See paras. 13-16, 19-22

1978 CarswellOnt 1235
Supreme Court of Canada

J.G. Collins Insurance Agencies Ltd. v. Elsley

1978 CarswellOnt 1235, 1978 CarswellOnt 592, [1978] 1 A.C.W.S. 514, [1978] 2 S.C.R. 916, [1978] S.C.J. No. 47, 20 N.R. 1, 36 C.P.R. (2d) 65, 3 B.L.R. 183, 83 D.L.R. (3d) 1

ELSLEY et al. v. J.G. COLLINS INSURANCE AGENCIES LTD.

Laskin C.J.C., Martland, Ritchie, Pigeon, Dickson, Beetz and Pratte JJ.

Heard: October 31, 1977
Judgment: March 7, 1978

Counsel: *G.J. Smith*, Q.C., for defendant, appellant.
R.A. O'Donnell and *R.F.L. Rose*, for plaintiff, respondent.

Subject: Intellectual Property; Corporate and Commercial; Property; Contracts; Employment; Public; Civil Practice and Procedure

Headnote

Contracts --- Rectification or reformation — Prerequisites — Mistake — Mutual

Contracts --- Remedies for breach — Contractual remedies — Penalty or liquidated damages

Employment Law --- Elements of employment relationship — Interpretation of employment contract — Particular covenants — Restrictive covenants

Injunctions --- Availability of injunctions — Adequacy of other remedies — Damages as adequate compensation — Damages as alternative or additional remedy

Contracts — Non-competition covenant given by manager of insurance agency not to compete with his employer — Principles applicable to enforceability of covenant.

Damages — Restrictive covenant of employee provided for liquidated damages on breach — Employer entitled to injunction to restrain future breaches of the covenant and damages

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in equity for past breaches — Damages in equity for past breaches cannot exceed amount stipulated as liquidated damages in the covenant. .

The plaintiff, C Ltd., purchased a general insurance agency business in 1956 from the defendant, E who had been its competitor. The purchase agreement provided that E would not engage in the business of a general insurance agency within a defined area for a period of ten years and that he would pay the plaintiff $1,000 as liquidated damages for each and every breach of this covenant. Shortly after the purchase, E agreed with the plaintiff to serve as manager of the insurance agency and to devote all his time and attention to it, subject to his right to supervise his interest in his real estate and life insurance business. This agreement provided that E would not directly or indirectly engage in the business of a general insurance agent within the defined area for a period of five years after any termination of his employment as manager. Unlike the purchase agreement, it provided for a single sum of $1,000 as liquidated damages for failure of E to comply with the terms of the restrictive covenant — not for a sum of $1,000 for each and every breach.

E managed the plaintiff's insurance agency from 1956 to 1973 and dealt with the customers of the agency almost to the exclusion of the plaintiff. As general manager, E dealt with the customers of his former business and also with the customers of the plaintiff. He had access to all policy-holder records and was familiar with the nature and extent of coverage and with the premium paid by each policy-holder. He had knowledge of the insurable assets, financial credit, likes and dislikes and idiosyncrasies of each customer, in a recurring and confidential relationship.

E terminated his employment in 1973 and established his own general insurance agency, taking with him three former employees of the plaintiff. E advertised for general insurance business, and the Court found that he had actively solicited clients of the plaintiff. A large number of such clients transferred their business to E.

At trial, the trial Judge ordered E restrained from carrying on the business of a general insurance agent within the defined area until 1st September 1978 and also directed a reference to the Master to assess the damages of the plaintiff with respect to business taken from it by E from the date of termination of employment to the date of trial, such damages being restricted to the agent's share of premiums from contracts of insurance set forth in a list submitted at the trial. The majority of the Court of Appeal affirmed the trial judgment but expanded the damages to include the loss of commissions on all contracts of general insurance sold by E from 1st June 1973 to the date of trial, after taking into account expenses incurred in securing and servicing the contracts. The minority decision held that the covenant was unenforeceable as being in restraint of trade. E having died, the executrix of his estate appealed to the Supreme Court of Canada.

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Held:

The plaintiff was entitled to the injunction awarded at trial, but its damages were limited to $1,000, as set forth in the restrictive covenant.

Although E had been hired in 1956 as part of the transaction relating to the purchase of the insurance agency, the restrictive covenant contained in the purchase agreement had expired seven years before the restrictive covenant contained in the employment agreement came into operation. The less onerous principles relating to the enforceability of a restrictive covenant that has been obtained on the sale of a business were accordingly inapplicable. In order to be enforceable, the restrictive covenant contained in the management agreement had to be reasonable between the parties and with reference to the public interest; and the reasonableness of such a covenant can be determined only upon a general assessment of the clause, of the agreement in which it is found and of all the surrounding circumstances.

In the instant case, the plaintiff had a proprietary interest to be protected, and the spatial and temporal features of the clause were not too broad. Hence the clause was reasonable between the parties. The clause was not unenforceable as being against competition generally. In cases where the employee has acquired a close personal acquaintance with the customers of the business, a covenant which prevents the employee from establishing his own business may be justified as opposed to a covenant which merely prohibits the solicitation of former clients by the employee. A non-solicitation covenant would not have been adequate to protect the plaintiff's proprietary interest in its clients in this case. The covenant was not contrary to the public interest, as the evidence indicated that there were at least 22 general insurance agents in the surrounding area.

The plaintiff was not entitled to both an injunction during the covenant period and to the liquidated damages specified in the covenant based on a breach of the covenant for the entire period, because this would permit it double recovery. The Court summarized the options open to a covenantee as follows:

1. Where a fixed sum is stipulated as and for liquidated damages upon a breach, the covenantee must elect with respect to that breach between these liquidated damages and an injunction.

2. If he elects to take the liquidated damages stipulated, he may recover that sum irrespective of his actual loss.

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3. Where the stipulated sum is a penalty, he may recover only such damages as he can prove, but the amount recoverable may not exceed the sum stipulated.

4. If he elects to take an injunction and not the liquidated sum stipulated, he may recover damages in equity for the actual loss sustained up to the date of the injunction or, if tardy, up to the date upon which he should have sought the injunction, but in either case, not exceeding the amount stipulated as payable upon a breach.

5. Where a liquidated damages sum is stipulated as payable for each and every breach, the covenantee may recover this sum in respect of distinct breaches which have occurred, and he may also be granted an injunction to restrain future breaches.

Accordingly, if the covenant had provided for liquidated damages of $1,000 for each and every breach, the plaintiff would have recovered for each breach to the date of the injunction. However, as the covenant limited damages to $1,000, the plaintiff could not recover an amount in excess of that sum.

Table of Authorities

Cases considered:

Attwood v. Lamont, [1920] 3 K.B. 571, [1920] All E.R. Rep. 55 (C.A.) — *referred to*

Campbell, Imrie & Shankland v. Park, [1954] 2 D.L.R. 170, 21 C.P.R. 1 (B.C.) — *considered*

Cellulose Acetate Silk Co. v. Widnes Foundry (1925) Ltd., [1933] A.C. 20, [1932] All E.R. Rep. 567 (H.L.) — *considered*

Clarke (H.F.) Ltd. v. Thermidaire Corpn., [1976] 1 S.C.R. 319, (sub nom. *Thermidaire Corpn. v. H.F. Clake Ltd.)* 3 N.R. 133, 17 C.P.R. (2d) 1, 54 D.L.R. (3d) 385 — *considered*

Fitch v. Dewes, [1921] 2 A.C. 158, [1921] All E.R. Rep. 13 (H.L.) — *considered*

Gen. Accident Assur. Corpn. v. Noel, [1902] 1 K.B. 377 — *referred to*

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Gledhow Autoparts Ltd. v. Delaney, [1965] 1 W.L.R. 1366, [1965] 3 All E.R. 288 (C.A.) — *referred to*

Imperial Tobacco Co. v. Parslay, [1936] 2 All E.R. 515 (C.A.) — *considered*

Jones v. Heavens (1877), 4 Ch. D. 636 — *considered*

Marguire v. Northland Drug Co., [1935] S.C.R. 412, [1935] 3 D.L.R. 521 — *referred to*

Mason v. Provident Clothing & Supply Co., [1913] A.C. 724, [1911-13] All E.R. Rep. 400 (H.L.) — *referred to*

Morris (Herbert) Ltd. v. Saxelby, [1916] 1 A.C. 688 (H.L.) — *considered*

Nat. Prov. Bank of England v. Marshall (1888), 40 Ch. D. 112 (C.A.) — *considered*

Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., [1894] A.C. 535, [1891-94] All E.R. Rep. 1 (H.L.) — *referred to*

P.C.O. Services Ltd. v. Rumleski, [1963] 2 O.R. 62, 38 D.L.R. (2d) 390, 41 C.P.R. 211 — *referred to*

Putsman v. Taylor, [1927] 1 K.B. 637, affirmed [1927] 1 K.B. 741, [1927] All E.R. Rep. 356 (C.A.) — *considered*

Scorer v. Seymour-Johns, [1966] 1 W.L.R. 1419, [1966] 3 All E.R. 347 (C.A.) — *referred to*

Silverman v. Silverman (1969), 113 S.J. 563 (C.A.) — *referred to*

Snider v. McKelvey (1900), 27 O.A.R. 339 — *considered*

Stenhouse Australia Ltd. v. Phillips, [1974] A.C. 391, [1974] 1 All E.R. 117 (P.C.) — *referred to*

White v. Francis, [1972] 1 W.L.R. 1423, [1972] 3 All E.R. 857 (C.A.) — *referred to*

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Wilbeam v. Ashton (1807), 1 Camp. 78, 170 E.R. 883 — *referred to*

Statutes considered:

Chancery Amendment Act (Lord Cairns' Act), 1858 (U.K., 21 & 22 Vict., c. 27).

Judicature Act, R.S.O. 1970, c. 228, s. 21.

Authorities considered:

Cheshire and Fifoot, The Law of Contract (8th ed., 1972), p. 369.

12 Hals. (4th ed.), para. 1118.

Spry, Equitable Remedies (1971), pp. 552-554.

Story, Equity Jurisprudence (14th ed.), s. 1728.

APPEAL from a decision of the Ontario Court of Appeal, reported at 13 O.R. (2d) 177, 70 D.L.R. (3d) 513, 26 C.P.R. (2d) 170, awarding an injunction and damages for breach by an employee of a restrictive covenant.

The judgment of the Court was delivered by *Dickson J.*:

1 The question for decision in this case is whether a restrictive covenant contained in a certain contract of employment, to which I will shortly refer, is valid.

2 The facts are, to all intents, undisputed. On 24th April 1956, an agreement was entered into for the purchase by the Collins company of the general insurance business of a competitor, D.C. Elsley Limited. The price was $46,137. The life insurance business and the real estate business conducted by the Elsley company were not included. The agreement contained a covenant on the part of the vendor that it would not, for a period of ten years, carry on or be engaged in the business of a general insurance agency within the City of Niagara Falls, the Township of Stamford and the Village of Chippawa, all in the County of Welland, and that the vendor would pay the purchaser $1,000 for each and every breach. The parties entered into a further agreement on 1st May 1956, whereby Elsley was employed as interim manager of the combined general insurance businesses, now owned by Collins, upon terms which included a restrictive covenant almost identical with that contained in the purchase agreement of 24th April 1956.

3 The interim management agreement was short-lived. It was replaced by an agreement of 30th May 1956, by which Elsley undertook to serve as manager of the Collins company's general

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insurance business in the greater Niagara Falls area, devoting all necessary time and attention to such employment, subject to the proviso that he might supervise the Elsley company in its real estate and life insurance business. The agreement commenced 1st June 1956 and was stated to continue in force from year to year until terminated by either party upon three months' notice. As things developed, it continued until May 1973.

4 Clause 3 of the management agreement contains the covenant which gave rise to the present proceedings. It reads:

> 3. Subject to the restrictive covenants contained in the Agreement made between the Parties dated May 1, 1956, in consideration of the employment, the Manager shall not, while in the employ of the Company or of its successors and assigns, whether in the capacity in which he is now or in any other capacity, or during the period of five years next after he shall, whether by reason of dismissal, retirement or otherwise, have ceased to be so employed, 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 within the corporate limits of the City of Niagara Falls, the Township of Stamford and the Village of Chippawa, all in the County of Welland; and in the event of his failing to observe or perform the said agreement, he shall pay to the said Company, its successors or assigns, or other the person or persons entitled for the time being to the benefit of the said agreement, the sum of One Thousand Dollars ($1,000.00) as and for liquidated damages, and the said Mrs. Elsley, wife of the Manager, by her signature hereto, agrees to observe and be bound by the aforesaid covenant.

5 The clause differs substantially from the restrictive covenant contained in each of the two earlier agreements. It is for a five-year period after cessation of the employment. It is made subject to the covenant contained in the sale agreement of 1st May 1956 for the purpose, no doubt, of assuring a minimum restrictive period of ten years and a maximum restrictive period of the term of employment plus five years. The sum of $1,000 was to become payable for failure on the part of Elsley to observe or perform the agreement; each of the earlier agreements made provision for payment of $1,000 "for each and every breach".

6 At trial, Collins asked for rectification of the agreement by adding the words "for each and every breach." The evidence disclosed, however, that although both parties had agreed that there should be a restrictive clause the drafting and detail had been left to the solicitor of the parties. The solicitor had died prior to date of trial, and neither party had any recollection of the discussion as to the terms of the clause. There was no memorandum or other written material. In the absence of evidence of mutual mistake leading to the conclusion that the true agreement of the parties was other than as recorded, the application for rectification was properly refused by the trial Judge. Upon such refusal, counsel for Collins abandoned any claim for liquidated damages.

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7 To return to the narrative, Elsley managed the combined general insurance businesses for 17 years, from 1st June 1956 until 31st May 1973, at which time he gave proper notice of termination of employment. During the 17-year period, Elsley dealt with the customers of the agency to the almost total exclusion of Collins. To them Elsley was the business, Collins little more than a name. Elsley met the customers, telephoned them frequently, placed their insurance policies and answered their queries. Such were the findings of the trial Judge. People became accustomed to doing business with him on a personal basis, and he looked after their insurance needs. He served not only customers of the business he formerly owned, but also Collins's customers.

8 From 1956 to 1973 the business bore the name "Collins & Elsley Insurance Agencies". During that period, as a convenience, many policy-holders paid their premiums at the office of D.C. Elsley Limited, the real estate office of Elsley, because a large part of the business purchased by Collins from Elsley came from the area in which this office was located. As general manager of the combined businesses, Elsley, of course, had access to all policy-holder records; he was familiar with the nature and extent of coverage and the premium paid by each policy-holder. He had knowledge of the insurable assets, financial credit, likes and dislikes and idiosyncrasies of each customer, in a recurring and confidential relationship not unlike that of lawyer/client or doctor/patient. It was only natural that policy-holders would follow him if he made a change.

I

9 Following termination of his employment with Collins, Elsley commenced his own general insurance business under D.C. Elsley Limited. He took with him two insurance salesmen and an insurance clerk formerly employed by the Collins and Elsley agency. A large number of former clients of the agency transferred their business. Exhibit 10 comprised a list of approximately 200 former clients who had advised Collins they were transferring their insurance business to Elsley. The only factual dispute in the entire case is as to whether Elsley solicited the business of former clients. He denied having done so. Collins could not say that Elsley himself had solicited former clients, but said that Elsley's employees had done so. When asked as to how many former clients he had had dealings with after leaving the employ of Collins, Elsley replied that he had never "stopped to add them up". There is evidence he advertised for general insurance business and that some advertisements referred to him as being "formerly of Collins and Elsley Insurance Agencies". In the Ontario Court of Appeal, Evans J.A. (with whom MacKinnon J.A. agreed) found that Elsley had actively solicited former clients. Jessup J.A. took a contrary view. Both Courts below considered Collins and Elsley to be successful businessmen, competent and experienced.

10 At trial, Stark J. ordered Elsley restrained until 1st September 1978 from carrying on the business of general insurance agent within the defined area. He also directed a reference to the Local Master to assess the damages of Collins with respect to the business taken from him by Elsley from 1st June 1973 until the date of trial, subject to such damages being restricted to the

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loss of the agent's share of the premiums from contracts of insurance detailed in Exhibit 10, to which I have referred.

11 The majority of the Court of Appeal affirmed the judgment at trial, with one variation. The Court directed that Collins be compensated for the loss of commissions on all contracts of general insurance sold by Elsley from 1st June 1973 to the date of the injunction (not limited to the policies set out in Exhibit 10), after taking into account expenses incurred in securing and servicing the contracts. Jessup J.A. dissented.

12 The point taken by Jessup J.A. is central to the case. It is this. The restrictive covenant, it is contended, does not merely restrain the solicitation by Elsley of clients of the Collins and Elsley agency; it prevents Elsley engaging at all in the general insurance business in a large area and operates, therefore, to eliminate competition per se without regard for the public interest and beyond necessary protection of Collins's interest. The argument, in short, is that the covenant would have been valid if it had precluded Elsley from soliciting clients of his former employer but, drawn in more sweeping terms, it is unenforceable as being in restraint of trade and an interference with individual liberty of action. Among the authorities cited in support of this are *Herbert Morris Ltd. v. Saxelby*, [1916] 1 A.C. 688 (H.L.); *Stenhouse Australia Ltd. v. Phillips*, [1974] A.C. 391, [1974] 1 All E.R. 117 (P.C.); *Maguire v. Northland Drug Co.*, [1935] S.C.R. 412, [1935] 3 D.L.R. 521.

II

13 The principles to be applied in considering restrictive covenants of employment are well-established. They are found in the cases above-mentioned and in such familiar authorities as the *Nordenfelt* case [*Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535, [1891-94] All E.R. Rep. 1 (H.L.)]; *Mason v. Provident Clothing & Supply Co.*, [1913] A.C. 724, [1911-13] All E.R. Rep. 400 (H.L.); and *Attwood v. Lamont*, [1920] 3 K.B. 571, [1920] All E.R. Rep. 55 (C.A.). Of more recent vintage: *Scorer v. Seymour-Johns*, [1966] 1 W.L.R. 1419, [1966] 3 All E.R. 347 (C.A.), and *Gledhow Autoparts Ltd. v. Delaney*, [1965] 1 W.L.R. 1366, [1965] 3 All E.R. 288 (C.A.). A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest. As in many of the cases which come before the courts, competing demands must be weighed. There is an important public interest in discouraging restraints on trade and maintaining free and open competition unencumbered by the fetters of restrictive covenants. On the other hand, the courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power. In assessing the opposing interests, the word one finds repeated throughout the cases is the word "reasonable". The test of reasonableness can be applied, however, only in the peculiar circumstances of the particular case. Circumstances are of infinite variety. Other cases may help in enunciating broad general principles but are otherwise of little assistance.

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14 It is important, I think, to resist the inclination to lift a restrictive covenant out of an employment agreement and examine it in a disembodied manner, as if it were some strange scientific specimen under microscopic scrutiny. The validity, or otherwise, of a restrictive covenant can be determined only upon an overall assessment of the clause, the agreement within which it is found and all of the surrounding circumstances.

15 The distinction made in the cases between a restrictive covenant contained in an agreement for the sale of a business and one contained in a contract of employment is well-conceived and responsive to practical considerations. A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition. Difficulty lies in definition of the time during which, and the area within which, the non-competitive covenant is to operate, but if these are reasonable, the courts will normally give effect to the covenant.

16 A different situation, at least in theory, obtains in the negotiation of a contract of employment, where an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills obtained during employment. Again, a distinction is made. Although blanket restraints on freedom to complete are generally held unenforceable, the courts have recognized and afforded reasonable protection to trade secrets, confidential information and trade connections of the employer.

17 The majority of the Court of Appeal considered the present case to be one which did not fit neatly into the category of either sale or employment, being inextricably bound together as in *Silverman v. Silverman* (1969), 113 S.J. 563 (C.A.). In a sense, that is true, but I do not think the restrictive covenant of the employment agreement can be fed by the sale agreement. The covenant contained in the sale agreement expired, and its force exhausted, seven years before the restrictive covenant contained in the employment agreement came into operation. The employment agreement was negotiated subsequent to and independent of the sale agreement. The agreement sued upon is the employment agreement. It would be wrong, in my opinion, to test that agreement by the criteria applicable in the case of a vendor/purchaser agreement, or by some hybrid test. The restrictive covenant, if enforceable, must stand up to the more rigorous tests applied in an employer/employee context.

III

18 The critical question, as I have indicated, is whether the employer, in seeking to protect his trade connection, overreached in the formulation of clause 3 of the agreement of 30th May 1956.

19 In assessing the reasonableness of the clause with reference to the interests of the parties, several questions must be asked. First, did Collins have a proprietary interest entitled to protection?

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The answer to this question must surely be in the affirmative. Shortly before the agreement for the employment of Elsley, Collins had paid Elsley some $46,000 for the general insurance trade connection of Elsley. By the agreement, Elsley was placed in control, not only of that trade connection, but also the trade connection which Collins enjoyed prior to that time. Second, were the temporal or spatial features of the clause too broad? Some argument was directed to the Court as to those aspects, but I am in entire agreement with the Courts below that they are not open to successful challenge. The next and crucial question is whether the covenant is unenforceable as being against competition generally, and not limited to proscribing solicitation of clients of the former employer. In a conventional employer/employee situation, the clause might well be held invalid for that reason. The fact that it could have been drafted in narrower terms would not have saved it, for as Viscount Haldane said in *Mason v. Provident Clothing & Supply Co.*, supra, at p. 732: "... the question is not whether they could have made a valid agreement, but whether the agreement actually made was valid." Whether a restriction is reasonably required for the protection of the covenantee can only be decided by considering the nature of the covenantee's business and the nature and character of the employment. Admittedly, an employer could not have a proprietary interest in people who were not actual or potential customers. Nevertheless, in exceptional cases, of which I think this is one, the nature of the employment may justify a covenant prohibiting an employee not only from soliciting customers, but also 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. This may indeed be the only effective covenant to protect the proprietary interest of the employer. A simple non-solicitation clause would not suffice.

20 There are cases which uphold the validity of a covenant prohibiting an employee from engaging in a particular type of work within a specified area, and for an acceptable period of time after the termination of his employment: see, e.g., *Fitch v. Dewes*, [1921] 2 A.C. 158, [1921] All E.R. Rep. 13 (H.L.); *White v. Francis*, [1972] 1 W.L.R. 1423, [1972] 3 All E.R. 857 (C.A.); *P.C.O. Services Ltd. v. Rumleski*, [1963] 2 O.R. 62, 38 D.L.R. (2d) 390, 41 C.P.R. 211; *Campbell, Imrie & Shankland v. Park*, [1954] 2 D.L.R. 170, 21 C.P.R. 1 (B.C.). In each of these cases, the employee was in a position where he acquired a close personal acquaintance with the clients or customers of the business. Such a restrictive covenant was reasonable, in the words of Lord Birkenhead in *Fitch v. Dewes* at p. 165, in order that the employee "should not be in a position to use the intimacies and the knowledge which he had acquired in the course of his employment in order to create a practice of his own in that same place and by doing so undermine the business and the connection of the [employer]". In the present case, when the clause was drafted it was known that Elsley had, or would acquire, a special and intimate knowledge of the customers of his prospective employer and the means of influence over them.

21 In the leading case of *Morris v. Saxelby*, supra, Lord Parker enunciated with clarity the circumstances in which a covenant taken by an employer from an employee or apprentice will be enforceable. He said, p. 709:

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> ... Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained.

22 It is difficult to envisage a factual situation in which an employee would be in a better position than that of Elsley in the present case, to obtain "personal knowledge of and influence over the customers of his employer". Later in his speech, Lord Parker made the point that it is of importance: whether "the defendant ever came into personal contact with the plaintiffs' customers". The same point is made in the following passage from Cheshire and Fifoot, The Law of Contract (8th ed., 1972), p. 369:

> ... A restraint is not valid unless the nature of employment is such that customers will either learn to rely upon the skill or judgment of the servant or will deal with him directly and personally to the virtual exclusion of the master, with the result that he will probably gain their custom if he sets up business on his own account.

23 In the view which I take of this case, a covenant against solicitation would not have been adequate to protect the proprietary interest entitled to protection. Exhibit 10 is telling support of that view. Elsley testified that he did not solicit former clients; notwithstanding, 200 clients switched their custom to him. That is a vivid illustration of what Lord Parker had in mind in speaking of the influence of an employee over the customers of his employer. And it is not suggested that Exhibit 10 was a complete list of all those who took action. It was filed as representative only. Collins estimated that Elsley had taken close to one-half of the business on the books when Elsley left. As Salter J. said in the case of *Putsman v. Taylor*, [1927] 1 K.B. 637 at 642, affirmed [1927] 1 K.B. 741, [1927] All E.R. Rep. 356 (C.A.), a covenant against solicitation "is difficult to enforce; it is difficult to show breach and difficult to frame an injunction". The difficulty is demonstrated in this case. Does an advertisement which comes to the attention of former clients amount to solicitation? Was there solicitation by Elsley? I need not attempt to answer those questions. The point is that a non-solicitation covenant, in the circumstances here found, would have been meaningless.

24 Jessup J.A. suggested in his reasons that a simple provision in a non-solicitation agreement would have enabled the plaintiff to examine the defendant's books and records from time to time so that solicitation of clients acquired by the plaintiff could be detected. I do not think any experienced businessman would consent to examination of his books by a competitor, whether a former employer or not. I doubt that clients of the defendant would welcome such intrusion upon

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their confidential affairs, or permit it if it came to their attention. If the defendant were hired by someone rather than being self-employed, by what right could he open the books of his employer to examination by a former employer? In short, I cannot accept the efficacy of the simple provision Jessup J.A. envisages.

25 For the foregoing reasons, in my view the impugned covenant is no wider than reasonably required in order to afford adequate protection to Collins.

26 After the party relying on a restrictive covenant has established its reasonableness as between the parties, the onus of proving that it is contrary to the public interest lies on the party attacking it: *Morris v. Saxelby*, supra. Since in my opinion the respondent has established what is required of him, the matter of the public interest must now be considered.

27 Unless it can be said that any and every restraint upon competition is bad, I do not think that enforcement of the clause could be considered inimical to the public interest. There were 20 to 22 general agents in Niagara Falls, according to the evidence as of the date of trial, employing 80 to 90 employees. There was nothing to suggest that the people of Niagara Falls would suffer through the loss, for a limited period, of the services of Elsley in the general insurance business.

28 I am of opinion that the clause in contention is valid, and enforceable in accordance with its terms.

IV

29 The only other question is as to damages. The injunction granted at trial and continued by the Court of Appeal ceased to have effect with the death of Elsley, after the judgment of the Court of Appeal. Proceedings in this Court were continued by his widow as executrix of his estate.

30 The damage issue is one of some importance and difficulty. It subsumes two questions: (i) the right of a plaintiff enforcing a restrictive covenant to claim both an injunction and damages; (ii) whether the quantum is, or is limited to, the amount stipulated as liquidated damages in the covenant. In other words, can Collins claim *any* damages; and if so, is the amount limited to $1,000? I would answer both of these questions in the affirmative.

31 The Court was referred to a number of authorities. The first, in time, was *Jones v. Heavens* (1877), 4 Ch. D. 636. In that case, the covenant precluded the carrying on of the business of a saddler under penalty of £100 to be paid by way of liquidated damages for each such offence. A motion was made for an injunction. It was argued that the plaintiff's remedy was by action for recovery of the sum named as liquidated damages. An injunction was granted. Thus, even where there is provision for liquidated damages, the plaintiff may elect instead to ask for an injunction to prevent breach.

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32 In the later case of *Nat. Prov. Bank of England v. Marshall* (1888), 40 Ch. D. 112 (C.A.), the defendant, on entering the service of the plaintiffs, a banking company, had executed a bond in the penal sum of £1,000 a condition of which was that he should pay this sum to the plaintiffs as liquidated damages if he should, within a limited period after leaving the service of the plaintiffs, accept employment in any other bank. The defendant accepted other employment in breach of the bond, and the plaintiffs brought an action claiming an injunction. In response to the claim, the defendant offered to pay the penal sum of £1,000. The Court held that he could not purchase his liberty to do the proscribed act. Cotton L.J. said that if the obligee brings an action at law he can recover damages, but (p. 116) "... if he comes into a Court of Equity the agreement will be enforced, if no action for damages has been brought, and an injunction will be granted". This case illustrates the principle that if the plaintiff is entitled to an injunction, the defendant cannot deprive him of this remedy by paying damages. The plaintiff may pursue whatever remedy is his due, even though it clearly affords him wider relief than another remedy open to him. Cotton L.J. added that if the bank had brought an action, they were not obliged to prove the damage they had suffered, but would be entitled without proof of damage to recover £1,000 as liquidated damages. Lindley L.J. in the same case spoke of the plaintiffs having an alternative remedy by way of injunction to enforce the agreement if they do not bring an action.

33 An early Canadian case, *Snider v. McKelvey* (1900), 27 O.A.R. 339, dealt also with the matter. The defendant, who had sold his medical practice, acted in defiance of the sale agreement, by which he had bound himself in the sum of $400 to be paid if he set up in practice within a defined time and area. Robertson J. granted an injunction and awarded damages of $100. On appeal, the Court held that the plaintiff must elect whether to take judgment for the $400 or for the injunction. The plaintiff insisted that the $400 was a penalty and, if such, he could have damages assessed for the breach of the condition as well as the injunction to restrain further breaches. Olser J.A., in the leading judgment, rejected this argument. He declined to recognize any distinction between the case of bond with a penalty and an agreement to pay liquidated damages, because the plaintiff would, if the equitable remedy by injunction were enforced, be obtaining performance of the agreement in specie and also what he was only entitled to recover in the case of its non-performance. He was of opinion that the $400 was intended to be payable as liquidated damages. After referring to the passage of Lord Cairns' Act [the Chancery Amendment Act], 1858 (U.K., 21 & 22 Vict., c. 27), the learned Judge of appeal had this to say (p. 344):

> ... It is clear that the Act did not enable the Court to give the plaintiff a double remedy where before the Act his right was in the alternative — either at law or in equity, but not in both: *Sainter v. Ferguson* (1849), 7 C.B. 716; Mac. & G. 286.

34 The following passage from the judgment of Osler J.A. is of particular interest because of the distinction made in respect of those cases concerning the sale of goodwill where there was no

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valid covenant or bond for the breach of which the plaintiff could have sued at law, and therefore no choice available between a suit at law and injunction in equity (pp. 344-345):

> The learned trial Judge relied upon the case of *Mossop v. Mason* (1869), 16 Gr. 302, (1870) 17 Gr. 360, (1871) 18 G.R. 453 (in appeal), where damages were awarded as well as an injunction. But that case is quite distinguishable. There the defendant had sold to the plaintiff *inter alia* the goodwill of the business of an innkeeper carried on by him, and the bill was filed to restrain him from resuming the business he had sold and for damages sustained in consequence of his having done so. There was, as the Court held, no valid covenant or bond for the breach of which the plaintiff could have sued at law. The plaintiff had, therefore, no alternative remedy, and his right to recover rested solely upon the defendant's equitable obligation, implied in the sale of the goodwill, not to hold out in any way that he was carrying on business in continuation of, or in succession to, the business formerly carried on by him, the goodwill of which he had sold. See *Labouchere v. Dawson* (1872), L.R. 13 Eq. 322; approved in *Trego v. Hunt*, [1896] A.C. 7.
>
> There was, therefore, nothing to prevent the Court from directing a reference to ascertain what damages the plaintiff had sustained consequent upon the breach of the equitable obligation.

35 We are, of course, not dealing here with a sale of goodwill but with an agreement for employment. Maclennan J.A. shared the opinion of Osler J.A. that the $400 was clearly liquidated damages, and he regarded it as clearly settled that in the case of liquidated damages the plaintiff must elect between the damages and an injunction. This case emphasizes that the basic principle being applied is the prohibition against double recovery. The agreed liquidated damages sum is to be a complete remedy for the entire breach specified. Once this sum has been awarded, to grant an injunction for even part of the breach would be to have overlapping remedies.

36 A year later, Wright J. in *Gen. Accident Assur. Corpn. v. Noel*, [1902] 1 K.B. 377, concluded that the current of authority in England was such that if the plaintiffs elected to take an injunction they could not have judgment as well for the liquidated damages for which the employment agreement in the case provided.

37 The British Columbia case of *Campbell, Imrie & Shankland v. Park*, supra, was cited in argument. In that case, a restrictive covenant had been given by a chartered accountant engaged to serve as branch manager by a firm of accountants. The agreement was silent as to the payment of a stated amount for breach. The plaintiffs sought both injunction and damages. The defendant, relying on *Gen. Accident Assur. Corpn. v. Noel*, supra, said they could not have both. Wilson J., as he then was, had this to say in respect of that contention (pp. 183-184):

> The plaintiffs have asked for an injunction and for damages. The defendant, relying on *Gen'l Accident Ass'ce Corp. v. Noel*, [1902] 1 K.B. 377, says they cannot have both, but must elect. The case referred to is one in which the restrictive agreement contained a clause requiring

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> the covenantor, in case of breach, to pay £100 as liquidated damages. Very reasonably, the covenantee was required to elect. The sum of £100 had been agreed to by the parties as being the total amount of damage which the covenantee would suffer by a breach. If he were paid this sum, he could not reasonably ask for an injunction to prohibit the doing of something in respect of which he had already collected full damages. But here the plaintiffs cannot say what their full damages may be if the defendant is allowed to continue to attract their clients, they can only tell me what damage they have suffered to date, and ask me to prevent the defendant from inflicting on them further damage. I have no doubt that it is my right and duty so to do. I refer to *Garbutt Business College Ltd. v. Henderson*, [1939] 4 D.L.R. 151, as a case in which both forms of relief were granted.

38 The Judge fixed damages at $1,000 and granted an injunction.

39 In the recent case in this Court, *H.F. Clarke Ltd. v. Thermidaire Corpn.*, [1976] 1 S.C.R. 319, *(*sub nom. *Thermidaire Corpn. v. H.F. Clarke Ltd.)* 3 N.R. 133, 17 C.P.R. (2d) 1, 54 D.L.R. (3d) 385, the claim was for damages for breach of a restrictive covenant contained in a distributorship agreement. The question of injunction was not in issue. The agreement provided that the defaulting party would be required to pay as liquidated damages the gross profit realized from the sale of competitive products. The issue was whether the plaintiff could recover this amount or only provable damages. A majority of the Court held in favour of the latter disposition. In the majority judgment the Chief Justice in obiter dicta had this to say (pp. 335-336):

> ... There is no doubt that a covenantee cannot have both an injunction during the covenant period and damages based on a breach of covenant for the entire period where they are based on a formula. There is case law holding that where a fixed sum is stipulated as the liquidated damages upon a breach, the covenantee cannot have both the damages and an injunction but must elect between the two remedies: see *General Accident Assurance Corp. v. Noel*, [1902] 1 K.B. 377; *Wirth and Hamid Booking Inc. v. Wirth* (1934), 192 N.E. 297. I do not however read these cases as excluding damages for past loss by reason of the breach, but only as precluding recovery of the liquidated amount referable to breach in the future which that amount was designed to cover and against which an injunction has been granted.

40 The *Campbell, Imrie & Shankland* case, as well as the passages quoted above from *Snider* and *H.F. Clarke*, in my opinion, point up the fact that a plaintiff may have a right to damages in equity in addition to an injunction if he can establish his entitlement under the appropriate equitable considerations. In Ontario, the Court's power to award damages in equity is founded on what is now s. 21 of The Judicature Act, R.S.O. 1970, c. 228, which is derived from Lord Cairns' Act of 1858. S. 21 provides as follows:

> 21. Where the court has jurisdiction to entertain an application for an injunction against a breach of a covenant, contract or agreement, or against the commission or continuance of

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> a wrongful act, or for the specific performance of a covenant, contract or agreement, the court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance, and the damages may be ascertained in such manner as the court directs, or the court may grant such other relief as is considered just.

41 It should be remembered that if a plaintiff is entitled to an injunction to restrain breach of a restrictive covenant, he is entitled to prevent the entire breach, not just part of it. Thus, for any part not restrained, he may be entitled to unliquidated damages in equity. There would be no double recovery, provided the damages were not referable to any period during which breach was restrained by the injunction. This right to damages would not be based on the liquidated damages clause, but on the right under s. 21 to damages in equity in substitution for an injunction in respect of the period of breach prior to the granting of the injunction. A plaintiff, of course, cannot delay seeking an injunction in order to inflate his damages. He would not be entitled to damages past the time when he should have sought the injunction.

42 How then should the measure of such damages be determined? It will generally be appropriate to adopt in equity rules similar to those applicable at law: Spry, Equitable Remedies (1971), pp. 552-554. This is so not because the Court is obliged to apply analogous legal criteria, but because the amount of compensation which would satisfy the loss suffered, and which the Court considers it just and equitable be paid, usually happens to be equivalent to the amount of legal damages which would be appropriate. The award is still governed, however, by general equitable considerations which would not apply if the plaintiff were seeking damages at law rather than in equity. These considerations might serve, for example, to reduce the amount, due to such factors as delay or acquiescence. In addition, if the parties have agreed on a set amount of damages at law, or a maximum amount, it would be unconscionable, in my opinion, to allow recovery of a greater amount of damages in equity.

43 In the case of a gross underestimate of damages, as, presumably, in the present case, the plaintiff may receive an amount equivalent to the liquidated damages sum, plus an injunction, and therefore appear to have double relief. But such is not the case. The injunction relates to the latter part of the period in respect of which the restrictive covenant imposes restraint, the damages (not exceeding the stipulated liquidated damages) relate to the period prior to the granting of the injunction and are in substitution for injunctive relief during that period.

V

44 The matter of the right of a plaintiff to recover legal damages for actual loss sustained where a lesser stipulated amount is mentioned was considered in the House of Lords decision in *Cellulose Acetate Silk Co. v. Widnes Foundry (1925) Ltd.*, [1933] A.C. 20, [1932] All E.R. Rep. 567. The amount stipulated was £20 for each week of delay in the erection of an acetone recovery plant. The contractors were 30 weeks late. The actual loss suffered was £5,850. The case is of interest

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in two respects. First, the recovery was limited to £600, the agreed damages. Second, Lord Atkin, delivering judgment, said that he found it unnecessary to consider what would be the position if the stipulated £20 per week were a penalty, adding (p. 26):

> ... It was argued by the appellants that if this were a penalty they would have an option either to sue for the penalty or for damages for breach of the promise as to time of delivery. I desire to leave open the question whether, where a penalty is plainly less in amount than the prospective damages, there is any legal objection to suing on it, or in a suitable case ignoring it and suing for damages.

45 There is authority indicating that a penalty clause is ineffective even where it is less than the actual loss suffered (see 12 Hals. (4th ed.), para. 1118 and the authorities cited therein). The result would be that actual damages could be recovered which exceeded the amount stipulated as a penalty. To that extent, the proposition appears to me to be contrary to principle and productive of injustice. The foundation of relief in equity against penalties is expressed in Story, Equity Jurisprudence (14th ed.), s. 1728, as follows:

> Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose as it would be to allow him to substitute another for the principal obligation.

46 The operation of this relief in the face of contrary agreement by the party is also explained in this section:

> If it be said that it is his own folly to have made such a stipulation, it may equally well be said that the folly of one man cannot authorize gross oppression on the other side.

47 It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression. If the actual loss turns out to exceed the penalty, the normal rules of enforcement of contract should apply to allow recovery of only the agreed sum. The party imposing the penalty should not be able to obtain the benefit of whatever intimidating force the penalty clause may have in inducing performance, and then ignore the clause when it turns out to be to his advantage to do so. A penalty clause should function as a limitation on the damages recoverable, while still being ineffective to increase damages above the actual loss sustained when such loss is less than the stipulated amount. As expressed by Lord Ellenborough in *Wilbeam v. Ashton* (1807), 1 Camp. 78, 170 E.R. 883: "... beyond the penalty you shall not go; within it, you are to give the party any compensation which he can prove himself entitled to." Of course, if an agreed sum is a valid liquidated damages clause, the plaintiff is entitled at law to recover this sum regardless of the actual loss sustained.

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48 In the context of the present discussion of the measure of damages, the result is that an agreed sum payable on breach represents the maximum amount recoverable whether the sum is a penalty or a valid liquidated damages clause.

49 It should be noted that the above principles concern only the situation where there is a single sum specified for breach of the agreement, or a single breach. Where there are different breaches and the agreement provides for a particular sum of liquidated damages to be payable for each and every breach, there is no bar to awarding the liquidated damages amount for each breach which has occurred to date of trial, and also awarding an injunction to restrain future breaches. In *Imperial Tobacco Co. v. Parslay*, [1936] 2 All E.R. 515, the Court of Appeal held that an agreed sum payable on every breach of a covenant was a recoverable amount of liquidated damages for past breaches, even though an injunction had also been granted to prevent future breaches. In principle, this result is correct. There is no double recovery because the liquidated damages award and the injunction are referable to different breaches.

50 To summarize:

51 1. Where a fixed sum is stipulated as and for liquidated damages upon a breach, the covenantee must elect with respect to that breach between these liquidated damages and an injunction.

52 2. If he elects to take the liquidated damages stipulated, he may recover that sum irrespective of his actual loss.

53 3. Where the stipulated sum is a penalty, he may only recover such damages as he can prove, but the amount recoverable may not exceed the sum stipulated.

54 4. If he elects to take an injunction and not the liquidated sum stipulated, he may recover damages in equity for the actual loss sustained up to the date of the injunction or, if tardy, up to the date upon which he should have sought the injunction, but in either case, not exceeding the amount stipulated as payable upon a breach.

55 5. Where a liquidated damages sum is stipulated as payable for each and every breach, the covenantee may recover this sum in respect of distinct breaches which have occurred, and he may also be granted an injunction to restrain future breaches.

56 Applying these propositions to the present case, in my view the plaintiff was entitled to an injunction and such damages as he could prove to date of trial but not to exceed the sum of $1,000.

57 I would accordingly dismiss the appeal and direct the payment of such damages, not to exceed $1,000, as the respondent can establish in respect of the period from 1st June 1973 to date

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of trial, for the loss of commission on all contracts of general insurance sold by Elsley during that period, after taking into account expenses incurred in securing and servicing the contracts.

58 Success has been divided. The respondent sustained the validity of the covenant; the appellant succeeded in limiting damages to the stipulated amount. I would not award costs to either party.

Appeal dismissed, damages varied.

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