

Court dismisses non-competition injunction against brothers who sold auto parts business

Litigation | Litigation & Dispute Resolution | Non-Compete

27 July 2021

In *UAP Inc. v. Yako*, 2021 ONSC 5065 (CanLII), the Ontario Superior Court of Justice dismissed the plaintiff's request for an interim injunction enforcing a non-competition clause relating to the purchase of an auto parts business.

In 2018, the plaintiff bought the business from two brothers for \$5 million pursuant to an asset purchase agreement that contained non-competition and non-solicitation clauses. Under the non-competition clause, the brothers agreed not to operate any business related to the sale of auto parts within 75 kilometres of the locations acquired by the plaintiff, or soliciting former customers and employees, for five years.

Following the purchase, the plaintiff agreed to continue to employ two desk clerks and provided them with signing bonuses in exchange for their agreements not to compete with or solicit the plaintiff's customers within 50 kilometres of the plaintiff's store for 12 months after leaving their employment.

A year and a half after the purchase of the business, the plaintiff alleged that the two brothers started a business to sell auto parts to a company owned by a third brother, and they allegedly recruited the two former desk clerks to solicit their former customers. The plaintiff retained a private investigator to obtain invoices and surveillance to identify customers that moved to the third brother's new business. While the plaintiff did not have evidence of direct solicitation, the plaintiff pointed to a decline in sales of approximately 34% compared to the period before the purchase of the brothers' business.

As a result, the plaintiff sought an interim injunction to enforce the non-competition and non-solicitation agreement until trial against the two brothers who sold the business to the plaintiff, as well as the third brother and his competing business, and the two desk clerks.

In determining whether an injunction should be granted the court reviewed the traditional criteria for the granting of an injunction: the showing (a) of a serious question to be tried; (b) of irreparable harm if the injunction is not granted; and (c) that the balance of convenience favoured granting the injunction: *RJR MacDonald Inc. v. Canada (Attorney-General)*, 1994 CanLII 117 (SCC), 1994 SCC 117, [1994] 1 S.C.R. 311.

However, because the injunction sought to enforce a non-competition clause in an agreement for the sale of a business, the plaintiff had to establish "a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice": *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 (CanLII), [2018] 1 SCR 196, at para 17.

The plaintiff failed to meet this exacting standard. As against the two brothers, who conceded that they were "back in business," the restrictive covenant imposed a prohibited geographic area of 75 kilometres. The brothers' new business was operated from a location that was 78 kilometres away. While this was almost within the prohibited area, the court stated that "'almost' doesn't count in the world of restrictive covenants."

The restrictive covenant was also flawed in that it prohibited the two brothers from business activities in which they "supply products or services to or in any other manner be involved in a business which competes directly" with the plaintiff. The court accepted that the two brothers were brokers—middlemen who put deals together between buyers and sellers—and that they did not "supply" any products themselves. The court held that the use of the words "supply products" in the restrictive covenant did not capture the activity of brokering deals in which others supply the products.

The third brother's business was within the 75-kilometre prohibited area and the plaintiff argued that he was facilitating his brothers' breach of the non-competition agreement by acting as an agent for them and that the entire arrangement between the brothers' two businesses was a sham. The third brother, however, was not a party to his brothers' agreement with the plaintiff and the plaintiff's evidence was entirely speculative, and based largely on the fact that the three brothers shared the same last name. The court noted that while he is a brother of the two individuals restricted in their business with the plaintiff, "he is not his brothers' keeper."

The speculative evidence relied on by the plaintiff was insufficient to establish either a strong *prima facie* case or that it would suffer irreparable harm if the injunction was not granted – that is, not that the plaintiff *might* suffer irreparable harm but that it demonstrably *will* suffer irreparable harm: *Airport Limousine Drivers Association v. Greater Toronto Airports Authority*, 2005 CanLII 29654 (SCJ).

The court further noted that the plaintiff was a large corporate enterprise that would be able to "weather the storm" until trial. If the plaintiff is successful at trial, it will have shown that it has lost expected profits and can make its claim in damages.

The same reasoning defeated the injunction sought against the two desk clerks. While they agreed not to work for a competing business for one year (due to expire about two months following the injunction motion), the potential harm to the plaintiff in allowing them to continue in their jobs was minuscule compared with the harm to the employees in being forced out of their jobs. Given that the plaintiff, with all of its investigative resources, had not managed to identify a single individual customer that the two desk clerks had solicited, the court found no grounds to issue an injunction against them.

The case demonstrates the difficult issues a party will face when attempting to enforce non-competition clauses and the courts' strict approach to reading the terms contained therein. The court noted that different terminology could have been used in the agreement to capture the acts complained of, but that the plaintiff was bound by the wording it chose and could not obtain a broader interpretation of the covenants after the fact. While it may be difficult to predict how a contracting party will attempt to circumvent non-competition obligations, utmost care should be taken to ensure that the intended goals of such restrictive covenants are incorporated when drafting the terms in accordance with the requirements of applicable law. A PDF version is available to download [here](#).

For more information please contact: **James Cook** at **416.865.6628** or jcook@grllp.com

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

Author



James R.G. Cook

Partner

416.865.6628

jcook@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com