See para. 94

Case Name:

IMS Health Canada Inc. v. Harbin

Between
IMS Health Canada Inc., Plaintiff (Moving Party), and
Peter Dwayne Harbin and Veeva Software
Systems Inc., Defendants (Responding
Parties)

[2014] O.J. No. 6464

2014 ONSC 4350

Court File No.: CV-14-506816

Ontario Superior Court of Justice
Toronto, Ontario

M.A. Sanderson J.

Heard: July 4, 2014.
Judgment: July 21, 2014.

(123 paras.)

Counsel:

Paul Boniferro, Ben Aberant for the Plaintiff.

Glenn Zacher, Alexander D. Rose, Sinziana Hennig for the Defendants.

REASONS FOR DECISION

M.A. SANDERSON J.:--

Introduction

1 This is a motion brought by IMS Health Canada Inc. ("IMS"), primarily for an injunction restraining its ex-employee, Peter Harbin ("Harbin") from working for the Defendant Veeva Software Systems Inc. ("Veeva") on the basis that it was a breach of Harbin's 2008 Employment Agreement with IMS, particularly a negative covenant in which Harbin agreed not to compete with IMS for a year after ceasing employment with IMS. IMS also seeks injunctive relief against Veeva.

Background

2 IMS Health Incorporated ("Incorporated") is a global information and technology services company, serving clients in the healthcare industry. The Plaintiff IMS is a subsidiary of Incorporated.

3 The Defendant Veeva was founded in 2007. Veeva has historically been a software applications provider for pharmaceutical and biotechnology companies.

4 IMS has historically been a healthcare data provider.

5 The Defendant Harbin is now 46 years old. He has worked for 20 years in the pharmaceutical industry.

6 From about April, 2002 to October 8, 2008, Harbin was employed by Skura Corporation ("Skura "). In 2008, Incorporated acquired a portion of Skura's business, as part of an asset acquisition. At the time of that acquisition, Harbin was a Senior Vice President at Skura, responsible for delivery and business development to pharmaceutical companies.

7 Harbin deposed in his affidavit sworn July 2, 2014, filed in opposition to IMS' motion that for Incorporated to acquire the part of Skura that had employed Harbin, IMS required Harbin to accept a position with IMS. IMS offered him a position of Senior Principal, level 8, that he considered to be a lower one than his previous position at Skura. He accepted it because he was concerned that if he did not, Skura would not survive and that he and 85 other ex-Skura employees would lose their jobs.

8 Harbin deposed that through most of the IMS negotiations with Skura, he was not advised that he would be asked and required to sign a non-competition agreement. That request/demand came only two days before closing. He had no opportunity to negotiate its terms. He did not receive any legal advice before he executed the non-competition agreement on October, 10, 2008.

9 In 2008, IMS did not have a Customer Relations Management ("CRM") product or a CRM consulting practice. When he signed the 2008 non-competition agreement, Harbin did not contemplate that it would preclude him from working in the CRM area if he ever left IMS.

10 Harbin conceded when he signed the 2008 Non-Competition Agreement, he received a retention bonus of $30,000, restricted stock units with a nominal value of $35,000 and eligibility for

20% of a bonus pool, if certain business targets were exceeded between 2009 and 2011.

11 Clause 3 of the 2008 Agreement provided as follows:

> Agreement Not to Compete
>
> I agree I will not without the prior written consent of IMS, manage, operate, join, control or participate in the ownership, management, operation or control of or engage in any business or perform any service directly or indirectly in competition anywhere in Canada, with the products and services of the IMS Companies...The foregoing provisions of this Paragraph 3 shall remain in effect during the term of my employment with IMS and after the termination thereof, howsoever arising, for a period of twelve months.

12 From 2008 to December 2012, Harbin's title at IMS was Senior Principal. During his four and a half years as Senior Principal, he worked mostly on performance analytics. As Senior Principal he worked in two capacities, about 20% of his time consulting directly for customers, and about 80% of the time as a subject matter expert, helping delivery and sales teams make presentations to IMS customers. He led a team of 9 direct and approximately 85 indirect reports in these activities. Historically, and during that timeframe, IMS did not have any CRM product offerings.

13 When Incorporated acquired 360 Vantage, a company that had developed some CRM products, that acquisition positioned Incorporated to compete directly with Veeva. Following IMS Incorporated's purchase of 360 Vantage, both Veeva and IMS Health Incorporated were marketing CRM systems.

14 After Incorporated bought 360 Vantage, between September 2013 and January 2014, Harbin estimated he spent up to 30% of his time as part of a team of more than 20 people working on the integration of 360 Vantage.

15 In December 2012 or January 2013, Harbin was promoted to Level 9 General Manager for IMS' Health Information Management and Business Intelligence Services business.

16 In March of 2013 Harbin was asked to "update his Restrictive Covenant Agreement, in connection with his promotion to General Manager." Harbin received 90,000 phantom shares in Incorporated. He signed another Non-Competition Agreement on March 13, 2013 "the 2013 non-competition agreement."

17 In her affidavit sworn June 27, 2014, filed in support of IMS' request for an injunction, Ms Lisa Kerber ("Kerber") an Incorporated Vice President, deposed that Harbin was "chief architect" of the 360 Vantage acquisition. Harbin's position of General Manager was a senior position. Less than 2% of IMS employees were classified at equivalent or higher levels. She deposed that in that role

Harbin possessed a great deal of sensitive information pertaining, among other things, to IMS' business strategy, tactics, products, plans and pricing strategies. He participated in IMS strategy sessions about how to best compete with Veeva. That sensitive information and insights gleaned from those strategy sessions would be extremely valuable to a corporation such as Veeva seeking to gain an unfair advantage in competing with IMS.

18 Harbin denied he was "chief architect" of the 360 Vantage acquisition.

19 In 2013, IMS entered the Marketing Campaign Management ("MCM") business when it bought the business of Appature Inc.

20 Harbin said he was not a member of the IMS acquisition team for Appature Inc. He was not involved in that acquisition. He was again part of an integration team along with more than 30 other IMS employees.

21 Harbin deposed that from the time he was appointed General Manager, IMS treated him unfairly. IMS was undergoing many internal changes. The targets set for him and members of his team were unrealistic. They could not be met. As a result, Harbin received a poor performance rating for the first time in his five years at IMS and his entire team was taken away from him. Mr. Tal Rosenberg ("Rosenberg"), who had recently replaced Kerber as his direct superior, told him that two or three members of senior management thought Harbin should be fired for poor performance. Rosenberg told him he should be an "uber salesman." Despite and over his objections, around January 2014, Harbin was told he was being transferred to a pure sales role. The position required him to travel constantly. His wife was ill. The travel took a toll on his family. He tried to adjust. In April 2014, he began to look for new work. Meanwhile he continued working at IMS.

22 On May 16, 2014, IMS publicly announced his changed position. Harbin was formally advised he was being appointed to the position of Enterprise Technology Solutions Executive. He felt frustrated and humiliated. He believed he had been constructively dismissed.

23 Three days later, on May 19, 2014, Harbin called Rosenberg to say he was resigning. He said he explained to Rosenberg that he was frustrated about how he had been treated, upset to have lost his team. He felt he had effectively been demoted. Rosenberg seemed to understand and accepted his resignation.

24 Harbin followed up with Rosenberg on May 20, 2014 with an email formally notifying IMS of his resignation.

25 On May 23, 2014, he advised Rosenberg he had accepted a position at Veeva.

26 Harbin denied refusing to inform IMS of the details of his duties and responsibilities at Veeva.

27 On May 29, 2014, after Rosenberg emailed Harbin, Harbin said he attempted to contact

Rosenberg who was out of the office.

28 Harbin deposed that on May 29, 2014 he had an exit interview with Ms. Laura Wurzer ("Wurzer"), IMS Director of Human Resources. He told her "the entire story of why I was leaving." He explained that his new position involved market ownership. Wurzer seemed very understanding. There was no mention of either the 2008 or 2013 Non-Competition Agreements.

29 On June 2, 2014, Harbin's last day of work at IMS, Wurzer emailed Harbin requesting that he respond to Rosenberg's email.

30 On June 5, 2014, IMS' lawyers at McCarthy Tétrault LLP sent a letter to Harbin claiming it had asked him several times to provide a job description with respect to his employment at Veeva. The June 5 letter contained the first mention of the 2008 Non-Competition Agreement. Mr Lawson, the author of the letter, demanded that Harbin confirm by June 6, 2014 that he would not be employed by Veeva in any capacity.

31 On June 9, 2014, Mr Baker, counsel for Veeva, emailed Lawson, advising that Harbin was employed by Veeva.

32 Lawson then wrote Baker claiming that Harbin's employment breached the 2008 Non-Competition Agreement and notifying him that IMS intended to seek legal remedies against Harbin and Veeva.

33 Harbin denied that Veeva had induced him to work at Veeva.

34 In her June 27, 2014, affidavit, Kerber deposed that Harbin's conduct had already caused IMS damages and irreparable harm. She also wrote "As Harbin was so intimately involved in IMS's CRM, CLM and MDM businesses [that compete directly with Veeva, and represent the primary scope of Veeva's business], he could not perform any role at Veeva in a manner that would not prejudice IMS..."

35 Harbin deposed he has not solicited any IMS customers. In his last 15 months at IMS he had direct or indirect contact with only three IMS customers. At Veeva he does not have a sales or product development role. To the extent he had confidential information about acquisitions IMS intended to make, that information is now public. He does not believe he took any confidential information with one possible exception, a memory stick that he has already turned over to counsel.

36 He is aware he must not disclose confidential information about IMS to Veeva and undertakes not to do so.

Position of the Parties

IMS re Harbin

37 Counsel for IMS submits that by working at Veeva, Harbin is contravening Clause 3 of the 2008 Agreement. The clause is enforceable. Harbin, a sophisticated executive, signed it and received valuable consideration for so doing, including a job, a retention bonus, a bonus plan, an RSU worth $57,000, a package worth in total about $300,000. The scope of clause 3 is reasonable. It was and is necessary to protect IMS' business interests. The circumstances here are exceptional, and meet the requirements of *J.G. Collins Insurance Agencies v Elsley* (1978), 83 D.L.R. (3d) 1 (S.C.C.)

38 Harbin was a key IMS employee especially in the CRM area. Counsel for IMS submitted Harbin was key in the CRM area. Harbin embodied the CRM business at IMS. He helped develop the CRM business and its strategy against Veeva. To allow Harbin to continue working at Veeva would give Veeva an unfair competitive advantage, not only on CRM, but also in other areas.

39 Whether or not Harbin was, as alleged, "the chief architect" of the 360 Vantage acquisition, by his own admission, Harbin was asked to fill in for the man whom he said was the key person when that man was unavailable.

40 Harbin admitted he had worked on the integration of 360 Vantage. At his cross examination he admitted that at a strategy session about competition, he had played the role of Veeva. Now, as Veeva VP Commercial Cloud Strategy, he is responsible for understanding the market for Veeva's products and gives guidance to its sales team on how to message Veeva's products. He has a team of seven employees reporting directly to him, responsible for market ownership, which involves interacting with marketing and sales teams. Counsel for IMS submitted that in giving guidance to the Veeva sales team, it would be virtually impossible for him, even with the best of intentions, not to disclose any confidential knowledge from IMS.

41 He submitted that the three part test in *RJR MacDonald v Canada* [1994] 1 S.C.R. 311 does not apply where a negative covenant is being enforced because the Court is simply giving sanction to an existing contract between the parties. The court is merely enforcing a bargain made by the parties themselves.

42 Where there is evidence of a clear breach of an express negative covenant and where a negative covenant to which the responding parties have already agreed is being enforced, it is not necessary for the moving party to establish that irreparable harm will result if an injunction is not granted, or that the balance of convenience favours granting the injunction, the court may grant an injunction without requiring proof of irreparable harm or proof that the balance of convenience favours granting of the injunction:

> If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the court to which already is a

contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury -- it is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves. *Doherty* v. *Allman* (1878), (1878), 3 A.C. 709 at 720 (H.L.), per Lord Cairn L.C. Cited with approval in, among other cases, *Button* v. *Jones* (2001),11 C.C.E.L. (3d) 312 (Ont. Sup. Ct.); *Hardee Farms International Ltd.* v. *Cam & Crank Grinding Ltd. et al.,* [1973] 2 O.R. 170 (Ont. High Ct.); *Hampstead Suburban Properties Ltd.* v. *Diomedous,* [1968] 3 All E.R. 545 (Ch. Div.)

I accept the proposition put forward by the plaintiff that where a moving party proves a clear breach by a defendant of a negative covenant, the Court will enforce the covenant on an interlocutory basis and proof of irreparable harm will not be required. *Canpages Inc.* v. *Quebecor Media Inc*., 2008 CanLII 26660, at para. 8.

If the governing factor were the balance of convenience, a person who is *prima facie* in breach of a contractual obligation could place an apparently innocent party at an irretrievable disadvantage by claiming that he, the ostensible wrongdoer, will be the more hurt by an interlocutory injunction wrongly granted. This would be an invitation to persons to sign solemn documents without any intention of honouring them and to seek, by this cynical act, to place the other party at a disadvantage. I know of no law, and have been shown none, that obliges me to blind myself to the equities of the situation before me. Indeed, it is just the other way; an injunction may be granted where it is "just" to quote the *Judicature Act.* Inequity must not be used to avoid equity. *Scantron Corp.* v. *Bruce* (1996),136 D.L.R. (4th) 64 at para. 30 (Ont. Gen. Div.), quoting *Indal Ltd. and Brampton Aluminum Products Ltd.* v. *Halko et al* (1976), 1 C.P.C. 121 at para 24, per Reid, J. (Ont. H.C.).

Where a party has by contract undertaken not to do something, specific performance of that obligation is achieved by enjoining its breach. Where specific performance is sought of a positive obligation, the plaintiff must establish that the ordinary remedy of damages would be inadequate. In the case of negative obligations, however, the courts have more readily granted injunctive relief...Ordinarily it is easier to ensure that a party has refrained from doing something than it is to ensure that some act of positive performance is carried out satisfactorily. Similarly, the cost of compliance to the party enjoined is less likely to prove disproportionate to the value of the benefit conferred on the plaintiff

> than in other injunction cases because the defendant has unequivocally and voluntarily accepted the obligation. The courts have sometimes said that, in the case of an express negative covenant, it is unnecessary for the plaintiff to establish any damage at all. Robert J. Sharpe, Injunctions and Specific Performance, looseleaf ed. (Aurora, Ont.: Canada Law Book, 2002) at 9.10-9.20.
>
> Where there is a plain and uncontested breach of a clear covenant not to do a particular thing and the covenant or promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is compelled to keep his promise the better. In such a case I do not think that the enforceability of the Defendant's obligation falls into two stages, so that between the issue of the writ and the trial the Defendant will be enjoined only if that is dictated by the balance of convenience and so on, and not until the trial will Lord Cairn's statement come into its own. Indeed, Lord Cairn's express reference to "the balance of a convenience or inconvenience" suggests that he had not forgotten interlocutory injunctions. I see no reason for allowing a covenantor who stands in clear breach of an expressed prohibition to have a holiday from the enforcement of his obligations until the trial. It may be that there is no direct authority on this point; certainly none has been cited. If so, it is high time that there was such authority; and now there is. *Hampstead and Suburban Properties Ltd., supra,*
>
> It seems to me, from a review of the cases mentioned above, that the ordinary tests to be satisfied for the granting of interlocutory injunctions do not apply when the application is for restraint of breach until trial of a negative covenant. In such cases the court is not as concerned about the adequacy of damages as a remedy, nor about the balance of convenience as in the ordinary case, but I think it must be satisfied that there is a clear breach of the covenant. *Bank of Montreal* v. *James Main Holdings Ltd.,* [1982] O.J. No. 1245 at para. 11

43 Counsel for IMS submitted that Harbin agreed, for good and valuable consideration and with his eyes open, that he would not compete with IMS Health or advise anyone competing with IMS Health. The language of the 2008 Non-Competition Agreement is clear. The injunctive relief sought by the Plaintiff on this motion should be granted because Harbin unequivocally and voluntarily agreed not to compete with IMS Health.

44 IMS has provided the standard undertaking to pay damages in any event.

45 Although this is an appropriate case for application of the modified test for an interlocutory injunction and IMS should not be required to prove irreparable harm, IMS submits it can

demonstrate irreparable harm in favour of granting the injunction.

46 IMS will suffer irreparable harm because it would be extremely difficult, if not impossible, to quantify damages arising from loss of market share: *RJR-MacDonald v. Canada (Attorney General), supra* at para. 59. Harbin was so intimately involved in IMS' CRM, MDM, and MCM businesses, all of which compete directly in Canada with Veeva, that he cannot perform any role at Veeva without causing irreparable harm to IMS.

47 The loss of actual or prospective customers, goodwill and diminution of a plaintiff's reputation have been recognized as irreparable harm not compensable in damages because it is difficult, if not impossible, for a plaintiff to establish the extent to which customers were lost by it or gained by the defendant as a result of the impugned conduct. In a competitive business market, it is very difficult for the plaintiff to adequately track current customers who do not renew contracts, or prospective customers who do not sign contracts due to the interference of former employees: *Just Speakers Inc.* v. *Benia*, [2002] O.J. No. 2097 at paras. 20-21 (S.C.J.); *Indal Ltd. and Brampton Aluminum Products Ltd.* v. *Halko et al* (1976), 1 C.P.C. 121 at para. 20 (Ont. H.C.) Where it is virtually impossible to pre-estimate the actual damages that will flow from the threat to market share, this is a factor which favours granting the injunction: *Eversoft Fibre & Foam Ltd.* v. *James*, [2001] O.J. No. 3741 at para. 11 (S.C.J.); *Scantron, supra* at paras 26-28; *Matrix Photocatalytic Inc.* v. *Purifics Environmental Technologies* (1994), 58 C.P.R. (3d) 289 at para. 77 (Ont. Gen. Div.).

48 Counsel for IMS submitted although not determinative of the issue, in deciding whether an injunction should be granted, this Court should have regard to Clause 8 of the 2008 Employment Agreement, including the following:

> I acknowledge and agree that a breach by me of the provisions of this Agreement will cause IMS irreparable injury and damage that may not be compensable by money damages and, therefore, I acknowledge and agree IMS shall be entitled to seek injunctive or other relief to prevent a breach of such provisions...

49 The third and final part of the test for an interlocutory injunction, if applicable, requires a court to consider on the particular facts of the case, which party will suffer the greater harm from the granting or refusal of the injunction sought pending determination of the merits.

50 The Court must weigh the consequences which will flow to each party should the injunction be granted or refused and come to a conclusion as to where the balance of convenience lies. In the present case, the balance of convenience favours the granting of the injunction.

51 Even though on the law it is not necessary for IMS to meet it on the balance of convenience portion of the RJR test, IMS can show that the balance of convenience favours IMS. It would be improper to give Veeva an unfair competitive advantage in the face of Harbin's clear breach of his contract, his promise not to compete. *Doherty v Allman*, (1878) 3 A.C. 709 at 720; *Button v. Jones* (2001),11 CCEL (3d) 312 (Ont Sup. Ct.); *Hardee Farms International Ltd. v. Cam and Crank*

Grinding Ltd. [1973] 2 OR 170 (Ont. High Court); *Hampstead Suburban Properties Ltd v. Diomedous* [1968] 3 All ER 545.(Ch Div).

52 Counsel for IMS submitted if the injunction were granted, Harbin would be able to earn a livelihood. Harbin has not proved that comparable work at a non-competitor was unavailable. That coupled with Undertaking re damages satisfies the balance of convenience test [normally required but not required here].

53 Veeva would continue to be able to carry on business. Harbin would strictly be restrained from competing directly with IMS.

54 If the injunction were not granted, the Plaintiff would suffer the irreparable harm described earlier.

55 Counsel for IMS submits that Harbin's claim that he was constructively dismissed when he was demoted from General Manager to Enterprise Technology Solutions. Executive should fail. It is not supported by the evidence before this Court. His pay did not change. Before his title was changed, he received a base salary plus bonus. After, he received the same base salary plus commissions. There was no change in his benefits. On the IMS pay scale, both positions were considered as VP positions. After the title change he continued to play a significant role in the IMS business.

56 He did not raise the issue until after IMS sought to enforce his negative covenant. He continued to work without objection until he voluntarily resigned in May 2014.

57 In its materials in support of its motion for an injunction, counsel for IMS did not mention the existence of the 2013 Non-Competition Agreement. Since he was attempting to enforce the 2008 Agreement, he took the position the 2013 Agreement was irrelevant.

Position of the Defendants Harbin and Veeva

58 Counsel for the Defendants conceded that since 2013 Veeva has been competing with IMS in CRM and that the businesses of IMS and Veeva are increasingly overlapping. Three of Veeva's products are relevant (a) an application used to manage and track interactions with health care providers (Veeva Customer Relations Management, "CRM"); (b) a Master Data Management application, "MDM," that facilitates marketing products to physicians; and (c) a mobile device Closed Loop Marketing, "CLM."

59 Counsel for Harbin conceded that in his final year at IMS, Harbin did some CRM work.

60 He submitted it is not necessary for the court to decide whether it is necessary to resort to the second and third branches of the *RJR* test because IMS cannot meet the first branch of the test, the Strong Prima Facie case test that is applicable here. The Plaintiff must show "a strong case with a

high though not absolutely assured likelihood of success based on the material presently before the court" *Quizno's Canada Restaurant Corp v 1450987 Ontario Corp*, [2009] O.J. no 1743 at para 42 (S.C.J.).

61 Before the court decides whether there has been a breach of the contract, it is necessary to decide whether there is an enforceable contract.

62 Counsel for the Defendants submits Clause 3 is not enforceable for a number of reasons:

1. This is an employment agreement.

63 Restrictive covenants in the employment context are presumed to be unenforceable. As this Court held in *Brown v. First Contact Software Consultants Inc.* (2009), 77 C.C.E.L. (3d) 295 (Ont. S.C.J.) at para. 45:

> Claims for relief based on restrictive covenants will ordinarily fail at trial because the covenants are *prima facie* void. As a consequence, a strong case showing otherwise is needed to convince a court to grant an interlocutory injunction.
>
> See also *Medtronic of Canada Ltd. v.* Armstrong, [1999] O.J. No. 4860 (S.C.J.) at para. 25.

64 Injunctions can have a devastating impact on departing employees by restraining their ability to make a living; in many cases they practically amount to a final determination of the action. *Kohler v. Porter*, [2002] O.J. No. 2418 at paras. 13-19; *Jet Print*; *Paradigm Shift* at para. 25 [2012] O.J. No. 190; *Boehmer Box LP v. Ellis Packaging Ltd.*, 2007 CarswellOnt 2726 (S.C.J.) at para. 39.

65 The Ontario Court of Appeal has repeatedly held that non-competition clauses in employment contracts are <u>void as a general rule</u> and will not be enforced, save in the "exceptional case" where the employer demonstrates that the employee to be restrained is so important and unique that another provision (such as a non-solicitation or confidentiality provision) is insufficient to protect its legitimate proprietary interests. *Lyons v. Multari*, [2000] O.J. No. 3462 (QL) at paras. 19, 31, 33 and 34; *Elsley* at para. 19; *H.L. Staebler Co. v. Allan*, 2008 ONCA 576, 92 O.R. (3d) 107 at para. 42.

66 The Supreme Court of Canada has held that rigorous scrutiny must be applied to restrictive covenants in employment contracts, "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."

67 In this case, the 2008 Agreement did not result from the exercise of free bargaining power. The boilerplate Non-Compete Provision was put to Harbin on short notice and without a real opportunity to obtain legal advice.

2. Because of the existence of the 2013 Employment Agreement, the 2008 Agreement may not be applicable.

68 Counsel for the Defendants submitted IMS has adduced no evidence to show that the agreement it relies upon as being breached is actually the agreement that governs the relationship between the parties. IMS has not established that Clause 3 of the 2008 agreement is applicable, given that Harbin signed another non-competition agreement in 2013. On its face, Clause 3 of the 2008 Non-Competition Agreement may have been superseded by the Non-Competition Provision in the 2013 Agreement. The question of whether the parties meant the second agreement to terminate or abrogate the prior contract will ultimately be up to the trial judge to determine. However, "[i]f it is clear that the parties intended that their subsequent agreement should replace the earlier one..., the later contract will be a good defence to an action brought upon the first one..." The 2013 Non-Competition Agreement cannot simply be ignored. G.H.L. Fridman, *The Law of Contract in Canada, 5th ed.* (Toronto: Thomson Carswell, 2006) at pp. 570-571.

69 The 2013 Agreement contains a provision allowing Harbin to work for a competitor within the one-year period if the employee gives notice and provides details of the intended activity. IMS must provide the employee with its determination within 10 days.

> ...during the employee's employment by or service with IMS and continuing for the period ending one year after termination of all employment and services with IMS, howsoever arising,... employee shall not directly or indirectly (a) perform or provide any services for any competitive organization; (b) perform or provide any services that are competitive in whole or in part, with any Covered IMS offering (c) perform or provide any services for any person that would reasonably desire to use employee's knowledge... Nothing in this section shall prohibit employee from seeking employment with or being employed by a company... If during the restrictive period the employee wished to engage in an activity that is or might be in violation of the section...employee agrees to provide IMS with written notice of his/her intention to do so at least 15 days in advance of undertaking such activity.Such written notice shall be sent to IMS's Regional Vice President,Legal or the Regional Vice President Human Resources and shall provide reasonable detail of the intended activity. A representative of IMS agrees to review the notice and provide employee with a determination of IMS' position with respect to Employee's intended activity within 10 days of receipt of employee's written notice

70 Clause 6 Other Agreements contains the following:

> The terms of this Agreement shall supercede the terms of any other agreement between IMS and the employee to the extent the terms of such agreement conflict with the terms hereof.

71 There is a real possibility that the terms of the 2013 Agreement conflict with the 2008 agreement by allowing Harbin to give notice to IMS of his expected activities at Veeva and giving IMS 10 days to respond. Harbin has deposed he did give notice. That is an issue that cannot be determined on the present record or by this Court. Only the Court of Connecticut has jurisdiction to make that determination.

72 The preamble to the 2013 Agreement recites that it is being entered into by and between IMS Health Incorporated on its own behalf and on behalf of its affiliates defined as all entities controlled by, under common control with, or controlling IMS Health Incorporated including but not limited to the Company and Peter Harbin

73 Nordheimer J wrote in *Jet Print et al v Cohen et al* 1999 CarswellOnt 2357 at para 12:

> While it will ultimately be up to the trial judge to determine this issue,it seems to me there is a fair argument that the employment contracts fell by the wayside when the plaintiffs entered into these new arrangements..."

74 Counsel for Harbin submitted that even if it were clear that the 2008 Non-Competition Agreement were applicable, Clause 3 is both ambiguous and overly broad. A non-compete provision can be no broader than necessary to protect IMS' proprietary interest.

75 Clause 3 fails the "reasonableness" test in at least four ways:

> First, Courts will not enforce provisions that restrict employees from competing in fields that the employer was not engaged in at the time of hiring, but *might* enter into during the course of the employment. Reasonableness must be determined in light of the circumstances existing at the time the contract is made, including the parties' reasonable expectations as to the future. Otherwise, it would be impossible for the employee to know at the time of signing the agreement what he would be precluded from doing.
>
> See *Creditel of Canada Ltd. v. Faultless* (1977), 81 D.L.R. (3d) 567 (Ont. H.C.J.) at para. 24; *Tank Lining Co. v. Dunlop Industrial Ltd.* (1982), 40 O.R. (2d) 219 at para. 18 (C.A.)
>
> At the time the Non-Compete Provision was entered into, IMS was not competing in the CRM business or any other relevant business. It did not do so

for almost five more years. Harbin could not have known or expected at the time the agreement was signed that IMS would enter the CRM business. It is inherently unreasonable for the Non-Compete Provision to preclude Harbin from competing in lines of business that were, at the time of signing, not expected to be engaged in by IMS.

Second, a non-compete provision is unenforceable if it includes a blanket prohibition that would prevent work that does not compete with the employer in any way. In this respect, the Non-Compete Provision fails because it purports to preclude Harbin from taking a position with Veeva in a business line that does not compete directly with IMS, on the basis that one of Veeva's unrelated business lines is in competition with IMS or one of IMS's affiliates. (For instance, Harbin could be precluded from working with Vault, Veeva's application for storing electronic documents, which has no parallel at IMS). Furthermore, it purports to preclude Harbin from competing with the products and services of entities *under common control* with IMS. The term "common control" could capture those entities controlled by IMS's major investors and their parent companies whose offerings differ from those of IMS and may have nothing to do with healthcare.

H.L. Staebler at para. 51, DBOA Tab 17; *Globex* at para. 21; *R.C. Young Insurance Ltd. v. Bricknell*, [1955] 5 D.L.R. 487 (Ont. H.C.J.) at para. 7, aff'd [1955] 5 D.L.R. 490 (Ont. C.A.) at para. 3.

Third, such provisions are unenforceable if the employer carries on business in which there are multiple specialties and purports to restrain the employee from more than the specialties in which he was involved with his former employer.

H.L. Staebler at para. 51; *Globex* at para. 21.

In this respect, the Non-Compete Provision is principally unreasonable because it purports to prevent Harbin from working with Veeva even in areas unrelated to his work with IMS.

Fourth, IMS has indicated that its concern is the misuse of allegedly confidential information. However, the Non-Compete Provision precludes Harbin from working in any capacity for a competitor regardless of whether such information

could be used. IMS has admitted it believes the provision precludes Harbin from working in any position at Veeva, even if that position were so mundane that no use could be made of any information learned at IMS. Accordingly, the Non-Compete Provision suffers from the flaw that was identified by this Court in *Sherwood Dash*, [2005] O.J. No. 5298:

> **[T]he non-competition clause in this case extends beyond the actual problem of the misappropriating of confidential information. Put somewhat differently, it is not that the former employee is competing, it is how the former employee competes. By absolutely foreclosing employment for any competitor anywhere, the covenant in this case precludes the employee** from **using acquired skills or knowledge that do not encroach on confidential information or the employer's proprietary interests. It is arguable in the immediate case that the restrictive covenant goes too far; colloquially speaking, it is overkill.**

Sherwood Dash at 69**.** See also *Mason v. Chem-Trend Ltd. Partnership*, 2011 ONCA 344, 106 O.R. (3d) 72 at paras. 23 and 24.

3. Clause 3 is not reasonable under the *Elsley* test.

76 Counsel for Harbin submitted this is not an exceptional case under the *Elsley* test. Harbin was not a member of senior management in the sense required in *Elsley*. He did not embody the IMS business or even the CRM business at IMS. Initially he was a senior principal. A year before he left IMS, he was a General Manager. Five months before he left, he unofficially lost that title and the staff he had previously managed. A few days before he left, his title was officially changed to Enterprise Technology Solutions Executive. Counsel for Harbin submitted he was not in a position of a nature to warrant a general prohibition on competition. The CEO of IMS had 15 senior executives reporting to him and those senior executives had other executives reporting to them. Harbin reported neither to the CEO nor to any of the senior managers who reported to the CEO.

4. Clause 3 is -- not Necessary to Protect IMS' Interests

77 IMS must demonstrate that a non-competition clause is necessary to protect its proprietary interests and that a confidentiality or non-solicitation provision would be insufficient. *Lyons v. Multari*, at paras. 31-35; *Elsley* at para. 19; *H.L. Staebler* at para. 42.

78 The proprietary interest raised by IMS relates to Harbin's alleged knowledge of a significant amount of information about IMS' "CRM offerings, including technical capabilities and commercial strategies and tactics." According to IMS, Harbin's knowledge "results in significant vulnerability to

IMS' ability to compete with Veeva." Kerber Affidavit, paras. 19, 22, 24 and 25.

79 The information that IMS suggested is in need of protection is vaguely described. It is impossible to tell whether the alleged strategic knowledge possessed by Harbin is of a kind that the confidentiality and non-solicitation provisions of the 2008 Non-Competition Agreement would be sufficient to protect. An employer cannot use a restrictive covenant to prevent an employee from using skill and knowledge that a similarly situated person with almost twenty years' experience in the industry would know. Harbin has deposed he has no access to any schematics, customer lists, computer code, or other tangible confidential information. IMS has not demonstrated that anything more than its existing confidentiality and non-solicitation provisions are required. *Winnipeg Livestock Sales Ltd. v. Plewman* (2000) 192 D.L.R. (4th) 525 at para. 27 (Man. C.A.); *Sherwood Dash* at paras. 68-69.

80 The flaws in the Non-Compete Provision cannot be remedied by reading it down to make it legal and enforceable. As the Supreme Court has held:

> The fact that a clause might have been enforceable had it been drafted in narrower terms will not save it. The question is not whether a valid agreement might have been made, but whether the agreement made was valid.
>
> *H.L. Staebler* at para. 43.

<u>Harbin was Constructively Dismissed</u>

81 Counsel for the Defendants submitted that even if the Non-Compete Provision in the 2008 agreement were otherwise enforceable, IMS would still not be able to rely upon it. Restrictive covenants will not bind an employee once the employer has repudiated the employment contract by constructively dismissing him. *Globex Foreign Exchange Corp. v. Kelcher*, 2011 ABCA 240, 337 D.L.R. (4th) 207 at paras. 54-55, citing *General Billposting Co. Ltd. v. Atkinson* (1908), [1909] AC 188, 25 TLR 178 (HL). See also *Gerrard v. Century 21 Armour Real Estate Inc.* (1991), 4 O.R. (3d) 191 (Gen. Div.) at paras. 35-38.

82 Constructive dismissal occurs where an employer makes a unilateral and fundamental change to a term or condition of the employment contract: *Faber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at paras. 24, 34 and 35.

83 Harbin was effectively demoted. His team was taken away from him. He was assigned to a dramatically different role and he was going to be put on a variable, commission-based compensation system. He was stripped of responsibilities, excluded from meetings, frustrated and humiliated.

84 As a result of the foregoing, IMS cannot meet the requirements of the strong *prima facie* test

here.

85 Even if IMS could establish a strong *prima facie* case, this would not relieve it of having to satisfy the other two elements of the *RJR-Macdonald* test. The *Doherty v. Allman* principle upon which IMS relies requires a "very clear, unquestionable breach of a negative covenant" and applies only "where the plaintiff's case is strong and where there is little doubt on the merits," absent which "irreparable harm and the balance of convenience must still be considered." *Button v. Jones* (2001), 11 C.C.E.L. (3d) 312 (Ont. S.C.J.) at para. 13. Ontario courts have repeatedly considered -- and repeatedly qualified -- the *Doherty v Allman* principle, with the result that irreparable harm and the balance of convenience are virtually always in issue *Canpages Inc. v. Quebecor Media Inc.* (2008), 66 C.P.R. (4th) 385 (Ont. S.C.J.) at para. 8.

86 Second, the principle has limited application to interlocutory injunctions, where the court does not have the advantage of a full review of the facts and law. Robert J. Sharpe, *Injunctions and Specific Performance* (Aurora: Canada Law Book, looseleaf) at para. 9.40, cited with approval in *Carecor Health Services Ltd. v. Health Trans Services Inc.*, 2006 CarswellOnt 3781 (S.C.J.) at para. 18; *Van Wagner Communications Co., Canada v. Penex Metropolis Ltd.*, 2008 CarswellOnt 218 (S.C.J.) (WL) at para. 30.

87 The "presence of a negative covenant does not divest the court of its discretion in injunctive matters." The fundamental question remains whether granting an injunction is just and equitable in <u>all the circumstances</u> of the case.

88 Molloy J. wrote in *Kohler v. Porter, supra* at para. 27:

> ... there is a significant body of case law from this Court on motions for injunctions to enforce non-competition clauses in which the test applied included a strong *prima facie* case on the merits plus the other two factors from *RJR MacDonald* (i.e. balance of convenience and irreparable harm). I was not referred to any such decision dealing squarely with whether the balance of convenience and irreparable harm tests are irrelevant, or even less important, once a *prima facie* case for enforcement of a negative covenant is established. However, finding in favour of the moving party on this point would represent a significant departure from the well-established principles long applied by this Court.

89 The most that can be said is that the extent of consideration given to irreparable harm and balance of convenience will be influenced by the strength of a plaintiff's case. Even where there is a clear breach of a negative covenant which is reasonable on its face, however, "the issues of irreparable harm and balance of convenience cannot be ignored." *Van Wagner* at para. 39.

<u>Irreparable Harm</u>

90 The onus is on the person seeking an injunction to establish that it will suffer irreparable harm unless the injunction is granted, and that the ordinary legal remedy of damages is inappropriate or inadequate. *Sharpe on Injunctions* at para. 2.390; *RJR -- MacDonald* at para. 64.

91 Counsel for Harbin submitted that irreparable harm cannot be inferred. In its absence, an injunction should not be issued. *Jet Print* at para. 21; *Canpages* at para. 9; *Medtronic* at paras. 38, 47-49; *Network Systems Ltd. v. Fibronics International Inc.* (1990), 33 C.P.R. (3d) 566 (S.C.J.) at para. 13; *Altus Group Ltd. v. Yeoman*, 2012 ONSC 4406 at paras. 35-42.

92 The existence of a contractual provision presuming irreparable harm does not "usurp the exclusive jurisdiction of the court to determine whether injunctive relief is appropriate and, more specifically, whether or not irreparable harm has been established."

93 IMS has failed to put forward any evidence of irreparable harm in support of its request for an injunction to terminate Harbin's employment. Instead, IMS claims that Harbin has certain strategic information and then asks this Court to infer that this will pose a "significant vulnerability to IMS Health's ability to compete with Veeva." IMS posits that "it is difficult to imagine any position at Veeva" in which Harbin could work without misusing this information. Ms. Kerber's "instincts" tell her that Harbin will misuse confidential information, nothing more. Kerber Affidavit at paras. 25, 27 and 33.

94 Counsel for the Defendants submitted that IMS' sheer speculation and suspicion cannot serve to establish irreparable harm. While IMS has suggested that Harbin will inevitably disclose confidential information to Veeva, Canadian courts have rejected the doctrine of "inevitable disclosure". IMS has the onus of leading evidence that Harbin has misused or will misuse confidential information. IMS has not done so. *Longyear Canada, ULC v. 897173 Ontario Inc.*, 2007 CarswellOnt 7958 (S.C.J.) at para. 69; *Future Shop Ltd. v. Northwest-Atlantic (B.C.) Broker Inc.*, 2000 BCSC 1797 at para. 61.

95 At para 33 of her affidavit sworn June 20, 2014, one week after Harbin commenced employment at Veeva, Kerber deposed that already Harbin's conduct had caused damages and irreparable harm and that it would continue.

96 If it were necessary for IMS to show damages, or to adduce evidence of irreparable harm, it has not done so.

97 Kerber deposed at para 33 of his Affidavit: "Harbin's employment with Veeva is a material breach of his duties to IMS ... His [Harbin's] conduct has <u>already</u> caused both damages and irreparable harm." [Emphasis added.]

Q 320 What are the damages and irreparable harm

A. I believe that he has already divulged confidential information about IMS' business

Q 321 And just to confirm you have no evidence on that?

A. I can confirm that.

Q 322 Neither you nor anybody else from IMS have spoken to Veeva about that?

A. I can only speak for myself. I did not speak to Veeva about that.

Q 323 To your knowledge no one else at IMS has spoken to Veeva?

A. I don't know.

Q 324 And so the statement that Mr Harbin has already caused IMS both damages and irreparable harm is based solely on your belief?

A. And I am representing IMS. So it's the belief of the company.

98 IMS has put forward no evidence that it will lose customers as a result of any information that Harbin allegedly possesses. It does not suggest that such a result would flow from a failure to enforce the Non-Compete Provision, as opposed to the confidentiality and non-solicitation provisions.

99 Counsel for Harbin submitted that IMS' position in this case resembles that of the employer in *Trapeze Software Inc. v. Bryans* (2007), 154 A.C.W.S. (3d) 944 (Ont. S.C.J.) Like IMS, Trapeze was one of a small number of companies in the business of providing software offerings and related services to a specialized industry. Trapeze, like IMS, sought an injunction to enforce restrictive covenants against two employees who left to join a company that may have had some competitive offerings. Trapeze alleged that it was "vulnerable to departed employees who had access to confidential information" because it believed disclosure was inevitable. *Trapeze Software* at para. 35.

100 In *Trapeze Software*, Newbould J. found both the non-compete and non-solicitation clauses to be unreasonably broad and then continued:

> There is no evidence that Trapeze has lost any business to Transched. Nor is there any evidence that the defendants have disclosed any confidential information to Transched or its customers. Trapeze contends that knowledge of its confidential information would provide an invaluable unfair competitive edge in the sales and bidding process and in ongoing service components of its business. Mr. Bacchus asserts that given the nature of the business, misuse of confidential information by these former Trapeze employees is inevitable. I am not persuaded that that assertion is anything more than speculation.
>
> Trapeze relies upon statements in cases to the effect that irreparable harm has been found to exist where there is evidence that the plaintiff will lose market share if an injunction is not granted. However, this too is speculative. There is no evidence of a reasonable likelihood that the plaintiff will lose any business or market share, and certainly not within 12 months of the defendants leaving their employment with Trapeze, or that any such likely loss of market share would be due to the actions of the defendants. This is not a case in which either defendant has contacted any of the clients of
>
> Trapeze that he dealt with while employed by Trapeze or a case in which either defendant has close important relationships with any Trapeze client that would enable him by virtue of such close relationship to sway business to Transched.
>
> *Trapeze Software* at paras. 53-54.

Balance of Convenience

101 Counsel for Harbin submitted that the final stage of the test for an injunction should be the consideration of which party would suffer the greater harm if the injunction is refused or granted, including the employee's ability to earn a livelihood should an injunction be granted restricting his conduct. In particular, this Court has held that:

> where the refusal to grant an injunction would result in some temporary loss of business to the employer, but would prevent the employee from earning his living in the geographical area of his residence and in the calling in which he is skilled, the balance of convenience favours the employee...
>
> *Jostens Canada Ltd. v. Gendron* (1993), 1 C.C.E.L. (2d) 275 (Ont. Gen. Div.) at para. 29. See also *RJR -- MacDonald* at paras. 62, 68; *Sharpe on Injunctions* at para. 2.530.

102 From Harbin's perspective, the present motion represents the final determination of this matter on the merits, as it is very unlikely that the matter would be reached for trial before the expiry of the Non-Compete Provision. There is evidence that Harbin will be harmed if he is enjoined from working for Veeva. If he were terminated, the negative impact upon him and his family would be significant because his skills and experience are in a highly specialized business. There are few jobs in Canada that would allow Harbin to keep working in his field, especially if IMS' definition of competitor were adopted, even if he were able to find work outside of the pharmaceutical industry.

103 The relative prejudice suffered by Harbin compared to that that would potentially be suffered by IMS tilts in favour of Harbin.

Conclusion

The Applicable Test

104 Counsel disagreed as to the applicable test here.

105 On all the facts I am of the view that a modified three part test is applicable here.

> (1) Can the Plaintiff establish a strong *prima facie* case? (2)Will the Plaintiff suffer irreparable harm? (3) Where does the balance of convenience lie?

106 I have considered the submission that Harbin should simply be required to live by the terms of the contract to which he has already agreed. This Court should enforce the 2008 Non-Competition Agreement.

107 Here, it is not as simple as that.

108 Before even considering whether Harbin has breached the 2008 contract, it is necessary to consider whether the 2008 contract is applicable and enforceable.

Is the 2008 Agreement Applicable?

109 On the evidence before me at this stage of these proceedings, I am not satisfied that the Plaintiff has established a strong *prima facie* case on this point. Of course this matter will be finally decided at trial. At this stage it seems to me, to use the words of Nordheimer J in *Jet Print supra*, "that there is a fair argument that" clause three has been superseded by the terms of the 2013 Agreement, at least to the extent that provisions in the 2013 Agreement conflict with Clause 3. The 2013 Agreement contains a provision allowing Harbin to compete under certain circumstances.

110 Although jurisdiction of this court may be an issue [Connecticut may be the proper forum to interpret and enforce the 2013 Non-Competition Agreement], Harbin has adduced evidence upon which the trial judge could conclude that Harbin has complied with the provisions of the 2013

Agreement, that IMS has not, and that what is left of clause 3 in the 2008 Agreement does not support IMS' claim for relief.

111 Even if Clause 3 of the 2008 Agreement is the relevant provision, there is a good argument that Clause 3 is unenforceable because it is overly broad and that it fails the reasonable test. Among other things, it bans all employment with competitors, not just competitive activity. The Plaintiff has not met the strong *prima facie* test component of the applicable test.

112 Kerber deposed at para. 27 of her affidavit that given Harbin's intimate knowledge in the very business in which Veeva competes, "... it is difficult to imagine ANY Position at Veeva in which Harbin could perform service without drawing on information he learned at IMS."

113 When Harbin signed the agreement, there is a fair argument that it was not foreseeable that IMS would attempt to prevent Harbin from engaging in CRM activities in the future. There is a fair argument that it would be difficult to understand what exactly he was barred from doing, with whom and where.

114 IMS was not in the CRM business in 2008 or for four years thereafter.

115 If overly broad, the whole clause will be found to be unenforceable.

116 There is a fair or reasonable argument that Clause 3 of the 2008 Agreement is unenforceable because IMS repudiated its contract with Harbin by constructively dismissing him. Harbin does not have to prove that he was constructively dismissed at this point. It is sufficient to note that IMS cannot establish a strong *prima facie* case. Under the circumstances, he did not unreasonably delay advising IMS he thought he had been constructively dismissed.

117 Restrictive covenants in employment contracts are generally presumed to be unenforceable save in the exceptional case. There is a good argument that Harbin was not the type of employee who would merit exceptional treatment under the *Elsley* test. I seriously question IMS' assertion that in 2008 Harbin WAS the CRM business at IMS. IMS was not in the CRM business in 2008. Even four years later, when IMS did enter the CRM business, Harbin denies being a decision maker in that regard. He claims to have had some involvement in implementation after the acquisition of Vantage 360 along with others on a large team. At the time of his resignation he claims to have been demoted and staffless, hardly the epitome of CRM at IMS. In my view, a court may well find that the facts here do not meet the "exceptional" requirement in *Elsley*. The Applicant has not made out a strong *prima facie* case in that regard.

118 In my view there is a fair argument that Clause 3, the non-competition clause, was not necessary to protect IMS' legitimate business interests. A confidentiality and non-solicitation clause would suffice. During her cross-examination on her affidavit, Kerber said as much.

119 In short, the moving party has failed to show a strong *prima facie* case, whether or not it is

required to show irreparable harm or that the balance of convenience favours an injunction.

120 Had it been necessary to do so, I would have held that on the facts here, it would have been necessary for the Plaintiff to show irreparable harm and to demonstrate that the balance of convenience favours IMS. IMS' suspicion is insufficient to establish irreparable harm. The inevitable disclosure doctrine does not apply in Canada. *Longyear Canada ULC v. 897173 Ontario Inc.*, 2007 CarswellOnt 7958. The balance of convenience would not favour IMS in all the circumstances here.

Disposition

121 The motion against Harbin is dismissed. Because Harbin is not being enjoined from working at Veeva, Veeva is not being enjoined from employing Harbin. The motion is also dismissed against Veeva.

122 An Order will go requiring Harbin not to provide confidential information to Veeva and not to solicit IMS' customers. If counsel cannot agree, they may make an appointment with me to settle the wording.

123 Counsel may make written submissions on costs limited to no more than 5 pages on or before August 25, 2014.

M.A. SANDERSON J.