employee to sell. The employee, if he stayed and continued his employment with the employer, risked damage to his professional reputation by associating his good name with "sloppy work" of the employer. The Court found that the employee had acted consistently with equity. The Court felt that, while an injunction should be issued, it should not be as broad an injunction as the employer asked for.

b. The Anton Pillar Order

An application for an Anton Pillar order is made in circumstances where there is a legitimate belief that a defendant may dissipate assets or evidence and thus render inconsequential any judicial proceedings brought against that defendant. The order permits the applicant to enter and search the premises of the defendant and seize all items that are enumerated in the order granted. The order is made *ex parte*, and served on the defendant at the time of the search. The element of surprise is of course essential in this type of order.

In *Bank Mellat v. Nikpour* [1985] F.S.R. 87 (Eng. C.A.), p92 Lord Justice Donaldson described Anton Pillar orders as the law's "nuclear weapons", and stated that "[i]f access to such a weapon is obtained without the fullest and frankest disclosure, I have no doubt as all that it should be revoked". This language reflects the extraordinary nature of an Anton Pillar order and its potentially devastating effect on a defendant's business or reputation. Accordingly, the courts exercise caution in issuing such orders.

The extraordinary nature of the Anton Pillar order was also noted by Brown-Wilkinson W.J. in *Thermax Ltd. v. P.Schott Industrial Galss Ltd.* [1981] F.S>R. 289 (Eng.H.C.J.Ch.Div.) p298:

"As time goes on and the granting of Anton Pillar orders becomes more and more frequent, there is a tendency to forget how serious an intervention they are in the privacy rights of defendants. One is also inclined to forget the stringency of the requirements as laid down by the Court of Appeal."

While still in the Supreme Court of British Columbia, Madam Justice Huddart described Anton Pillar orders in the leading case of *Grenzservice Speditiones Ges.m.b.H v. Jans* [1995] B.C.J. No. 2481 p 17 para. 92 as follows:

"The Mareva and Anton Pillar orders were conceived not so much to protect the plaintiffs as to protect the Court's jurisdiction against defendants bent on dissipating or secreting their assets or evidence in order to render inconsequential the judicial process against them. They represent an extraordinary assumption of power by the judiciary. Judges must be prudent and cautious in their issue. It follows that counsel must be discerning in their execution and particularly sensitive to the rights of unrepresented defendants who have not been heard".

The requirements of an *ex parte* Anton Pillar order are strict. They include a duty on the applicant to act in good faith and to make full and frank disclosure of all facts relevant to the court. A breach of this duty will generally result in the order being set aside regardless of the substantive merits of the application. In *Girocredit Bank v. Bader* [1998] B.C.J. no. 1516 (B.C.C.A.), leave to appeal denied at [1998] S.C.C. No. 459, Mr. Justice Goldie writing for the Court of Appeal, upheld a decision of Mr. Justice Spencer to set aside a Mareva injunction and Anton Pillar order, where material circumstances were not put before the court by the applicant. This decision was rendered by the court before a consideration of the merits of the orders obtained.

One should also be aware that a failure to observe the duties described when applying for an Anton Pillar order, may result in an award of special damages against the applicant. See *Girocredit Bank v. Bader* [1999] B.C.J. No. 151 (B.C.S.C.).

c. Damages

In British Columbia, damages for breach of a non-competition covenant or fiduciary duty in employment context may be assessed in at least two ways: an accounting of profits made by the party who breached the non-competition covenant or fiduciary duty; and a calculation of the loss suffered by the party for whose benefit the non-competition was imposed or to whom the fiduciary duty was owed.

This is supported by the decision of the British Columbia Court of Appeal in *Moore International (Canada) Ltd. v. Carter et al* (1984), 56 B.C.L.R. 207. In this case, the Defendants were two senior employees of the Plaintiff who actively solicited three contracts on behalf of the Plaintiff prior to leaving the employ of the Plaintiff and joining the Plaintiff's direct competitor. The Plaintiff's competitor was subsequently awarded these contracts and the Defendants played an active part in the competitor obtaining the said contracts. Both the trial and Appellate Courts were of the view that the Defendants had breached their fiduciary duties owed to the Plaintiff and were liable in respect of one of the contracts. The Court of Appeal, in deciding how damages should be assessed stated, at p.214:

“In my opinion the Plaintiff is not required to elect one remedy or the other. He may lead evidence of both his own loss and his fiduciary's profit. The trial judge may then make an award of compensation that is supported by the evidence.

...

“The fiduciary or his accomplice should not be permitted to gain from the breach of the fiduciary's obligation of trust and good faith. So, if their profit is greater than the loss by the former employer, an accounting is a better standard of compensation than damages. But, conversely, the employer should not be penalized for any business ineptitude of the fiduciary or his accomplice. So, if the loss by the employer is greater than the profit of fiduciary damages would be the better standard of compensation. It follows that, where the evidence will support a sound assessment based on an accounting of profits and also a sound assessment based on a calculation of loss and where, in the particular circumstances, both remedies are available and both are supported by the pleadings and the evidence, the compensation awarded should be the higher of the two.”

As the *Moore* case dealt with three specific contracts there was no consideration of future losses.

In *5713 Manitoba Ltd. v. Palmer* (1985-1986) 8 C.C.E.L. 282 (BCSC), the Court accepted the principles in *Moore, supra*, as to the two available methods of calculating damages in a breach of a fiduciary obligation case, and chose to evaluate damages by the loss suffered by the Plaintiff as it would yield a higher award. With respect to future loss, the Court in *Palmer, supra*, was of the view that damages should be awarded to such point in time that profits would be in line with where they would have been if the Defendants had not breached their duty. At p.299, the Court stated:

“The Plaintiff claims damages for the period of five years since Palmer left and also into the future. It has been unable to get back a substantial number of customers Palmer wrongfully took and does not expect to recover them over the next several years. In the meantime, however, it has turned its energies to other areas of business, including retail packaging sales to drug stores and jewellery stores and sales of store fixtures and clothes racks. Martin Tatelman testified that by doing so, it expects to have made up its lost sales ground sometime in 1985. Had Palmer stayed and had Mayers cut back its staff and overhead as the Tatelmans wished it to do, I think it probable it would not have developed that business. Therefore, I think it would be wrong to treat the newly developed business as additional to the old business, but rather it should be viewed in substitution for the old business. It is in mitigation of the Plaintiff’s loss. Damages should therefore be assessed up to and including the year end, September 30, 1985, only.”

It should be noted that punitive damages were also awarded as a result of the Defendant’s wrongful conduct which the Court identified as “clearly tortious”.

The *Palmer, supra*, decision was appealed to the British Columbia Court of Appeal (see (1989), 37 B.C.L.R. (2d) 50). Both the appeal by the Defendants and cross-appeal on damages by the Plaintiff were dismissed. No helpful comments were made regarding the general assessment of damages.

In *Tree Savers International Ltd. v. Savoy*, [1991] 6 W.W.R. 84 (Alta. Q.B.), the trial judge accepted the principle in *Moore, supra*, dealing with the calculation of damages for wrongful conduct by an employee. The Court was of the view, however, that *Moore* stood for the proposition that usually the assessment would be on the basis of what the plaintiff employer has lost. The Court stated that damages were to be awarded in two categories. First, for the loss of profits from the time of the breach to the date of the trial, and second for the capitalized value of the future loss of profits. The second branch, also referred to as the loss of business, goodwill, or reputation, would be calculated by “subtracting the value of the business as a going concern at the time of the trial from its value immediately before the damages were suffered”. The Defendants appealed this part of the Court’s decision on the basis that the Court’s calculation of damages awarded double, or overlap compensation. The Alberta Court of Appeal (see (1992) 87 D.L.R. (4th) 202), at p.209, rejected this proposition and stated:

“The Defendants/Appellants object that the other awards overlap, i.e., compensate the same thing twice. There was an award for loss of the Plaintiff/Respondent’s profits up to the time of trial, and then an award for loss of value of the Plaintiff’s business. The Defendants say that the latter was calculated using the same annual drop in profits. However, there is no real duplication. The drop in business value was based on an estimate of lessened future profits. Both competing experts objected that there would have been constant annual profits in future (had there been no wrongful acts by the Defendants). Had they projected any decrease or increase of future profits, then not even the appearance of duplication would have existed. If a highway accident victim successfully sues for loss of income of \$15,000 a year, he is entitled to loss of that

amount per year up to trial, plus the same amount per year in the future (discounted for interest). That is not duplication. Nor does it matter whether the future loss be called lost future income, or be called diminished earning power. The name changes nothing, and there is no duplication.”

Thus damages were awarded for future loss but as to how far into the future they would extend was not clearly determined.

There are two additional cases that may be of some value in determining how a Court may calculate future damages in the case of a breach of a fiduciary duty or restrictive covenant.

The first is *White Oaks Welding Supplies v. Tapp* (1983), 149 D.L.R. (3d) 159 (Ont. H.C.). This was a case of a sales manager of the Plaintiff who left and entered competition against his former employer breaching his fiduciary duty owed to it. The Court applied the same reasoning present in *Moore, supra*, by considering both approaches to calculate damages. As to the period of time for which damages should be awarded, the Court felt the expiration date of the restrictive covenant would provide a fair guideline. At p.165, the Court stated:

“The amount awarded should, in my view, be based on the demonstrated loss of the Plaintiff, adjusted in several major respects. First, on the admission of the president and general manager of the Plaintiff, Mr. Arthur, competition in the welding supply business is very severe and clients’ accounts, in whole or in part, are constantly being captured and recaptured by the various competitors. Secondly, the non-competition agreement which the Defendant was at one time asked to sign, but which was in fact never executed, had in it a limit of one year from the time of resignation as the period during which the Defendant would not compete. In my view, this furnishes a fair limit to the period during which losses should be charged to the Defendant.”

The second case is *Nathu v. Imbrook Properties Ltd.* (1992), 89 D.L.R. (4th) 751 (Alta. C.A.). This case did not deal with an employee/employer relationship. It involved the breach of a restrictive covenant in a lease agreement by the lessor in leasing space to competing business which was forbidden by the covenant. The Alberta Court of Appeal assessed damages under two heads: loss of part profits to the date of trial and loss of future profits which would extend to the expiry of the lease. The formula for calculating future loss is stated at p.757:

| | | |
|---|---|---|
| Anticipated profits if no breach during future period | Less anticipated earned profits despite breach during future period | x contingency factor and discount rate |
|---|---|---|

One of the contingencies, among others, that would become part of the equation is the lawful competition by other parties that may affect the Plaintiff’s business.

The law on damages as described above was more recently reviewed and confirmed by the B.C.C.A. by Mr. Justice Lambert in *Jostens v. Gibsons*, April 28, 1999 Victoria

Registry No. V03357.(1999 BCCA 273).

d. Liquidated Damages

A contract of employment may contain a liquidated damages clause which may permit an employer and an employee to determine, at the time the contract is entered into, the exact amount of damages due in the event the non-competition covenant is breached.

However, in *Executive Employment Law* (1993, Butterworths, Canada, looseleaf ed.) it is stated, para. 11.48:

“... the main disadvantage with the (liquidated damages) clause is that where damages are greater than those provided for in the employment contract, such damages will not be awarded as the clause essentially places a ceiling on the amount of compensation the employer can claim from the former executive. Alternatively, some courts will refuse to enforce such clauses where the amounts agreed upon are not proportionate to actual damages.”

Query whether an employer can be granted both an injunction and liquidated damages, especially when the sum stipulated in the contract is relatively small compared to the actual loss suffered or that may be suffered by the employer. The Supreme Court of Canada, in *Elsley, supra*, dealt with this and other questions at p.15:

- “1. Where a fixed sum is stipulated as and for liquidated damages upon breach, the covenantee must elect with respect to that breach between these liquidated damages and an injunction.
2. If he elects to take the liquidated damages as stipulated he may recover that sum irrespective of his actual loss.
3. Where the stipulated sum is a penalty he may only recover such damages as he can prove, but the amount recoverable may not exceed the sum stipulated.
4. If he elects to take an injunction and not the liquidated sum stipulated, he may recover damages in equity for the actual loss sustained up to the date of the injunction or, if tardy, up to the date upon which he should have sought the injunction, but in either case, not exceeding the amount stipulated as payable upon a breach.
5. Where a liquidated damage sum is stipulated as payable for each and every breach, the covenantee may recover this sum in respect of distinct breaches which have occurred and he may also be granted an injunction to restrain future breaches.”

5. Conclusion

The principles to be applied when determining the validity or enforceability of non-

competition covenants in employment contracts are well settled in theory, but difficult to apply. The reasonableness of the covenant will be determined by balancing the competing interests of the employee, the employer, and the public. The employer must show that there is a legitimate proprietary interest to be protected, that the covenant is not too broad either spatially or temporarily, and that the covenant is not aimed at competition generally and goes not further than protecting the employer's legitimate interests.

The employee, even in the face of a finding supporting the reasonableness of the non-competition covenant, may successfully persuade the Court to strike it out on the basis that it is contrary to the public interest.

The relief available for breach of a valid non-competition covenant will be predominantly in the form of an interlocutory injunction against further breaches. To be granted an injunction the employer must show that there is a fair question to be tried and that the balance of convenience favours the granting of the injunction.

In exceptional circumstances, where there is a fear that assets or evidence may be dissipated by a defendant, an application for an Anton Pillar order may be appropriate.

In the event damages are awarded after a trial on the merits of the case, the assessment can be done in at least two ways.

1. an accounting of profits made by the party who breached the covenant or fiduciary duty; and
2. a calculation of the loss suffered by the party for whose benefit the non-competition was imposed or to whom the fiduciary duty was owed. The Plaintiff can call evidence of both and elect for the higher of the two.

In the present day of globalization, and internet communications across the world, our Courts will be faced with novel arguments well beyond the contemplation of the learned judges who wrote the leading cases. Hold on tight!

D. Murray Tevlin
October, 2001