IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Jordon v. Pacific Sign Group Inc. et al,***
2007 BCSC 574

Date: 20070330
Docket: S066820
Registry: Vancouver

Between:

Christopher Jordon

Plaintiff

And:

Pacific Sign Group Inc. and Pacific Sign Leasing Ltd.
(with both companies dba Knight Signs)

Defendants

Before: The Honourable Mr. Justice Frankel

Oral Reasons for Judgment

In Chambers
March 30, 2007

Counsel for Plaintiff — Simon K. Kent

Counsel for Defendants — Richard H. Hamilton, Q.C.

Place of Hearing: — Vancouver, B.C.

THE COURT:

Introduction

[1] Mr. Jordon brings this application under Rule 18A for judgment on what appears to be a central issue in this litigation, namely, whether a restrictive covenant in an employment contract entered into between the parties is enforceable.

[2] Both parties filed affidavits. Indeed, Mr. Jordon filed two responding to the one filed by Pacific Sign. No objection is taken to these reply affidavits.

[3] Pacific Sign's initial position is that given the conflicts in the affidavits, the issue raised here cannot be resolved on a summary trial under Rule 18A. It says a full trial is required to appreciate the context in which the restrictive covenant was sought and obtained. It further says that the interpretation of the covenant may be different after a trial.

[4] Having regard to the judgment of Chief Justice McEachern in ***Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*** (1989), 36 B.C.L.R. (2d) 202 (B.C.C.A.), it is clear that if I am able to find facts that enable me to decide this matter, then I should, unless to do so would be unjust.

[5] As set out below, I am able to find facts sufficient to enable me to resolve this matter.

Facts That Can Be Found

[6] The following facts have been established on a balance of probabilities.

[7] Mr. Jordon is 44 years of age and has spent most of his working life in the sign industry.

[8] From January 1993 until November 1996, Mr. Jordon was employed as the national accounts manager of Sign-O-Lite Signs. He left Sign-O-Lite to become one of the founders of Pacific Sign Group Inc. Pacific Sign Leasing Ltd. is a wholly owned subsidiary of Pacific Sign Group Inc. The Pacific Sign companies are in the business of designing, manufacturing, installing, servicing, and leasing signs. By February of 1999, Mr. Jordon was president of both companies and a member of the board of directors.

[9] In mid-1999, the Pacific Sign companies needed capital for expansion. They retained a consultant, Mr. Walter Fries, to assist in this regard. As a result of Mr. Fries' efforts, in the fall of 1999 Mercantile Bancorp Limited agreed to provide $1.5 million in debenture financing. As a condition of doing so, Mercantile required Pacific Sign to enter into contracts with certain of its senior managers which included the one-year restrictive covenant. Such a covenant was sought from Mr. Jordon as he was considered "a key man in the Company's operations"; that is, he is skilled in organizing and managing an effective sales team.

[10] Mr. Jordon entered into the first of two management contracts on 6 December 1999.

[11] In April 2002, Mercantile provided approximately $4.2 million in additional financing to enable Pacific Sign to acquire a competitor, Knight Signs. Shortly thereafter, both Pacific Sign Group Inc. and Pacific Sign Leasing Ltd. began to carry on business under the name Knight Signs.

[12] On 31 October 2005, Mr. Jordon entered into an "Amended and Restated Employment Agreement" with Pacific Sign Group Inc. Its terms are not materially different from the first contract. The restrictive covenant in the second contract reads:

> 5. RESTRICTIVE COVENANT
>
> 5.1 Jordon acknowledges that by virtue of his past employment with the Company, he has gained considerable skill, experience, knowledge, and personal contacts in the business of the Company, and that by continuing to work for the Company he will be able to maintain and increase that skill, experience, knowledge and those contacts, and accordingly, Jordon agrees that he will not, except with the prior

specific consent of the Board of Directors of the Company, acting reasonably, expressed by resolution, during the term of this Agreement and thereafter according to subsection 5.4:

a) except for the benefit of the Company or its subsidiaries or its affiliates, solicit any clients or customers of the Company or its affiliates with whom he has dealt in the course of the business of the Company or its affiliates;

b) carry on or engage in any business which directly competes with any aspect of the business of the Company or its affiliates; or

c) offer his services as a consultant to, or become employed with, accept payment from, invest in or participate in any way with any company, partnership or other business organization, which directly competes with any aspect of the business of the Company or any of its affiliates.

5.2 Jordon acknowledges that he has an extensive knowledge of all the services provided by, and market and present customers and clients of, the Company and therefore fully understands the scope of the restraint on his activities in subsection 5.1.

5.3 The restraint on Jordon's activities set out in subsection 5.1 will apply throughout Canada and the U.S.A. and in each distinct locality within every city, municipality or similar local geographic area where the Company's products are sold or rented during the term of the restraint.

5.4 The restraint set out in subsection 5.1 will remain in force for the duration of this Agreement, and if Jordon is terminated for any reason or he resigns as an employee of the Company, for a period of 1 year following the effective date of such termination or resignation, as applicable.

5.5 Jordon recognizes that he has special, exceptional and unique knowledge, skill and ability, so that a breach by him of any of the covenants contained in subsection 5.1 would result in damage to the Company, which would be difficult to quantify in terms of a monetary reward. Accordingly, Jordon agrees that in the event of any such breach, and in addition to the other remedies available to the Company at law or in equity, the Company will be entitled as a matter of right to apply to a Court of competent jurisdiction for injunctive relief to ensure compliance with the provisions of this section 5, and admits that, for the purpose of any such application, damages will not be an adequate remedy for the Company.

5.6 Jordon expressly acknowledges that he has read and understood the restraints on his activities in this section 5, and recognizes and agrees that the restraints are necessary and fundamental to the protection of the competitive advantage of the Company in its business, its trade secrets, confidential information and goodwill, while at the same time not placing undue restrictions on his ability to utilize at the conclusion

of his employment, the knowledge and skills gained by him in the employment with the Company.

5.7 Each provision of this section 5 constitutes a separate and distinct covenant and is severable from all other provisions of this part, and without limitation, each activity restrained in subsection 5.1, the geographical area specified in subsection 5.3 and the period of time contained in subsection 5.4, constitutes a separate and distinct covenant severable from all other provisions of the Agreement. If any restraint on the activities, time period or geographical area is considered by a Court of competent jurisdiction to be unreasonable or uncertain, that Court will have jurisdiction to limit that restraint, or substitute for that restraint the broadest restraint that would not be unreasonable or uncertain.

5.8 If any provisions in this section 5 is determined to be illegal, void and unenforceable in whole in or part, it will not affect or impair the enforceability or validity of the remainder of that provision, if any, or any other provision or part thereof in this section 5.

[13] The only difference between this covenant and that in the first contract is with respect to its geographic scope set out in Clause 5.3. Initially, the restriction was limited to the Province of British Columbia. It was later expanded to include the United States.

[14] Contrary to what is stated in Clause 5.6, the nature of the sign business is such that there are no trade secrets. While Mr. Jordon would be privy to how Pacific Sign is structured and conducts its business, the only potentially confidential information of which he would have knowledge is the company's customer list.

[15] Pacific Sign has a number of customers with whom it has an ongoing relationship. However, the nature of the sign business is such that a significant percentage of its annual business comes from what can be described as "one-off" projects. Even with repeat customers, it can be several years between transactions.

[16] By letter dated 18 September 2006, Mr. Jordon resigned from the board of directors effective immediately. By letter dated 19 September 2006, he resigned as president effective October 17th.

[17] In the fiscal year ending 31 October 2006, Pacific Sign's sales distribution was as follows: British Columbia and Alberta – 70%; Ontario and Quebec – 2%; Manitoba and Saskatchewan – 6%; and the United States of America – 2%.

Facts That Cannot Be Found

[18] There is disagreement between the parties as to the following matters which I am unable to resolve on the basis of the affidavits:

(a) whether Mr. Jordon was responsible for any employees of Sign-O-Lite leaving that company to come to work for Pacific Sign;

(b) whether the parties were of equal bargaining power at the time the employment contracts were signed - Mr. Jordon asserts he was under "duress";

(c) whether Mr. Jordon expressed any concerns about the restrictive covenants at the time the contracts were signed; and

(d) the circumstances leading to his resignation.

Discussion

[19] The principles applicable to determining the validity of a restrictive covenant are conveniently set out in the judgment of Mr. Justice Smith in ***Valley First Financial Services Ltd. v. Trach*** (2004), 30 B.C.L.R. (4th) 73 (B.C.C.A.):

> [44] There is no dispute about the legal principles applicable to such restrictive covenants. In the seminal case of ***Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.***, [1894] A.C. 535 at 552 (H.L.), Lord Watson observed that the general policy of the law is opposed to restraints of trade that are injurious to the public interest, although the freedom of individuals to contract must be respected. The modern Canadian view is expressed in ***Elsley v. J.G. Collins Ins. Agencies***, [1978] 2 S.C.R. 916 at 923-924: a restrictive covenant will be enforceable only if it is reasonable between the parties and with reference to the public interest; the question of reasonableness must be considered in the context of the covenant itself, the agreement in which it is found, and all of the surrounding circumstances; and a restrictive covenant in a contract of employment will be construed more strictly against the employer than a restrictive covenant in a contract for the sale of a business against the seller. Further, at 925-28, an employer seeking to rely on a restrictive covenant must show that it has a proprietary interest entitled to protection and that the temporal and spatial restrictions in the covenant are no wider than reasonably required to adequately protect that interest. If the employer has shown that the covenant meets these criteria, the onus of proving that it is contrary to the public interest lies on the party challenging the validity of the covenant.

[20] More recently in ***KRG Insurance Brokers (Western) Inc. v. Shafron***, 2007 BCCA 79, Mr. Justice Chiasson (at para. 23) adopted the following criteria for testing the validity of a restrictive covenant from the judgment of Mr. Justice Brenner, as he then was, in ***Aurum Ceramic Dental Laboratories Ltd. v. Hwang***, [1998] B.C.J. No. 190 (QL) (S.C.):

> [11] For a "post-employment" restraint to be enforced, the Courts have required the parties seeking to uphold the restraint to prove that the restraint has the following characteristics:
>
> (a) it protects a legitimate proprietary interest of the employer;
>
> (b) the restraint is reasonable between the parties in terms of:
>
> (i) temporal length;
>
> (ii) spatial area covered;
>
> (iii) nature of activities prohibited; and
>
> (iv) overall fairness;
>
> (c) the terms of the restraint are clear, certain and not vague; and

(d) the restraint is reasonable in terms of the public interest with the onus on the party seeking to strike out the restraint.

[21] As noted above, a distinction has been drawn in the treatment of a restrictive covenant in an agreement for the sale of a business as compared to one contained in a contract of employment. Mr. Hamilton, Q.C., submits that the situation in the case at bar is equivalent to the former. His position is that a person seeking to finance a business should be viewed as a seller and that the financier should be viewed as a buyer.

[22] I do not agree. Although Mr. Jordon has an interest in Pacific Sign, he is not the company. It is a separate legal entity. The agreement is between Pacific Sign as employer, and Mr. Jordon as employee. That it came about as a result of a desire on the part of Mercantile to protect its financial investment does not alter its legal character.

[23] Turning to the non-solicitation clause in the contract, that is Clause 5.1(a), Mr. Kent submits that the expression "with whom he has dealt in the course of the business of the Company or its affiliates" is both vague and overbroad. Although neither counsel focussed their submissions on the word "solicit," I note that it was considered in ***Dr. P. Andreou Inc. v. McCaig***, 2007 BCCA 159. In that case, which involved a dental practise, Madam Justice Huddart held that "solicit" means something more than a general advertisement in a newspaper announcing the opening of a new business.

[24] The meaning of Clause 5.1(a) is difficult to discern. On any purposive interpretation it reaches beyond what is reasonable and fair with respect to adequately protecting Pacific Sign's proprietary interest in its customer base vis-à-vis a departing senior manager. I say this for two reasons.

[25] First, as one of the founders, and later president, of Pacific Sign, Mr. Jordon undoubtedly has "dealt" with numerous customers over the past 10 years. These "dealings" will have taken many forms from, to use Mr. Hamilton's expression, "closing a deal", to a casual conversation with a customer whose account is serviced by one of the sales staff. It is one thing to preclude Mr. Jordon from soliciting customers over which he has come to exercise some special influence, for example, those whose business he brought to Pacific Sign, or was responsible for retaining. However, it is another to preclude him from seeking their business merely because his position in the company brought him into contact with them in some way. I do not accept the submission that because Mr. Jordon "drives" the sales team at Pacific Sign, it is reasonable to preclude him from seeking to do business with any of the company's customers.

[26] A second, and related, concern arises from the nature of the sign business. As previously mentioned, although Pacific Sign has a number of repeat customers, a significant portion of its business comes from "one-off" projects. Further, even with repeat customers, there can be years between transactions. Clause 5.1(a) does not take into account these distinctions. Rather, it applies to every customer with whom Mr. Jordon has "dealt" regardless of the nature of their relationship with Pacific Sign.

[27] While Pacific Sign has a legitimate interest in maintaining the loyalty of its customer base, the restriction here reaches beyond what is reasonable to achieve that end. To give but one example, if Mr. Jordon was directly responsible for the sale of a sign on a "one-off" basis in 1998, but that customer has since taken its repeat business elsewhere, he would be precluded from soliciting that customer's business today.

[28] I now turn to Clauses 5.1(b) and (c), which prevent Mr. Jordon from engaging in any business which directly competes with any aspect of the business of Pacific Sign. Simply put, he cannot work in the sign industry in any capacity.

[29] Again, I find these provisions to be unreasonable and unfair. They are not needed to prevent the misuse of trade secrets, and go beyond what is necessary to protect Pacific Sign's customer base. They are blanket, not focussed prohibitions.

[30] In seeking to support these restrictions, Mr. Hamilton submits that if Mr. Jordon secures a position with a competitor, then some of Pacific Sign's sales staff may leave to join him. This, it is said, will have an adverse impact on Pacific Sign's business and is something his clients are entitled to guard against.

[31] Assuming, without deciding, that a restrictive covenant can be used to prevent a departing employee from enticing others to follow him or her elsewhere, the difficulty here is that the restrictions as worded go beyond what is necessary to achieve this objective.

[32] I should indicate that, having regard to ***KRG Insurance Brokers (Western) Inc. v. Shafron***, I have considered, but rejected, the concept of "reading down" as a means of giving some effect to the restrictive covenant. Pacific Sign clearly intended to prevent Mr. Jordon from competing with it in any way. To now attempt to impose more moderate restrictions would require me to rewrite, as opposed to interpret, the contract. This I cannot do.

[33] Having regard to the foregoing, I find it unnecessary to deal with the challenge to the geographic reach of the restrictive covenant set out in Clause 5.3.

Conclusion

[34] In the result, this application is granted to the extent that Clauses 5.1(a), (b), and (c) of the contract are declared unenforceable.

Costs

[35] Unless counsel have any submissions they wish to make, I think costs should follow the event and, on this application, should be awarded to Mr. Jordon.

[36] Mr. Hamilton, do you have anything to say in that regard?

[37] MR. HAMILTON: No, My Lord, I'm just wondering are you saying costs to Mr. Jordon in any event of the cause.

[38] THE COURT: Yes, costs as they relate to this application to Mr. Jordon regardless of the outcome of any other aspects of the litigation.

[39] MR. KENT: My Lord, may those be payable within a certain time frame, or we don't even have a -- the trial's not booked until the end of 2007, so it may be of assistance to Mr. Jordon given his financial circumstance that the defendant be made to pay within a reasonable time from this date.

[40] MR. HAMILTON: Well, My Lord, I don't understand that to be the order that you're making. An order for costs in any event of the cause is just that. Those costs will be payable in due course in any event of the cause, but they won't be payable --

[41] THE COURT: I am not ordering costs in any event of the cause. I am ordering costs to Mr. Jordon -- yes, costs in any event of the cause, I am sorry.

[42] MR. HAMILTON: I think the fact that --

[43] THE COURT: Mr. Jordon, as I understand it, could take steps now to begin to collect those costs.

[44] MR. HAMILTON: Well, that's the issue, I think. You have to decide whether you wish to make these costs payable forthwith in any event of the cause.

[45] THE COURT: That is what I am thinking.

[46] MR. HAMILTON: And I am suggesting that you should not do that. These should be costs in any event of the cause to be determined overall once the trial has resolved.

[47] MR. KENT: And I would like them payable forthwith.

[48] THE COURT: I think they should be payable forthwith. I view this as one of the most significant aspects of the litigation and Mr. Jordon has succeeded. So the costs will be payable forthwith in any event of the cause.

"S.D. Frankel, J."
The Honourable Mr. Justice S.D. Frankel