Understanding Non-Compete Clauses When Purchasing Or Selling A Health Practice



In our recent blog post, we reviewed the 2024 decision of the Ontario Court of Appeal, *Dr. C. Sims Dentistry Professional Corporation v. Cooke*, which affirmed the enforceability of a restrictive non-compete clause in a business purchase and sale agreement of a dental practice. In the Court's decision, a distinction was made between using these clauses in employment agreements and in commercial purchase and sale agreements. Justice van Rensburg, writing for the unanimous Court, discussed two reasons to make this distinction: freedom of contract and the purchaser's interest.

Freedom of Contract

One aspect that sets non-compete clauses in the commercial context apart from employment agreements is the increased freedom of contract, specifically due to negotiations, in the purchase and sale of a business. While employment agreements are drafted with a power imbalance, typically being created by an employer and agreed to by an employee, sale agreements tend to be negotiated between commercial parties with equal bargaining power. In this case, the Court, citing the Supreme Court of Canada case of *Payette v. Guay inc.*,[1] stated that while courts will give more scrutiny to non-compete clauses in the employment context, there is a presumption of validity of non-compete clauses where the agreement was negotiated in the sale of a business. This is referred to as the "cardinal rule",[2] which holds that parties have more freedom of contract when negotiating purchases and sales than they do in the employment context. Due to the increased freedom to negotiate and enter into these commercial contracts, the principles of contractual interpretation applied to these clauses are less strict in this context than in employment agreements.

Purchaser's Interest

Relying on the reasoning in *Elsley v. J.G. Collins Ins. Agencies*,[3] the Court stated that the parties to a commercial agreement of this nature are "best placed to determine what is reasonably required to protect the purchaser's interest in the goodwill". Justice van Rensburg explained that this is consistent with the purpose of a non-compete clause in a purchase and sale agreement, which is to protect the purchaser's interest in the goodwill of the acquired business. Accordingly, where the parties to a contract have equal bargaining power, they are best situated to know what is reasonable in their particular circumstances at the time of negotiating the agreement, and a court will therefore rarely overrule the parties' judgement by not giving effect to a non-compete clause.

While the courts differentiate between non-compete clauses in the employment and commercial contexts, we note that the test of reasonableness applies to these clauses in both contexts and validity will therefore depend on the circumstances of each particular case. The Supreme Court of Canada in *Elsley* affirmed the distinction between non-compete clauses for the sale of a business and in employment contracts as one that is "responsive to practical considerations". This suggests that while these clauses tend to be differentiated, a court may still use discretion in determining whether a clause ought to be given effect.

Key Takeaway

When negotiating a purchase and sale agreement for a health company or organization, such as a dental practice, parties should be diligent in reviewing the entirety of the agreement and should seek legal assistance to ensure that they have a comprehensive understanding of the entire agreement. Generally, courts will be reluctant to overturn a non-compete clause when the agreement has been negotiated between two commercial parties with equal bargaining power who have also had opportunities to seek legal advice and guidance.

Footnotes

1. 2013 SCC 45, as cited in *MEDIchair LP v. DME Medequip Inc.*, 2016.

2. As articulated by Justice Wagner, as he then was in *Payette*.

3. [1978] 2 S.C.R. 916.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Authors: Alisha Kapur, Amna Kataria

Rosen Sunshine LLP