COURT OF APPEAL FOR ONTARIO

CITATION: M & P Drug Mart Inc. v. Norton, 2022 ONCA 398
DATE: 20220517
DOCKET: C69818

Lauwers, Nordheimer and Zarnett JJ.A.

BETWEEN

M & P Drug Mart Inc.

Applicant (Appellant)

and

Sydney (Alan) Norton and Whitehead Pharmacy Ltd.

Respondents (Respondent)

Anser Farooq and Shivani Balcharan, for the appellant

Audrey Doxtdator and Cara Valiquette, for the respondent

Heard: April 29, 2022

On appeal from the order of Justice Stephen T. Bale of the Superior Court of Justice dated July 26, 2021, with reasons reported at 2021 ONSC 5211, 73 C.C.E.L. (4th) 151.

Zarnett J.A.:

OVERVIEW

[1] In September 2020, the respondent, Sydney (Alan) Norton, left the employ of the appellant, M & P Drug Mart Inc. ("M & P") and went to work at another pharmacy. Alleging that this constituted a breach of a non-competition covenant in his employment agreement, M & P brought proceedings against Mr. Norton.

[2] These events occurred prior to the coming into force in December 2021 of the *Working for Workers Act, 2021,* S.O. 2021, c. 35 (the "*WWA*"), which prohibits employers from obtaining a non-competition agreement from an employee, subject to certain narrow exceptions. The parties' rights were therefore governed by the common law principles that treat such a covenant as unenforceable, even if freely entered into, unless it is reasonable as between the parties and with respect to the public interest.

[3] Applying the common law principles, the application judge found the non-competition covenant in the employment agreement to be unreasonable as between the parties and therefore unenforceable. He therefore dismissed M & P's application.

[4] For the reasons that follow, I agree with this determination and would dismiss M & P's appeal.

BACKGROUND

[5] Hometown IDA is a pharmacy located in Huntsville, Ontario. Mr. Norton, a pharmacist, began working at Hometown IDA in 1980 when he was a student. Except for a brief hiatus in the mid-1980s, he worked there continuously through to the pharmacy's acquisition by M & P in 2014. At the time of the acquisition, he was the pharmacy manager.

[6] M & P wished to continue Mr. Norton's employment following the acquisition. After negotiations in which Mr. Norton had the benefit of legal advice, they entered into an employment agreement on May 8, 2014 under which Mr. Norton would serve as pharmacy manager.

[7] The employment agreement contained non-competition covenants, which were the subject of specific attention during the negotiation of the employment agreement. The application judge found that Mr. Norton had considerable leverage in the negotiations and that M & P made concessions in his favour to secure his agreement.

[8] The terms of the non-competition covenants, as finalized, were tied to Mr. Norton's age at the time his employment ended. The covenant relevant to this litigation is the one that applied once Mr. Norton reached the age of 60. It reads as follows:

> The Employee agrees that during the Employee's employment with the Company and during the one year period following the termination of the Employee's employment with the Company, for any reason whatsoever, the Employee shall not carry on, or be engaged in, concerned with, or interested in, directly or indirectly, any undertaking involving any business the same as, similar to or competitive with the business within a fifteen (15) kilometre radius of the business located at 10 Main Street East, Huntsville, Ontario P1H 2C9.

[9] The business located at the address in the covenant is the Hometown IDA.

[10] The employment agreement also contained clauses whereby Mr. Norton acknowledged that the non-competition covenants (and a non-solicitation covenant also included in the agreement) were necessary for the protection of M & P's legitimate business interests and were "reasonable in the circumstances".

[11] On September 25, 2020, after having given notice several months earlier, Mr. Norton resigned from his employment with M & P.

[12] Mr. Norton then went to work, as a pharmacist, at the Campus Trail Pharmacy, located in Huntsville less than three kilometres from the Hometown IDA. After M & P, through counsel, reminded Mr. Norton of the provisions of the non-competition covenant, Mr. Norton, through counsel, took the position that it was unenforceable. Litigation ensued.

[13] The exact length of time that Mr. Norton worked at the Campus Trail Pharmacy during the year following his resignation from Hometown IDA was not the subject of precise agreement between the parties and was affected by an interim order made in the application. For the purpose of the disposition of the appeal, I proceed on the premise that there was a period of time, in the year following the resignation, during which Mr. Norton was working as a pharmacist at the Campus Trail Pharmacy, sufficient to constitute a breach of the covenant if the covenant is enforceable.

THE APPLICATION JUDGE'S DECISION

[14] M & P's application alleged that Mr. Norton breached the non-competition covenant when he went to work at the Campus Trail Pharmacy following his September 25, 2020 resignation from his employment by M & P, but before the end of the one-year term of the covenant.

[15] The application judge dismissed M & P's application. He found that the non-competition covenant was unreasonable as between the parties because it was ambiguous or because the scope of the prohibited activities was overly broad. As a consequence, he held it was unenforceable.

[16] The application judge outlined the principles. He noted that covenants in restraint of trade are *prima facie* unenforceable and will only be upheld if reasonable in reference to the interests of the parties and the public. Factors to be considered in assessing reasonableness include (i) whether the employer had a proprietary interest entitled to protection, and (ii) whether the scope of the prohibited activities, the length of the covenant, or its geographical limits are overly broad. An ambiguous covenant is *prima facie* unreasonable because if the restrictions are unclear as to activity, time, or geography, it will not be possible to show them to be reasonable.

[17] The application judge focused on whether the covenant was unreasonable as between the parties because the meaning of the covenant was ambiguous or

because its terms, as they related to the scope of the prohibited activities, were overly broad. He observed that a clause that prohibited “working as a pharmacist at a pharmacy” would have been reasonable. But he found the covenant ambiguous because it extended to prohibit Mr. Norton from being “concerned”, even “indirectly”, with an “undertaking involving a business” that was “similar” to Hometown IDA. It might, for example, preclude him from working in a non-pharmacist role in a non-pharmacy department of a supermarket if the supermarket also included a pharmacy. It was also unclear whether prohibited competition only included businesses that dispensed prescriptions, or whether it extended to any business that sold over-the-counter drugs, cosmetics, greeting cards, food, shaving items, or other products that are sold by Hometown IDA but also by convenience, grocery, and big box stores.

[18] The application judge also found the clause overly broad, as it prevented Mr. Norton from having an interest in such businesses and from doing work unrelated to the practice of pharmacy. Such restrictions were wider than reasonably required to afford adequate protection to M & P’s legitimate proprietary interests.

[19] Given his finding that the covenant was not reasonable between the parties, he declined to address whether it was reasonable with respect to the public interest.

ANALYSIS

[20] M & P submits that the application judge's decision is reviewable on a standard of correctness. It contends that covenants with certain similarities have been found not to be ambiguous. It argues that the application judge erred by focusing on whether the covenant extended to the broader situations that concerned him, as in doing so he lifted the covenant out of its context. M & P maintains that the covenant is unambiguous and not overly broad since when read in light of the surrounding circumstances – Mr. Norton's occupation as a pharmacist, Hometown IDA's pharmacy business, and certain pre-contract communications – it clearly only addresses Mr. Norton working as a pharmacist in or for a pharmacy or a store that houses a pharmacy within the geographical limits of the covenant. Finally, it submits that the covenant is also reasonable with respect to the public interest.

[21] Mr. Norton makes the preliminary argument that the appeal is moot since the covenant has expired. While not directly contesting correctness as the standard of review for a finding of unenforceability due to unreasonableness, he notes that M & P's arguments engage certain matters on which appellate deference is owed. On the merits, he supports the conclusions of the application judge and points to cases where similarly worded clauses were found to be unenforceable. He also submits that if the covenant is found to be reasonable with

respect to the parties, it should be found unreasonable with respect to the public interest.

[22] To dispose of the appeal, it is necessary to address the mootness point, the standard of review, and whether the decision of the application judge that the covenant was unenforceable because it was not reasonable as between the parties should be reversed. Because of the view I take on these matters, it is unnecessary to consider the issue of whether the covenant is reasonable with respect to the public interest.

(1) Is the Appeal Moot?

[23] Mr. Norton argues that the appeal is moot because the term of the covenant expired in September 2021. Thus, according to Mr. Norton, it is inconsequential whether it was valid, as on any view it is no longer in force. He further argues that this court should not exercise its discretion to hear a moot appeal as there is no public interest in what, he contends, would be an academic exercise about the validity of the now expired covenant. The Ontario legislature has enacted the *WWA*, in force from December 2, 2021, which now prohibits employers from entering into non-compete agreements with employees[1], and renders void any non-compete agreement made in violation of the prohibition: ss. 67.2(1) and (2).

[1] The prohibition does not apply to a non-compete agreement that is part of a sale agreement where the vendor immediately becomes an employee of the purchaser, nor to non-compete agreements with defined executives: ss. 67.2(3), (4) and (5).

[24] It is not necessary to consider the question of whether this court should exercise its discretion to hear a moot appeal because, in my view, the appeal is not moot.

[25] M & P's application sought a declaration that Mr. Norton breached the covenant and various forms of ancillary relief, including an order directing a trial of the issue of damages. Accordingly, whether the application judge erred in finding the covenant unenforceable is not a hypothetical or abstract question with no relevance to the parties' rights. On the contrary, the determination is one with practical and direct consequences for those rights. If the covenant were found to have been valid for the period of September 2020 to September 2021, its expiry would not absolve Mr. Norton of liability for damages for a breach that occurred during that one-year period. It is not suggested by Mr. Norton that the *WWA* applies to a covenant made and, if valid, breached before the *WWA* came into force.

[26] The appeal is therefore not moot: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at pp. 353-56.

(2) The Standard of Review

[27] M & P argues that correctness is the appellate standard of review applicable to the question of whether a non-competition covenant is unambiguous and reasonable, citing *Martin v. ConCreate USL Limited Partnership*, 2013 ONCA 72, 359 D.L.R. (4th) 123, at para. 55.

[28] However, in this case, there is an issue that must be addressed before the reasonableness (and therefore the enforceability) of the covenant can be considered. Before a determination of reasonableness may be made, there first must be a determination as to what the covenant means, that is, what conduct the covenant does and does not restrict. It is the scope, duration, and geographic reach of the covenant, properly determined, that must then be assessed for reasonableness. What the covenant means is a question of contractual interpretation that, absent an extricable error of law, is subject to a deferential standard of review: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 50-53.

[29] In short, the determination of what the covenant means – what activities it extends to – is reviewable as a question of mixed fact and law. The determination of whether the properly interpreted covenant is reasonable, and therefore enforceable, is reviewable on a correctness standard.

(3) Did The Application Judge Err in Finding the Covenant Unreasonable as Between the Parties?

[30] I do not agree with M & P that the application judge erred in his conclusion of unenforceability. I begin by setting out the framework to analyze this issue and then turn to how it applies to the arguments M & P makes.

(i) The Framework

[31] The common law that controls this case begins with a general rule and an exception.

[32] The general rule is that, on public policy grounds, a provision in a contract that restrains a vendor of a business from competing with the purchaser, or an employee upon leaving employment from competing with the employer, is *prima facie* unenforceable. The exception to the general rule is that the provision will be upheld if it is reasonable in reference to the interests of the parties and the public, judged in light of the circumstances at the time the covenant is made: *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at paras. 15-17; *Martin,* at paras. 49, 54.

[33] In order to determine whether a non-competition agreement is reasonable, the extent of the activity sought to be prohibited, the geographic coverage of the restriction, and its duration are all relevant: *Shafron*, at para. 26.

[34] Although the factors considered are the same, the reasonableness of a restriction is scrutinized differently depending on whether the covenant is between purchaser and vendor or between employer and employee. A non-competition covenant in an employment agreement that restricts the post-termination activities of an employee is subject to more rigorous scrutiny than a non-competition

covenant in a sales agreement that restricts the post-sale activities of the vendor: *Shafron*, at para. 23.

[35] The party seeking to enforce the restrictive covenant has the onus of demonstrating that it is reasonable as between the parties; the party seeking to avoid enforcement has the onus of showing the covenant is unreasonable with respect to the public interest: *Martin*, at para. 50.

[36] In order to withstand scrutiny, a covenant must be clear as to activity, time, and geography. A covenant that is ambiguous on any of these matters is *prima facie* unenforceable. This is because it is not possible to show, in the face of unresolved ambiguity, that the covenant is reasonable: *Shafron*, at paras. 27, 43; *Martin,* at para. 51.

[37] It does not follow, however, that if the covenant is clear or the ambiguity is resolved, the covenant will be upheld. The covenant still needs to be assessed for reasonableness given the meaning ascribed to its terms by the interpretive process.

[38] Where, properly interpreted, the covenant as worded is not shown to be reasonable, the court may not effectively rewrite it to reflect terms the parties may have reasonably agreed to. The court is not permitted “to rewrite a restrictive covenant in an employment contract in order to reflect its own view of what the

parties' consensus *ad idem* might have been or what the court thinks is reasonable in the circumstances": *Shafron*, at para. 47.

(ii) Application of the Framework

[39] Against the backdrop of this framework, I turn to M & P's arguments.

[40] In essence, the application judge's two findings, ambiguity and overbreadth, are different sides of the same coin. By finding ambiguity, the application judge concluded that M & P could not demonstrate that the restrictions on Mr. Norton's post-termination activity fell within limits that were reasonable. By finding overbreadth, he concluded that M & P failed in its onus because the restrictions on activity, properly interpreted, went beyond what was reasonable. To succeed, M & P must show that both conclusions are wrong – not only that the ambiguity finding was wrong, but that the clear meaning of the covenant (or the resolved ambiguity) is not an overly broad restriction.

[41] Put differently, M & P had the onus of showing that the clear meaning of the covenant was a demonstrably reasonable restriction of activity. It fails in that onus if the language is ambiguous, in the sense of not being clear: *Martin*, at para. 51. But it also fails if the language is not ambiguous (or any ambiguity is resolved) and the result is terms that impose broader restrictions than are reasonable, in other words, restrictions that are overly broad.

[42] M & P seeks to uphold the reasonableness of the activity portion of the covenant on the basis that a protection in its favour, which restricts Mr. Norton's post-termination activities as a pharmacist for a pharmacy or a store that includes a pharmacy, is a reasonable protection. M & P does not seek to demonstrate that greater restrictions than these are reasonable.

[43] M & P's reasonableness contention can therefore only succeed if the covenant does not go beyond restricting Mr. Norton from acting as a pharmacist for a pharmacy or a store that includes a pharmacy.

[44] The starting point of the interpretive process are the words used. The covenant does not say that Mr. Norton may not work as a pharmacist in a pharmacy or in a store that contains a pharmacy. It forbids Mr. Norton to "carry on, or be engaged in, concerned with, or interested in, directly or indirectly, any undertaking involving any business the same as, similar to or competitive with the [Hometown IDA]". M & P agrees that "an undertaking involving any business" includes one, such as a supermarket, that has a pharmacy as well as non-pharmacy departments. The language "carry on, or be engaged in, concerned with, or interested in, directly or indirectly" restricts all of those activities at undertakings that have non-pharmacy aspects to their business and therefore have non-pharmacy-related employee positions.

[45] In the application judge's view, the covenant might extend to working in a job other than a pharmacist for a supermarket that included a pharmacy department, even if the job was in a completely different department. He concluded that the covenant was therefore ambiguous. In the sense relevant to the issue here, I see no error in his conclusion. The wording does not clearly and only restrict Mr. Norton from acting as a pharmacist; the restriction goes further.

[46] In any event, even if there were an error in the application judge's characterization of an ambiguity, this would only be because it is clear that the language extends beyond working as a pharmacist, rather than being ambiguous on the subject. But this is not M & P's complaint about the ambiguity finding. In order to show that no restriction beyond what was reasonable was imposed, M & P must show that the language is clear that nothing more than working as a pharmacist is covered. To do so, it would have to persuasively suggest a way of reading the words "be engaged in, concerned with, or interested in, directly or indirectly" an undertaking that has non-pharmacy aspects to its business to mean "work as a pharmacist" and nothing more. In my view, M & P has not done so.

[47] M & P's argument against the application judge's conclusion of overbreadth is flawed. The overbreadth finding follows from the application judge's determination of what activities the covenant prevented – for example, that it would prevent Mr. Norton from doing work unrelated to the practice of pharmacy for an enterprise that had, as any aspect of its undertaking, a pharmacy. The terms would

also prevent him from being a passive investor to any extent in any such enterprise, given the restrictions on being “interested in” or “concerned with”, “directly or indirectly”.

[48] M & P does not seek to demonstrate that those kinds of restrictions are reasonable. It seeks to read the covenant as though such restrictions are not imposed. It attacks the interpretation that leads to the unreasonableness (due to overbreadth) conclusion, rather than the conclusion of overbreadth that follows from that interpretation. In my view, M & P has not shown an error in the application judge’s interpretation that would displace appellate deference.

[49] M & P has not shown why the language of the covenant is not properly read to reach activities beyond working as a pharmacist. It cannot demonstrate an interpretive error by insisting on a meaning that ignores the words used. The language of the covenant is the primary indicator of contractual meaning. Although M & P refers to pre-contractual negotiations that it says show the parties’ concern was about Mr. Norton going to work as a pharmacist at another pharmacy, the covenant used broader language. The factual matrix cannot be used to overwhelm or deviate from the contractual text, change the meaning of the words used, nor to effectively create a new agreement: *Sattva*, at paras. 57, 60. And the court is not empowered to rewrite the covenant “to reflect its own view of what the parties’ consensus *ad idem* might have been or what the court thinks is reasonable in the circumstances”: *Shafron*, at para. 47.

[50] Although M & P argues that the language of the covenant in issue uses phrases contained in non-competition clauses that have been upheld, the situation in each case was materially different from the issue here. I refer to two cases to illustrate the point.

[51] In *Elsley v. J.G. Collins Ins. Agencies*, [1978] 2 S.C.R. 916, the covenant provided that the manager of a general insurance business could not, after termination "directly or indirectly, and whether as principal, agent, director of a company, traveller, servant or otherwise, carry on or be engaged or concerned or take part in the business of a general insurance agent": at p. 919. The issue in *Elsley* was whether the covenant was too broad because it went beyond restricting the employee from soliciting the employer's customers. In holding that it was not overly broad, the court considered the covenant to be justified as the employer's legitimate interests could be protected only by a covenant that prevented the employee from "establishing his own business or working for others so as to be likely to appropriate the employer's trade connection through his acquaintance with the employer's customers": at p. 926. The covenant was considered on the full extent of its reach and that reach was, in the circumstances, found to be reasonable. The problem for M & P in this case is that it is forced to argue for a more restricted reach of the covenant than its terms provide in order to bring it within reasonable limits.

[52] Nor is M & P assisted by *Martin*, where covenants (in the sale of a business) that included the words “directly or indirectly”, “engage in” and “be concerned with” any business that competes with the business sold were held to be unambiguous. The question is not whether it is possible, in some covenants, for those phrases to be used unambiguously. The question is whether this particular covenant, as a whole including such phrases, can be demonstrated to be reasonable. In *Martin*, unambiguous covenants were found to be unreasonable as to both the duration and the scope of the prohibited activities: at paras. 59, 68.

(iii) Conclusion

[53] M & P essentially asks the court to read the covenant as applying only to Mr. Norton acting as a pharmacist for a pharmacy or a store that includes a pharmacy in the year following the termination of his employment. It argues that this was the protection the parties were aiming at in their pre-contractual dealings, that this extent of protection would be reasonable, and that this is the very conduct in which Mr. Norton engaged.

[54] But the covenant was not worded in such a restricted manner, the factual matrix cannot change the words used and *Shafron* prevents the court from rewriting the covenant. The result is that the covenant cannot be demonstrated to be reasonable. Even though Mr. Norton freely agreed to the covenant, the question is one of legal consequences rather than business ethics. The application judge

did not err in his conclusion that M & P did not overcome the general rule, rooted in public policy, that the covenant is unenforceable.

DISPOSITION

[55] I would dismiss the appeal.

[56] I would award costs of the appeal to Mr. Norton in the amount of $10,000, inclusive of disbursements and applicable taxes.

Released: May 17, 2022 “P.L.”

“B. Zarnett J.A.”
“I agree. P. Lauwers J.A.”
“I agree. I.V.B. Nordheimer J.A.”