

THE HIGH COURT

[2014 No. 2434 P]

BETWEEN

LEVINWICK LIMITED

PLAINTIFF

AND

PATRICK HOLLINGSWORTH

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 4th day of July 2014

1. The plaintiff is the owner of a chain of pharmacies and at all material times owned and operated Blakes Pharmacy at Main Street, Celbridge, County Kildare.

2. The defendant is a Pharmacist who worked as Pharmacy Manager at Blakes Pharmacy from 7th August 2007, until 1st March, 2013. Between 4th March 2013, and 24th November, 2013, the defendant worked as Supervising Pharmacist with 'Your Local Pharmacy Group' in Huntstown, Dublin 15. Between 9th December 2013, and 4th January 2014, he worked as Pharmacy Manager with Tesco Pharmacy, Newbridge, County Kildare. On 7th January 2014, the defendant commenced employment with Chemco Pharmacy as Pharmacy Manager and the pharmacy began trading in Celbridge, County Kildare, on 14th January, 2014. It is this latter contract of employment that has given rise to these proceedings.

3. In these proceedings, the plaintiff seeks to enforce the terms of his contract of employment made on 7th August 2007 ("the contract"), in which he agreed not to do similar work in another pharmacy within a two-mile radius of Blakes Pharmacy for a period of 24 months after the termination of his employment.

4. The contract was structured on a three-month rolling basis and the defendant was required to give three months notice of intention to leave the pharmacy. Clause 15 of the contract which is entitled 'Non-Solicitation' is in the following terms:

"You undertake that during the term of your employment but for a period of 24 months after the termination of your employment, for any reason, you will not be employed or engaged by, do locum work, manage, own or part-own, a pharmacy or other retail business which trades in cosmetics or gifts or which provides photography services within a two-mile radius of the Pharmacy, you will not solicit in competition with the Pharmacy the business of any person, firm or company who is at the time of termination of your employment or was during the preceding 12 months a customer of the Pharmacy and you will not, in competition with the Pharmacy, solicit any person who was during your employment with the Pharmacy employed or engaged by the Pharmacy within 12 months prior to the termination of your employment, and who by means of such employment, is likely to be in possession of confidential information relating to the Pharmacy or its business.

You agree that all of the above restrictions are reasonable in all the circumstances and are no more than is necessary for the protection of the interests of the Pharmacy.

You agree that, in the event that any of the above restrictions is held to be unreasonable by reason of the area, duration or type or scope of service covered by such restriction, then effect will be given to such restriction in such reduced form as may be decided by any court of competent jurisdiction."

5. The issue arising in this case is one of the enforceability of a covenant in restraint of trade. Such covenants are, *prima facie*, unenforceable at common law. They are, however, enforceable if they:

(i) Protect a legitimate business interest; and

(ii) are no wider than is reasonably necessary for the protection of that interest. See *Office Angels Ltd. v. Rainer-Thomas & O'Connor* [1991] I.R.L.R. 214, and *Murgitroyd & Co. Ltd. v. Purdy* [2005] 3 I.R. 12.

6. In *Murgitroyd & Co. Ltd. v. Purdy*, Clarke J. said at p. 21, para. 17:

*"The test seems to be, therefore, as to whether in all the circumstances of the case both the nature of the restriction and its extent is reasonable to protect the goodwill of the employer. Clearly certain clauses which preclude solicitation come within that definition provided that they are not excessively wide. In certain other cases clauses have been upheld which have prohibited employees setting up a similar business within a specified distance of an employer's establishment: see for example *Marion White Ltd. v. Francis* [1972] 1 W.L.R. 1423. But it is clear that the duration of the prohibition and the geographical scope of same are important matters to be considered having regard to the nature of the work in question and the structure of the business."*

In determining the reasonableness of a covenant as between the parties, the burden of proving reasonableness lies on the person who seeks to rely on the covenant. See *Herbert Morris Ltd. v. Saxelby* [1916] A.C. 688. In the case of *Murgitroyd & Co. Ltd. v. Purdy*, Clarke J. drew a distinction between covenants by employees and covenants given on the sale of a business. At p. 21, para. 21, he said:

". . . it is also clear that a more restrictive view is taken of covenants by employees than is taken of covenants given on sale of a business. Covenants against competition by former employees are never reasonable as such. They may be upheld only where the employee might obtain such personal knowledge of, and influence over, the customers of his

employer as would enable him, if competition were allowed, to take advantage of his employer's trade connection: see Kores Manufacturing Co. Ltd. v. Kolok Manufacturing Co. Ltd. [1959] Ch. 108."

7. The plaintiff contends that, by virtue of his position as Pharmacy Manager, the defendant had a particular degree of contact with the customers of Blakes Pharmacy, such that many customers would follow him if he worked for another pharmacy in the Celbridge area. For his part, the defendant gave evidence that the plaintiff had exaggerated the level of personal relationship which he, as Pharmacy Manager, would have built up with customers. He also says that, having left the employment of Blake's Pharmacy on 1st March 2013, he did not commence work in another pharmacy in the Celbridge area (being within the two-mile radius specified in clause 15 of the contract) until 7th January 2014, which was more than ten months after he left Blakes Pharmacy.

8. In assessing whether the restrictions in clause 15 of the contract are necessary to protect a legitimate business interest of the plaintiff and no wider than reasonably necessary for the protection of that interest, it is necessary to analyse the role of the defendant while he was working with Blakes Pharmacy and his current role, and the extent to which he interacted with the customers of Blakes Pharmacy.

9. The defendant was the only person who gave direct evidence as to the degree of interaction between him and customers calling to Blakes Pharmacy. He informed the court that the pharmacy drew customers from Celbridge and that three doctors in General Practice had clinics near the Main Street in Celbridge and there were two nursing homes nearby. In 2007, when he commenced his employment, there were three pharmacies in Celbridge; three further pharmacies have opened in the town since October 2011. He described the role of Pharmacy Manager, which was primarily involved with dispensing prescription medicines and he had responsibility for purchasing and making payments to suppliers. He converted one room upstairs in the premises into an office and he said that the majority of his activities were carried on in the office. He worked a 40-hour week. The pharmacy was open seven days a week and 12 hours every day. He described the staffing levels in the pharmacy. There were two fulltime Pharmacists and two part-time locum Pharmacists to cover weekend and backup work. There were two dispensing technicians and eight or nine counter retail assistants who handled the bulk of customer transactions, although these would have been dealing with non-prescription items. The defendant was one of the two fulltime Pharmacists, but he had many administrative duties. The main role of the other Pharmacist was to run the Dispensary and she had a large level of customer contact. He said that she would have a higher level of personal contact with customers than he did. The two part-time locum Pharmacists would be the only Pharmacists seen by customers at weekends. He did not see himself as "the face" of the pharmacy. In the defendant's view, issues which might draw people to a pharmacy were proximity to their home or to their doctor and the availability of parking facilities. He said he would find it unusual that people would follow a Pharmacist to another pharmacy where they might go to work. He agreed with a suggestion by counsel for the plaintiff that it would take a new Pharmacist approximately two and a half years to get established in a neighbourhood.

10. The court heard evidence from Mr. Tom McDonald, a Chartered Accountant from Benson Lawlor, who provide services to the plaintiff and the pharmacy industry generally. I accept his evidence that, in recent years, various State health agencies have cut the charges of pharmaceutical products, and in particular, prescription drugs, and that there has been a progressive reduction in the prescription fee for pharmacies. This has put pressure on pharmacies and there is also increasing competition in the market. He gave evidence to the court of the decline in the business at Blakes Pharmacy and attributed 75% of that to the defendant moving. In his view, the customers were following the defendant. Mr. McDonald said that the 24-month restriction in the defendant's contract of employment would protect the goodwill of the plaintiff because the owners are not involved in the day-to-day running of the business, but a person in the defendant's position would be seen as "the face" of the pharmacy. Goodwill is a real asset of the pharmacy and it takes time to train a new Pharmacy Manager and for that person to build up a new relationship.

11. The court also heard evidence from Mr. Brian Hyland, an Accountant with Baker Tilley Ryan Glennon Accountants, who carried out a review of the financial statements of the plaintiff from 2008 to 2013, together with copies of VAT returns for part of the period from February 2010 to December 2013, and the projected losses for 2014 and 2015. He gave evidence that since 2009, sales started to decline at the pharmacy and continued to decline annually thereafter, with a total decline of turnover of 26.55% from 2009 to 2013, which was an average decline of nearly 6% *per annum*.

12. I accept the evidence of Mr. Hyland. Bearing in mind that the defendant worked with the pharmacy from August 2007 until March 2013, it is clear that for the greater part of his tenure in Blakes Pharmacy, turnover was declining. This decline began within two years of the commencement of his employment there which lasted almost five and a half years.

13. There were also other factors at play, as described by Mr. Tom McDonald of Benson Lawlor, and Mr. Dermot Ryan, a director of the plaintiff. Not least among these was the increasing number of pharmacies in the Celbridge area and the fact that there was a reduction in prescription fees due to Government policy.

14. In my view, the evidence fell a long way short of establishing that the defendant represented "the face" of Blakes Pharmacy while he worked there and that he was identified by customers as such. The plaintiff relies on a letter of 27th March 2010, written by the defendant to Independent Pharmacy Ownership Scheme (IPOS), which, at one time, owned or controlled the pharmacy, as identifying him closely as the person with whom the customers had a particular relationship. The letter was written in the context of the defendant expressing an interest to purchase the pharmacy under a scheme set up by IPOS to assist young pharmacists in getting their own premises. In that letter, he says:

"An excellent relationship has been forged between my staff and our customers since I took on the role here as MP and they constantly remind us how professional and friendly our customer service is in comparison to our competitors in Celbridge. As my staff and I all reside in Celbridge, we are regarded as being fellow members of the community and not just employees of Blakes Pharmacy by our fiercely loyal customers, all of which is reflected in the goodwill aspect of the business."

15. While this letter undoubtedly seeks to identify the defendant closely with the business for the purpose of his expression of interest to IPOS, it must be read in the context in which it is written and it does not single out the defendant from other staff members. The defendant gave persuasive evidence that the plaintiff could have ascertained if any significant number of customers were following him to the pharmacy where he now works. Every customer of a pharmacy has a Patient Record (a 'PMR') from which it could find out who were its customers before and after the defendant worked with Blakes Pharmacy. This evidence was not challenged and the plaintiff did not establish, or seek to establish, by empirical evidence, what number of customers, if any, had followed the defendant to the other pharmacies where he worked after leaving Blakes Pharmacy, and in particular, the pharmacy where he now works in Celbridge.

16. In the course of his evidence, Mr. Dermot Ryan, a director of the plaintiff, conceded that the plaintiff was not alleging that the defendant was in breach of a non-solicitation clause, nor was it alleging that he took with him any trade secrets or plans of the

plaintiff. The plaintiff contended that it was its goodwill that had to be protected and that the clause in issue in this case was no wider than was reasonably necessary for that purpose. The plaintiff relied on the fact that it takes a substantial period of time for a new Pharmacy Manager to build up a relationship with customers. This was not disputed by the defendant. But I cannot ignore the fact that in Blakes Pharmacy, there were a substantial number of employees, including two Pharmacists and two locum Pharmacists to cover weekends and backup. I have to consider these facts in determining what was reasonable and the extent to which it was likely that a particular Pharmacist (the defendant) would have built up such a special relationship with customers, as is claimed by the plaintiff. I also have to consider the particular role of the defendant, as Pharmacy Manager, which involved him in many administrative duties relating to the pharmacy which required him to spend a considerable amount of time in an office on the premises.

17. The plaintiff did not seek to establish that a less onerous restrictive clause was not reasonable or practicable in the particular circumstances that arose in this case.

18. An issue arose as to the date on which the defendant's employment with Blakes Pharmacy terminated. The plaintiff contends that it terminated with effect from 30th April 2013, as under clause 8, he was required to give three months' notice of his intention to leave the pharmacy. The defendant gave six weeks notice. He says this was accepted by the plaintiff, and on that basis, his employment would have ended on 15th March 2013. But as he had accrued holiday leave of two weeks, he gave evidence that his manager, Mr. Juan Fravega, agreed that he could leave the plaintiff's employment two weeks early, on 1st March 2013. He was issued with a P45 with a date of cessation of 6th March 2013, which corresponds with his final payslip.

19. The evidence of the defendant on this issue was not contradicted and I accept that it was agreed that he could leave on 1st March 2013. It seems that his P45 showed 6th March 2013, as the date of cessation of his employment because he was paid one week in arrears. In any event, not much turns on this. But insofar as it is an issue, I hold that the date of cessation of his employment was 6th March 2013, and that this was agreed with the plaintiff.

Conclusion

20. Clause 15 of the defendant's contract is contract in restraint of trade and therefore only enforceable if it protects a legitimate business interest of the plaintiff and is no wider than is reasonably necessary for the protection of that interest. I accept the submission of the defendant that both the nature of the restriction and its extent must be reasonable to protect the goodwill of the employer if the clause is to be enforceable.

21. The plaintiff has not established that the nature of the defendant's position and his work in Blakes Pharmacy gave rise to such a personal connection with customers of the Pharmacy that the restriction imposed by clause 15 was necessary to protect the goodwill of the plaintiff. Therefore, the plaintiff is not entitled to the injunctive relief or damages or other relief claimed in the statement of claim.