COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Rhebergen v. Creston Veterinary Clinic Ltd.,* 2014 BCCA 97

Date: 20140312
Docket: CA40628

Between:

Stephanie Rhebergen
a.k.a. Steph Rhebergen

Respondent
(Plaintiff)

And

Creston Veterinary Clinic Ltd.

Appellant
(Defendant)

Before: The Honourable Mr. Justice Lowry
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Bennett

On appeal from: An order of the Supreme Court of British Columbia, dated January 28, 2013 (*Rhebergen v. Creston Veterinary Clinic Ltd.*, 2013 BCSC 115, Kelowna Docket 93956).

Counsel for the Appellant:	S. H. Haakonson
Counsel for the Respondent:	R. D. Bajer
Place and Date of Hearing:	Vancouver, British Columbia November 12, 2013
Place and Date of Judgment:	Vancouver, British Columbia March 12, 2014

Dissenting Reasons by:
The Honourable Mr. Justice Lowry

Majority Reasons by:
The Honourable Madam Justice D. Smith (P. 25, para. 71)

Concurred in by:
The Honourable Madam Justice Bennett

Summary:

An employer appealed an order declaring unenforceable a clause in an employment contract requiring an employee to pay the employer a prescribed amount in the event she was to compete with the employer upon the contract being terminated. The clause was held to be a restraint of trade. As such it was not enforceable because it was unreasonable for two reasons: it was ambiguous and the amount to be paid was a penalty. Held: appeal allowed. The clause was not a conventional non-competition clause in that it contained no prohibition against the employee competing, but the required payment compromised the employee's opportunity to compete with the employer rendering the clause a restraint of trade. While the payment could not be characterized as a penalty, the court divided on whether the clause was ambiguous with the majority concluding it was not, there being only one reasonable interpretation on a fair reading.

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[1] The provisions of employment contracts that constitute a restraint of trade are not enforceable unless they are reasonable. The question to which this appeal gives rise is whether a clause in an agreement between a newly licensed veterinarian and the clinic by which she was to be employed for three years of training amounts to a restraint of trade and, if so, whether the clause is unreasonable. Justice Betton, before whom the question was addressed at first instance, declared the clause to be unenforceable.

The Associate Agreement

[2] Creston Veterinary Clinic Ltd. is located in Creston, B.C. There are no other clinics within a 100-mile radius save for two, about 60 miles distant, across the American border in Idaho. There are, however, 13 clinics within a 130-mile radius. The clinic is operated by Dr. Robert McLeod. His business partner is John Wallis. The greatest amount of the clinic's business is drawn from eight dairy farms in the Creston area, a business Dr. McLeod has built over the course of many years.

[3] Upon graduating from a veterinarian college and obtaining a licence to practise, in order to gain the necessary field training while earning an income, Dr. Stephanie Rhebergen entered into a three-year agreement with the clinic, titled

"Associate Agreement". She had another offer of employment but chose the clinic. She has a particular interest in dairy medicine. Under the agreement, she was to be paid $65,000 in salary for each of the three years. The agreement contained the following clauses:

> 11. NON-COMPETITION
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> 1. The Associate acknowledges and agrees that she will gain knowledge of and a close working relationship with the CVC's [Creston Veterinary Clinic Ltd.'s] patients and clients which would injure CVC if made available to a competitor or used for competitive purposes.
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> 2. The Associate covenants and agrees that in consideration of the investment in her training and the transfer of goodwill by CVC, if at the termination of this contract with CVC she sets up a veterinary practice in Creston, BC or within a twenty-five (25) mile radius in British Columbia of CVC's place of business in Creston, BC, she will pay CVC the following amounts:
>
> If her practice is set up within one (1) year termination of this contract - $150,000.00;
> If her practice is set up within two (2) years termination of this contract - $120,000.00;
> If her practice is set up within three (3) years termination of this contract - $90,000.00.
>
> * * *
>
> 13. TERMINATION
>
> 1. CVC agrees not to terminate this agreement during the term hereof except for just cause as hereinafter defined.
>
> 2. The Associate cannot terminate this agreement prior to the expiry of the term, except for death, permanent disability preventing the Associate from continuing to practice veterinary medicine, or default of this agreement by the CVC….

[4] The amount to be paid in the event Dr. Rhebergen were to set up a practice within 25 miles of Creston during the first, second, or third year after the agreement was terminated was calculated by Dr. McLeod and Mr. Wallis based primarily on their experience in hiring a former associate. They calculated the investment to be made in employing Dr. Rhebergen with respect to mentoring, training, and equipment (with training said to be an investment in her outside the mentorship), apart from her salary, would not be recovered unless she remained with the clinic for three years – hence the three-year term. They concluded the unrecoverable cost to

the clinic in this regard if the agreement were terminated before Dr. Rhebergen had been there three years could amount to $90,000 or more, although that would vary depending when the termination occurred.

[5] They then calculated what they considered the impact on the clinic's goodwill and the volume of its business could be if Dr. Rhebergen were to compete for its clientele. They believed that after being introduced to and working with the clinic's clientele, she could be expected to take as much as 25% of its business, which would amount to perhaps $60,000 in revenue. They recognized that would decline if one or two years passed before she began to compete. Thus, the payment Dr. Rhebergen would have to make if she left the clinic before the term of the agreement expired and set up a practice within the stipulated radius totalled $150,000 declining to $90,000.

[6] Differences arose between Dr. McLeod and Dr. Rhebergen after 14 months. She informed him she was terminating the agreement and would not continue to work for the clinic. He pointed out that the agreement precluded her termination and then exercised the clinic's right to terminate her for cause.

[7] Five months later, Dr. Rhebergen filed a notice of claim in the Supreme Court pleading she "intends to set up a mobile dairy veterinary practice in Creston and vicinity" and seeking to have clause 11 declared unenforceable.

[8] While what she intends may be Dr. Rhebergen's reason for seeking the relief she claims, it is not, for present purposes, of particular consequence. The question before the judge was, and remains, only whether, when the parties entered into the associate agreement, the clause constituted a restraint of trade and, if so, whether it was a reasonable restraint such as to be enforceable. If the clause is not enforceable, and is accordingly so declared, Dr. Rhebergen would be free to practice veterinary medicine in the vicinity of Creston as she wishes without incurring any liability to the clinic.

The Judgment

[9] The judge recognized clause 11 did not prohibit Dr. Rhebergen from setting up a practice within 25 miles of Creston but only required that she pay the clinic as provided if she did. He nonetheless considered the clause to constitute a restraint of trade, citing *Canaccord Capital Corp. v. Clough*, [1999] B.C.J. No. 2342 (S.C.). He quoted from *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, to the effect that restraint of trade, or the interference with individual liberty, may be justified by the circumstances where the restraint is reasonable in terms of the interests of the parties concerned and those of the public, with a more rigorous scrutiny being justified in respect of contracts of employment. He then turned to determining whether the clause was a reasonable restraint on Dr. Rhebergen's setting up a veterinary practice after her agreement with the clinic was terminated.

[10] The criteria that have been recognized for assessing the reasonableness and hence the enforceability of a clause that constitutes a restraint of trade (at least where there is prohibition) have been drawn from *J.G. Collins Insurance Agencies Ltd. v. Elsley Estate*, [1978] 2 S.C.R. 916. It stands as the cornerstone of the jurisprudence on post-employment restraint of trade. As expanded, the criteria were succinctly summarized in *Aurum Ceramic Dental Laboratories Ltd. v. Hwang* (1998), 77 A.C.W.S. (3d) 161 (B.C.S.C.):

> [11] For a "post-employment" restraint to be enforced, the Courts have required the parties seeking to uphold the restraint to prove that the restraint has the following characteristics:
>
> (a) it protects a legitimate proprietary interest of the employer;
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> (b) the restraint is reasonable between the parties in terms of:
>
> (i) temporal length;
> (ii) spatial area covered;
> (iii) nature of activities prohibited; and
> (iv) overall fairness;
>
> (c) the terms of the restraint are clear, certain and not vague; and
>
> (d) the restraint is reasonable in terms of the public interest with the onus on the party seeking to strike out the restraint.

[11] The above was quoted by the judge at para. 21 of his reasons. He then followed this summary in assessing the reasonableness of clause 11 under headings for the criteria he discussed. He first considered the clarity of clause 11, s. 2.

[12] The clause provides Dr. Rhebergen must pay the designated amount if, within three years of the associate agreement being terminated, she "sets up a veterinary practice in Creston, BC or within a twenty-five (25) mile radius in British Columbia of CVC's place of business in Creston, BC". The judge said "sets up a veterinary practice" are words that "can mean a variety of things" such that clause 11, s. 2, is ambiguous. He questioned whether the clause would "prevent" Dr. Rhebergen from practising within the designated radius if her practice was based elsewhere, or would "prohibit" her being based in the radius if she practised elsewhere. He asked rhetorically whether Dr. Rhebergen could set up a mobile practice and provide some veterinary services within the radius, or join an established practice within the radius she had no part in setting up. He said clarity was an element of reasonableness and that the number of possible interpretations of the wording establishes ambiguity and unreasonableness.

[13] The judge then turned to considering what he headed "Overall Reasonableness of this Restraint of Trade", drawing from *Elsley* and further from *Shafron.*

[14] Under the subheading "Nature of Activities Prohibited", he expressed the view that clause 11 was essentially a non-competition clause which would serve to protect the clinic's clientele, something that in *Elsley* was said to be justified in exceptional circumstances. In his view, the reasonableness of the restraint on Dr. Rhebergen setting up a practice without having to pay the stipulated amount to the clinic was to be assessed with regard to whether the amount to be paid would be liquidated damages or a penalty:

> [35] I cannot conclude that this case falls into that exceptional category justifying a non-competition clause. Given the nature of this clause and the fact that it does not create an absolute prohibition, however, this conclusion

> must be linked to the analysis below regarding the characterization of amounts to be paid if there is a breach. If the amount to be paid is properly characterized as liquidated damages, I would not be inclined to find the clause unreasonable despite it being, in essence, a non-competition clause. If the amount is a penalty, then I conclude that there is a rebuttable presumption that the clause is an unreasonable restraint of trade.
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> [Emphasis added.]

[15] Then, under the subheading "Overall Fairness – Liquidated Damages vs. Penalty Clause", the judge said categorizing the amount as liquidated damages or a penalty was "essential" to determining the overall fairness of the clause. He said:

> [38] It is my view that if a clause such as this is properly characterized as imposing a penalty as distinct from requiring payment of liquidated damages, a rebuttable presumption of unreasonableness is created. There may be cases where a penalty is created, but the amount is not such that the clause would be found to be unreasonable.

[16] The judge distinguished liquidated damages, being a genuine pre-estimate of damages, from a penalty, which is a sum that is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to be in consequence of a breach, quoting the following statement of law (para. 39), from *Snell's Principles of Equity*, 27th ed. (London: Sweet & Maxwell, 1973) at 535, accepted in *H.F. Clarke Ltd. v. Thermidaire Corp.*, [1976] 1 S.C.R. 319 at 338:

> The sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.

[17] He then discussed what he found to be the way in which the amounts were determined:

> [42] The affidavit of Dr. MacLeod, on behalf of the defendant, explains how CVC arrived at the monetary amounts payable under Clause 11. In very basic terms, Dr. MacLeod says that they are a combination of expenses incurred by the defendant in employing the plaintiff in the practice and of the prospective loss of goodwill based on an expectation that if she "set up a practice", some of the defendant's clients would go with/to her. The specific amounts are, however, somewhat arbitrary and only loosely based on the plaintiff's salary and a portion of a value attributed to goodwill.
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> [43] The plaintiff's salary at hiring was $65,000 per annum. The net income of the practice was $120,000 for 2010.

> [44] I am cognizant of the fact that liquidated damages often cannot be precisely calculated. The evidence of Dr. MacLeod explains the considerations that influenced the numbers in Clause 11, but the plaintiff's salary, at the least, is not a valid element of genuinely pre-estimated damages.
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> [45] The net effect of the amounts set out in Clause 11 is that the defendant, if entitled to recover, would essentially receive full indemnity for the salary it would have paid her for the 14 months that she worked and compensation for the loss of approximately 25 percent of its clientele/goodwill. Given that salary is not a valid component of any genuine estimation of damages, the amounts payable under Clause 11 are excessive.
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> [46] It is therefore my conclusion that the amounts set out in Clause 11 do in fact represent penalties.
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> [Emphasis added.]

[18] Essentially the judge found the amounts to be paid under clause 11 were based in large measure on the $65,000 salary Dr. Rhebergen was to be paid under the agreement and because her salary was not a valid component the amount was a penalty rendering the clause unreasonable quite apart from its ambiguity.

[19] The judge went on under the subheading "Temporal Length of Clause" to say the time over which clause 11 would affect Dr. Rhebergen after the agreement was terminated was "too long" because it restrained her from setting up a practice in, or within 25 miles of, Creston for a period that was two-and-a-half times as long as the 14 months she was employed at the clinic. The duration was not graduated as were the payments. He did not, however, say he considered the time unreasonably long.

[20] Under the subheading "Spatial Area Covered", he said Dr. Rhebergen had acknowledged on discovery the 25-mile area to which clause 11 applied was not unreasonable. It was not a concern.

[21] Finally, the judge raised the question of public interest but found the evidence bearing on that aspect of his assessment limited and declined to make any determination. Thus, he declared the clause unreasonable and unenforceable based on what he considered to be its ambiguity and the penalty it imposed.

[22] On this appeal, relying on decisions of the courts of Ontario, the clinic first contends the judge erred in law in determining clause 11 to constitute a restraint of

trade because it does not prohibit Dr. Rhebergen from setting up a practice anywhere she wishes. The clinic then says that, if the judge was correct in determining the clause to constitute a restraint of trade, he erred in concluding the restraint was unreasonable and the clause unenforceable. It says the judge erred in law and then in fact in characterizing the amount to be paid a penalty; he also erred in law in determining the wording of clause 11, s. 2 to be ambiguous.

[23] For her part, Dr. Rhebergen seeks to support the judge's findings and conclusions in all respects and she contends clause 11 is, in any event, unreasonable because the circumstances were such that a non-solicitation clause would have been sufficient.

Restraint of Trade

[24] Clauses that are said to amount to a restraint of trade are commonly found in contracts of employment and agreements for the sale of a business. The classic expression of the restraint of trade doctrine is captured in Lord Diplock's formulation in *Petrofina (Gt. Britain) Ltd. v. Martin*, [1966] 1 Ch. 146 (C.A.), describing a contract in restraint of trade as "one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with other persons" (p. 180). The rationale is straightforward: "restraints of trade are contrary to public policy because they interfere with individual liberty of action and because the exercise of trade should be encouraged and should be free": *Shafron* at para. 16. Thus, a contractual covenant that constitutes a restraint of trade is enforceable only if it is reasonable. The first question then is whether an impugned clause or contractual provision constitutes a recognized *restraint*. Only then does it become necessary to determine whether the restraint is reasonable and therefore enforceable. See J.D. Heydon, *The Restraint of Trade Doctrine* (London: Butterworths, 1971) at 48ff.

[25] The first question arises here because clause 11 differs from conventional non-competition or non-solicitation clauses that constitute a restraint of trade: it contains no prohibition. Dr. Rhebergen would not breach the clause if she were to

set up a veterinary practice in or within 25 miles of Creston. She could not be enjoined from doing so and there could be no damages unless, upon setting up a veterinary practice, she did not pay the amount she agreed would be paid to the clinic in that event. Unlike the prohibition that renders a more conventional clause a restraint of trade, a clause in the form of clause 11 may be considered a restraint only because of the financial consequence for which it provides. Here, the clause, which is not prohibitory but permissive, burdens an employee with a cost of pursuing the practice of her profession as she may wish which she would not otherwise bear.

[26] Whether such a clause in a contract of employment amounts to a recognized restraint for the purposes of the doctrine, rendering the clause unenforceable if unreasonable, is, in my view, by no means settled law.

[27] The seminal cases in this long established common law doctrine – including *Dyer's Case* (1414), Y.B. Mich. 2 Hen. V, pl. 26, fol. 5, and *Mitchel v. Reynolds* (1711) 1 P. Wms. 181 – did not involve strict prohibitions but rather penal bonds, payable upon breach of the restraining terms (see also *Maguire v. Northland Drug Co. Ltd.*, [1935] S.C.R. 412). In those cases, it might be said, there was not so much a direct prohibition as there was provision for a payment to be made upon choosing to compete, but those decisions are nevertheless foundational to the doctrine.

[28] With respect to the modern jurisprudence, however, there appears to be essentially two strands of authority in the employment context: first, what one may call a 'functional' approach, which asks whether the clause at issue attempts to, or effectively does, restrain trade, in which case it will be captured by the doctrine and subjected to reasonableness scrutiny; and second, a more 'formalist' approach, in which the clause must be structured as a prohibition against competition to constitute a 'restraint'. On the latter approach, mere disincentives to post-employment competition are not sufficient to trigger the doctrine, even if those disincentives operate as effectively at dissuading competitive conduct and participation in the marketplace as a prohibition.

[29] The functional approach has been firmly established in English law. It has long been clear that a strict prohibition on competitive conduct is not required in order for the doctrine to apply.

[30] In *Wyatt v. Kreglinger and Fernau*, [1933] 1 K.B. 793 (H.L.), an employee of long standing who was leaving the service of his employer agreed not to compete in the employer's trade, and to do nothing detrimental to the employer, in return for a pension which was paid but discontinued after ten years. The employee then sued. While the agreement contained no prohibition against the employee competing with his employer, it nonetheless constituted a restraint of trade and as such was not enforceable. The pension was no more than a gratuitous payment giving rise to no legal obligation on the part of the employer. In his speech, Lord Slesser reasoned (p. 809):

> Now it has been argued for Mr. Wyatt that a distinction must be drawn between a case where a person has expressly covenanted to exclude himself, without limitation of time and space, from entering into a specified trade and a case where a person has agreed that a right which he would otherwise have would be defeated by his so entering into that trade. I cannot in principle find any distinction between the two agreements. The public policy which has to be considered, the interest of the community, seems to be affected quite as much by an agreement that a person will give up a benefit which he would otherwise receive if he enters into a particular trade, as it is by a direct agreement by him not to enter into that trade. In such matters it is well to go back to principle, and the principle is nowhere better stated than by Lord Macnaghten in *Nordenfelt v. Maxim Nordenfelt, &c. Co.*, [[1894] A.C. 535, 565], where he says this: "All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void." It seems to me that to say to a man that he should be deprived of a benefit if he fails to restrain himself from entering into a particular trade, when such restraint would be a general restraint, is just as much contrary to public policy and deprives the public of his services as much as if he made an express covenant not to enter that trade.

[31] The proposition can be seen to have been applied in *Marshall v. N.M. Financial Management Ltd.*, [1997] 1 W.L.R. 1527 (C.A.) at 1533, and before that, discussed in *Bull v. Pitney-Bowes Ltd.,* [1967] 1 W.L.R 273 (Q.B.) at 275. It is treated as essentially settled in authoritative writing on English law: *Chitty on Contracts*, 30th ed. (London: Sweet & Maxwell, 2008) at 6-087; and *Cheshire, Fifoot*

& Furmston's Law of Contract, 15th ed. (Oxford: Oxford University Press, 2007) at 531.

[32] In *Stenhouse Australia Ltd. v. Phillips*, [1974] A.C. 391, the Judicial Committee of the Privy Council considered the terms of an agreement between an insurance broker and his employer for the termination of his employment. For a period of five years from his termination, the employee was precluded from soliciting the employer's clients. Further, in the event they placed any insurance business in that time from which the employee derived a financial benefit, he was required to pay the employer one-half of the gross commission he received. Both the soliciting provision and the payment provision were held to be a restraint of trade. The first was determined to be enforceable; the second was not. With respect to the second, speaking for the Committee, consistent with English law, Lord Wilberforce said (p. 402):

> … It is not on the face of it a restraint at all, but a provision for the payment of money: it was described by counsel for the appellant as a profit-sharing agreement. And it was submitted that, as such, the court should not inquire whether it was burdensome, or one sided. The judge took a different view, holding that it operated in restraint of trade and that it was not shown to be reasonable.
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> Their Lordships on the whole agree with this view. Whether a particular provision operates in restraint of trade is to be determined not by the form the stipulation wears, but, as the statement of the question itself shows, by its effect in practice. Such approach to provisions of this kind has been endorsed by the High Court in the recent decision of *Howard F. Hudson Pty. Ltd. v. Ronayne* (1972) 46 A.L.J.R. 173, which in turn is in line with English decisions: cf. *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.* [1968] A.C. 269. The clause in question here contains no direct covenant to abstain from any kind of competition or business, but the question to be answered is whether, in effect, it is likely to cause the employee to refuse business which otherwise he would take: or, looking at it another way, whether the existence of this provision would diminish his prospects of employment. Judged by this test, their Lordships have no doubt that the clause operates in restraint of trade. ...
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> [Emphasis added.]

[33] Various trial courts in this country have adopted the proposition: *Furlong v. Burns & Co.* (1964), 43 D.L.R. (2d) 689 (Ont. H.C.); *Colonial Broadcasting System*

Ltd. v. Russell (1964), 48 D.L.R. (2d) 242 (Nfld. S.C.); and *Taylor v. McQuilkin* (1968), 2 D.L.R. (3d) 463 (Man. Q.B.).

[34] Here, as indicated, the judge followed *Canaccord,* citing no other authority on the point. *Canaccord* is a superior trial court decision in this jurisdiction citing only *Sacallis v. Georgia Pacific Securities Corp*., [1998] B.C.J. No. 2987 (Prov. Ct.), in support of holding a clause in an employment contract requiring the repaying of training expenses in the event of post-employment competition to be a restraint of trade. *Sacallis* is a decision of the Provincial Court where a similar clause in an employment contract was considered. There, citing *Wyatt* and *Bull v. Pitney-Bowes,* the inducement to forego pursuing one's trade or profession was said to form the substance of the restraint.

[35] On the other hand, however, is authority stemming from Ontario, which favours the formalistic approach. *Inglis v. The Great West Life Assurance Co.*, [1941] O.R. 305 (C.A.), appears to stand as the only provincial court of appeal decision on the point in this country. The Ontario Court of Appeal held there to be no restraint where the continuation of commissions payable to a departed employee was subject to the employee not becoming connected with another life insurance company, as he did. The conclusion was stated as follows (p 311):

> The Court is also agreed that clause 17 is not in restraint of trade. The plaintiff was not thereby precluded from himself cancelling the agreement or from going anywhere and doing anything he chose to do, and there was no restraint of any kind on his activities. He voluntarily joined the staff of the Monarch Life Company with the agreement before him and with its provision definitely there stated, and he is bound by his own agreement.

[36] This logic has been followed and expanded upon. In *Renaud v. Graham*, [2009] O.J. No. 597 (Div. Ct.), based on *Inglis,* a trial court determination that a clause providing a pre-estimate of real estate agent training costs to be repaid in the event of post-employment competition with the employer did not constitute a restraint of trade was upheld.

[37] Earlier in *Nortel Networks Corp. v. Jervis*, [2002] O.J. No. 12, 2002 CanLII 49617 (S.C.J.), consideration was given to the enforceability of a plan offering

annual stock options to employees, with provision for payments to be made to the employer if an employee accepted competitive employment within a year of an option being exercised. Citing *Inglis*, the subject clause was held not to be a restraint of trade because an employee "was not precluded from going elsewhere or from doing whatever he chose to do" (para. 32).

[38] Most recently, in *Levinsky v. The Toronto-Dominion Bank*, 2013 ONSC 5657, an enlightening discussion of the law was undertaken and the competing lines of authority thoroughly canvassed. The judge surveyed many of the authorities discussed above, amongst others, and found that *Inglis* remained binding on him, including the determination that clauses which do not preclude an employee "from going anywhere and doing anything he chose to do" will not be considered to constitute a restraint (para. 80). At the same time, he appears to have endorsed the functionalist approach, in noting that, "Whether a particular provision operates in restraint of trade falls to be determined not merely by the form of the clause, but by the effect of the clause in practice" (para. 50), citing *Stenhouse*. The circumstances were, however, such that the judge found there was no restraint in a deferred compensation program where the loss of payment was not in any way tied to post-employment competitive activity.

[39] Further authority lending support, at least to some extent, to the proposition that mere economic disincentive tied to post-employment competition does not constitute a restraint of trade is to be found in *Webster v. Excelsior Life Insurance Company* (1984), 50 B.C.L.R. 381 (S.C.); *Roy v. Assumption Mutual Life Insurance Co.* (2000), 222 N.B.R. (2d) 316 (Q.B.); and *Meszaros v. Barnes* (1977), 73 D.L.R. (3d) 407 (Man. Q.B.), where in each instance *Inglis* was cited and followed.

[40] This Court does not appear to have found it necessary to decide whether contractual provisions that do not contain an express prohibition concerning competition, whether in the context of an employment contract or otherwise, can constitute restraint of trade. The point was raised In *Burgess v. Industrial Frictions & Supply Co.* (1987), 12 B.C.L.R. (2d) 85 (C.A.). There the principal transferred his

shares to his company on terms whereby he was to be paid in instalments that were subject to forfeiture if he did not continue to act as a fiduciary. The agreement also contained a conventional non-competition clause. In considering the implication of the principal's conduct which caused the company to discontinue the payments, the majority distinguished the prohibition from the financial disincentive (p. 94):

> Clause 10 imposes an absolute prohibition for five years of the right to work in any business carried on by Industrial, in any capacity, anywhere in British Columbia or Alberta. Clause 3 is quite different. It does not prohibit Burgess' working for competitors; it only says that if he does so during the currency of the agreement in such a way that he is in breach of the fiduciary obligation he has assumed, he will lose his right to payment by Industrial. It is not a prohibition, but an economic disincentive.

[41] With respect to the fiduciary obligation upon which the company relied, the decision proceeded on the assumption "(without deciding) that the doctrine of restraint of trade may apply to provisions other than direct restrictions on the right to work or trade" (p. 95). Recognizing that considerations of public interest differ between contracts of employment and agreements for the sale of a business, the clause was held to be reasonable and enforceable such that the company prevailed.

[42] Here, against this background of conflicting authority, like the judge, I consider clause 11 of the associate agreement constitutes a restraint of trade. In my view, the functionalist approach established in English law is to be preferred as the legal basis for determining whether clauses that burden employees with financial consequences, whether by payment or forfeiture, they would not otherwise have for engaging in post-employment competition constitute a restraint on trade. In the words of Lord Wilberforce, it is a matter of the effect of the clause in practice over its form.

[43] While clause 11 is not a conventional non-competition clause in that it contains no prohibition, it is, as its title in the agreement suggests, a kind of non-competition clause because it effectively provides for no competition within the stipulated radius during a three-year period after the termination of the associate agreement in the absence of the required payment. The payment is a restraint – it compromises the opportunity to compete with the clinic Dr. Rhebergen would other-

wise have. The clause requiring the payment then constitutes a restraint of trade and is enforceable only if, in the circumstances, it can be said to be reasonable.

[44] I turn then to consider the clinic's contentions that the judge erred in determining the clause to be unreasonable in two respects: it imposes a penalty and its wording is ambiguous.

Penalty

[45] As indicated, a determination of whether the amount to be paid by Dr. Rhebergen upon setting up a competing practice was a proper measure of liquidated damages or a penalty, was considered by the judge to be essential to his assessment of the reasonableness of clause 11 in terms of its overall fairness. He found justification for the approach he took in the nature of the clause: it creates no "absolute prohibition". He said the amount would not have rendered the clause unreasonable had it been a proper pre-estimate of damages, but he determined it to be a penalty.

[46] Where provided, the amount to be paid in damages for breach of the prohibition in conventional post-employment non-competition clauses appears not to be a consideration in assessing reasonableness. As in *Elsley,* the assessment is confined to the reasonableness of the restraint imposed by the prohibition. The characterization of any amount payable for breach of the prohibition, whether a pre-estimate of damages or a penalty, is a separate consideration bearing only on the amount recoverable. The imposition of what may be determined to be a penalty does not render the clause unreasonable. See, for example, *H.F. Clarke Limited v. Thermidaire Corp. Ltd.,* [1976] 1 S.C.R. 319, where a non-competition clause was considered, although not in the context of a contract of employment.

[47] There may then be no established legal basis upon which it could be said the amount to be paid under a permissive post-employment clause may render the clause unreasonable. This may appear particularly so given that the clause constitutes a restraint of trade only because it has the practical effect of a prohibition

clause. But on the judge's reasoning, what would not be a factor in the overall fairness of a prohibition clause becomes essential to the consideration of the fairness of a permissive clause and clause 11 in particular.

[48] While the authorities shed little light on the point, consideration of the amount to be paid may, in my view, be supportable in law as a significant factor to be taken into account in the overall fairness of a permissive clause. Under a conventional non-competition clause, the prohibition constitutes the restraint and is what must be reasonable to be enforceable; under a permissive clause it is, if anything, the amount to be paid, or for that matter forfeited, that constitutes the restraint and may have to be considered as an element of the fairness of a non-competition clause of that kind.

[49] However, the legal basis of the approach the judge took in considering whether the amount is a penalty is not in itself free of difficulty. That is because the amount to be paid by Dr. Rhebergen is not an amount fixed in advance to be forfeited for breach of a contractual obligation, as may be the case in a conventional prohibitory clause, but rather an amount she is to pay upon the occurrence of an event: setting up a competing practice. In law, provision for a payment of that kind does not generally give rise to any question of a penalty: *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. – Canada*, 2007 BCCA 88 at paras. 121-125 and the authority cited.

[50] In any event, the judge does appear to have misapprehended the basis on which the payment to be made by Dr. Rhebergen was calculated. The evidence seems clear; the $150,000 payable if she were to set up a competing practice within a year of the agreement being terminated has two components as outlined. The first represents the concerted effort Dr. McLeod and Mr. Wallis made to calculate what could be the unrecoverable mentoring, training, and equipment costs to the clinic if Dr. Rhebergen did not stay there for three years. The salary she was paid was stated to have been "on top of" that amount. The second is what was thought could be the impact on the clinic's goodwill and the volume of business if she was to

compete within the first year of leaving. The calculated costs are not particularized as they might have been, but Dr. Rhebergen does not challenge, in cross-examination or otherwise, the evidentiary basis of the calculations made by Dr. McLeod and Mr. Wallis and, on the evidence, it cannot be said they are other than as sound as the circumstances permitted.

[51] While the unrecoverable costs to the clinic of Dr. Rhebergen leaving and competing within the three-year term of the agreement may vary depending when she was to leave, on the unchallenged evidence, properly understood, the amount to be paid could certainly not be said to be extravagant and unconscionable in comparison with the greatest costs to the clinic that could be proved. The judge's determination that it constituted a penalty was without evidentiary support.

[52] In the end, the reasonableness of clause 11 must be considered free of any suggestion it constitutes a penalty to be borne by Dr. Rhebergen if she chooses to set up a veterinary practice that will require her to pay the clinic the designated amount.

Ambiguity

[53] To be reasonable, a clause which constitutes a restraint of trade must be clear in its meaning. In *Shafron*, consideration was given to the ambiguity in the meaning of a geographical description ("Metropolitan City of Vancouver") contained in prohibitive non-competition provisions of a contract for the continuing employment of the principal of a business that had been sold. There it was said:

> [27] However, for a determination of reasonableness to be made, the terms of the restrictive covenant must be unambiguous. The reasonableness of a covenant cannot be determined without first establishing the meaning of the covenant. The onus is on the party seeking to enforce the restrictive covenant to show the reasonableness of its terms. An ambiguous restrictive covenant will be *prima facie* unenforceable because the party seeking enforcement will be unable to demonstrate reasonableness in the face of an ambiguity.
>
> * * *
>
> [43] Normally, the reasonableness of a restrictive covenant is determined by considering the extent of the activity sought to be prohibited and the extent of the temporal and spatial scope of the prohibition. This case is different

> because of the added issue of ambiguity. As indicated, a restrictive covenant is *prima facie* unenforceable unless it is shown to be reasonable. However, if the covenant is ambiguous, in the sense that what is prohibited is not clear as to activity, time, or geography, it is not possible to demonstrate that it is reasonable. Thus, an ambiguous restrictive covenant is, by definition, *prima facie* unreasonable and unenforceable. Only if the ambiguity can be resolved is it then possible to determine whether the unambiguous restrictive covenant is reasonable.

[54] Generally a court must endeavour to resolve ambiguity in order to determine the mutual intention of the parties to a contract by interpreting the wording of any given clause in the context of the whole of the agreement as well as the factual matrix that gave rise to the agreement and against which it is intended to operate: *Jacobsen v. Bergman*, 2002 BCCA 102, paras. 3-6. Recourse to extrinsic evidence for that purpose may be had but only if what can be said to be the mutual intention of the parties cannot otherwise be objectively derived: *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459 at para. 23.

[55] That said, however, in *Shafron* the Supreme Court saw the demand for clarity in respect of restraint of trade as particularly high and (at para. 47) it found error in this Court having employed "its notion of reasonableness and what it thought the parties might have intended" to resolve the ambiguity. While a court will generally go some distance to interpret contractual provisions in commercial agreements in a manner that can be said to reasonably give effect to the parties' intended purpose and yield a fair result, it is said "a restrictive covenant is interpreted in a fashion which reflects the common law's historical antipathy towards restraints on trade" and will be "interpreted strictly, with clear language being required to create one" (Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d ed. (Markham, Ont.: LexisNexis, 2012) at 314). Further, as recognized by this Court in *Valley First Financial Services Ltd. v. Trach,* 2004 BCCA 312 at para. 44, "a restrictive covenant in a contract of employment will be construed more strictly against the employer than a restrictive covenant in a contract for the sale of a business against the seller". Thus, the principles that govern the interpretation of contractual terms are to some extent attenuated in favour of the employee who is faced with an ambiguous provision in a contract of employment that would compromise the employee's ability

to compete with the employer. There is no place for an ambiguity the resolution of which is not readily apparent.

[56] Here, clause 11, s. 1, reflects the circumstances in material respect. Dr. Rhebergen was to be in a close working relationship with the clinic's clientele. That would be detrimental to the clinic if she were to compete with it. If her employment were terminated, the clinic would have invested in her training as a newly licensed associate only to have her take advantage of having been introduced to its clientele. Clause 11, s. 2, addresses the concern to the extent the parties saw fit. To repeat, it provides Dr. Rhebergen must make a prescribed payment to the clinic in the first three years of her employment being terminated: "if … she sets up a veterinary practice in Creston, BC or within a twenty-five (25) mile radius in British Columbia of CVC's place of business in Creston, BC, she will pay CVC the following amounts: If her practice is set up within one (1) year of termination of [the] contract - $150,000" with reduced amounts if her practice is set up within two or three years of the contract being terminated.

[57] Before the judge the clinic contended it was not open to Dr. Rhebergen to argue the wording of clause 11 was ambiguous because ambiguity had not been pleaded. The judge rejected the contention and the clinic does not now raise his having done so as a ground of appeal. Rather it argues the interpretation of the wording through several pages of its factum and in its submissions made at the hearing of the appeal, although, while it maintains the words ought to be given their plain and ordinary meaning, it does not purport to say what that meaning is.

[58] The judge said he considered the words "sets up a veterinary practice" had a variety of meanings, although he did not say what they are. Rather, as indicated, he posed questions that illustrate the uncertainty that arises if setting up a practice were to mean no more than opening a clinic or a base for a mobile service. Attributing that meaning to the words would defeat the purpose of clause 11. Given that competition is the concern the clause was to address, the parties cannot have intended Dr. Rhebergen could open a clinic just outside the 25-mile radius around

Creston and then provide veterinary services on an ongoing basis within that radius without incurring liability, whereas if she opened a clinic within the radius but rendered services entirely beyond it, she would have to pay.

[59] While it might not be clear, I consider a professional practice, whether it be medical, accounting, or legal, may be said to be set up or established where it is being conducted as opposed to merely where the location of any facility opened to support the practice may be. Thus, Dr. Rhebergen would become liable to pay the clinic the stipulated amount when – but only when – it could be said there is a veterinary practice being conducted within a 25-mile radius of Creston that she has set up.

[60] There is an important distinction to be drawn between practising, or providing professional services, and setting up a practice as made evident in *Chitty on Contracts,* 30th ed. at §16-114 in discussing the distinction between practise and setting up *in* practice:

> A covenant by a doctor not to practise within an area is broken by attendance on patients in that area, even though he does not solicit such patients, but he does not "set up in practice," though he does "practise", by attending a few patients within the prohibited area at their own request, he having no residence or premises within the area….

[61] The authority cited for those propositions is *Rogers v. Drury* (1887), 57 L.J. Ch. 504, and *Robertson v. Buchanan* (1904), 73 L.J. Ch. 408. In the latter, the Court of Appeal considered the terms of the sale of a medical practice that provided the seller was not to "set up in practice" within a two-mile radius of the house from which his practice had been carried on. He commenced practising from a house nearby but outside the radius. He then attended once on each of two of his former patients within the radius. The purchaser sought an injunction. It was denied on the basis the doctor had not set up in practice within the prohibited area. Only the interpretation of the provision, not its enforceability, was in issue, although it was observed the uncertainty inherent in the wording would lead to further difficulties in the absence of the parties being "guided by common-sense and a friendly spirit". The following reasoning was advanced (p. 410):

> I do not think that the words "set up in practice" mean the same thing as "practise". If the words had been "not to practise" it would have been very difficult, if not impossible, for the defendant to justify attending a single patient for remuneration within the limits named. I think that the parties had this intent in their minds, and I am partly confirmed in that conclusion by the evidence. The defendant did not covenant not to "practise" but covenanted not to "set up in practice." In my judgment, they are very different things, and a man may well commit a breach of a covenant not to practise by an act which would not constitute a breach of a covenant not to set up in practice, and I believe that distinction was present to the minds of the parties.

[62] The same reasoning is applicable now. Clause 11 does not render Dr. Rhebergen liable to the clinic for providing veterinary services *per se* as it might have. Indeed the parties could not have intended Dr. Rhebergen, a newly licensed associate, would have to pay the clinic as much as $150,000 if she provided any veterinary service within the designated radius however minimal or infrequent the service she rendered might be. Simply engaging in the practise of veterinary medicine to treat a farm animal or a domestic pet could not mean a veterinary practice had been set up, and it is not a matter of what Dr. Rhebergen might want to do or take steps to achieve in that regard. No liability would arise until she had a practice established.

[63] A professional practice is an asset. Practices are owned; they are bought and sold. They consist primarily of a client base, whether large or small. Generally at some point a professional person who is providing services, which entail practising, can be said to have set up a practice as Dr. Rhebergen pleads she intends. But I do not consider that when the associate agreement was signed it could have been said with any certainty, nor can it be said now, at what point in any provision of veterinary services Dr. Rhebergen would have a practice that she had set up within the designated radius. Viewed objectively, had they been asked, the parties could not have answered.

[64] The uncertainty lies in there being no prescribed or understood basis upon which it can be said a professional practice has been established in the circumstances. Once it is accepted Dr. Rhebergen can engage in some measure of practice, however limited, without incurring liability to the clinic, it cannot be said how

many animals, on how many occasions, with what frequency, for how long, and over what period of time she could render treatment before she would have crossed the line, so to speak, and become liable to pay the clinic $150,000 because a practice had been set up. The phrase "set up a veterinary practice" is simply not definitive. The meaning is not clear and it renders clause 11, s. 2 ambiguous.

[65] The ambiguity is not capable of being resolved on a consideration of the associate agreement as a whole or the factual matrix that gave rise to it. What might be said to be the mutual intention of the parties cannot be discerned. The only extrinsic evidence referenced does not advance the inquiry. When Dr. Rhebergen was offered a position as an associate with the clinic, the e-mail message she received contained the following:

> Contract will include a restrictive covenant the purpose of which would not be to restrict your ability to leave the practice if you so choose but to recognise the significant investment Creston Veterinary Hospital would be putting into your training and the transfer of goodwill – as such a dollar figure would be assigned to it that would be paid by you to Creston Veterinary Hospital if you wanted to start your own practice in the Creston area following working for us. The amount will vary dependent on time worked and will be reasonable.

[66] There can be little confidence in this statement being indicative of what the parties ultimately intended given that contrary to what was said there, under the associate agreement Dr. Rhebergen's ability to leave the practice was expressly restricted and the amount to be paid under clause 11, s. 2 does not vary depending on the time she worked. Further, the suggestion that Dr. Rhebergen may want to start her own practice does not assist in clarifying the terms ultimately agreed in respect of her doing so in any event.

[67] It is, in my view, imperative that a non-competition clause of any kind in a contract of employment be clear: free of ambiguity that cannot be resolved with certainty such as to leave no doubt as to what the parties can be said to have intended. "[T]he onus on the employer to draft a clear restraint is not a light one" (Stacey Reginald Ball, *Canadian Employment Law,* looseleaf (Toronto: Canada Law Book, 2013) at §7:30.5.). Employees must know, in no uncertain terms, the extent

to which their post-employment opportunities are compromised, which is one reason a rigorous analysis is warranted. For this reason, if competition can be curtailed on any reasonable basis, a prohibitive clause, which states in definitive terms what an employee must not do such that the employer is afforded the right to injunctive relief or perhaps damages (pre-estimated or otherwise) in the event of a breach, is entirely preferable to a permissive clause such as was incorporated in Dr. Rhebergen's associate agreement.

[68] Here it was essential that Dr. Rhebergen knew where she stood if her contract was terminated – knew to what extent she might provide veterinary services in, or within 25 miles of, Creston before becoming liable to pay the clinic a substantial sum of money. On the wording of clause 11, s. 2, that is something that could not be determined. The clause is ambiguous. As such, it is a restraint of trade that, as the judge concluded, is not reasonable.

Conclusion

[69] Clause 11 constitutes a restraint of trade. It cannot be said to be reasonable because the wording of clause 11 (specifically s. 2) is ambiguous and the ambiguity cannot be resolved with any certainty: the mutual intention of the parties cannot be determined. The clause is accordingly not enforceable. It then becomes unnecessary to undertake an assessment of its overall reasonableness on the criteria summarized in *Aurum Ceramic Dental Laboratories*, upon which the judge relied in his analysis, that would otherwise have been essential. Whether a non-solicitation clause would have been sufficient, as Dr. Rhebergen contends, need not be considered.

Disposition

[70] I would dismiss the appeal.

"The Honourable Mr. Justice Lowry"

Reasons for Judgment of the Honourable Madam Justice D. Smith:

[71] I have had the opportunity to review the draft reasons of my colleague Mr. Justice Lowry. I agree with his adoption of the functionalist approach in upholding the chambers judge's finding that the impugned "non-competition" clause 11, s. 2, of the agreement is *prima facie* a restraint of trade. I also agree with his conclusion that the lump sum amounts triggered if Dr. Rhebergen "sets up a practice" as provided for in clause 11, s. 2, are not a penalty but rather compensation for the costs incurred by the clinic in training Dr. Rhebergen and which Dr. Rhebergen has acknowledged were reasonable. I am unable to agree, however, with my colleague's conclusion that clause 11, s. 2, is ambiguous and therefore unreasonable and unenforceable.

[72] A covenant is ambiguous if it is "not clear as to activity, time, or geography": *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157 at para. 43. The question here is whether the compensable activity in clause 11, s. 2, described as "set[ting] up a veterinary practice", is unclear. The clause will only be ambiguous if it cannot objectively be determined when the compensation provisions are triggered.

[73] The contractual intent of parties to an agreement must be objectively determined. This is achieved by construing the plain and ordinary meaning of the impugned words, not in isolation, but in the context of the agreement as a whole and the factual matrix (or surrounding circumstances) in which the agreement was reached. Evidence of the factual matrix includes "circumstances known to both parties that illuminate the meaning a reasonable person would give to the words employed": *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459 at para. 24, 57 B.C.L.R. (4th) 212. Ambiguity only arises where, "on a fair reading of the agreement as a whole", the language of a provision is reasonably capable of more than one meaning: *Water Street Pictures Ltd.* at paras. 23-24, and 26.

[74] A clause is not ambiguous simply because of a difference of opinion as to whether the hypothetical activity triggers the compensable provision. If the clause

can be construed by an application of the plain and ordinary meaning of its words and the ordinary rules of grammar, then the clause is not ambiguous. In deciding on the applicability of the *contra proferentem* doctrine, which is also premised on a finding of ambiguity, Ritchie J., in his concurring reasons in *Survey Aircraft Ltd. v. Stevenson,* [1962] S.C.R. 555 at 563, said the following:

> In my view the principle was correctly stated by Lord Sumner in *London and Lancashire Fire Insurance Company v. Bolands, Limited* [[1924] A.C. 836 at 848], and the following language in my opinion has direct application to the present case:
>
> > It is suggested further that there is some ambiguity about the proviso, and that, under the various well-known authorities, upon the principle of reading words contra proferentes, we ought to construe this proviso, which is in favour of the insurance company, adversely to them. That, however, is a principle which depends upon there being some ambiguity–that is to say, some choice of an expression–*by those who are responsible for putting forward the clause,* which leaves one unable to decide which of two meanings is the right one. In the present case it is a question only of construction. There may be some difficulty, there may be even some difference of opinion, about the construction, but it is a question quite capable of being solved by the ordinary rules of grammar, and it appears to me that there is no ground for saying that there is such an ambiguity as would warrant us in reading the clause otherwise than in accordance with its express terms. (The italics are [Ritchie J.'s].)

[75] The principal consideration in determining the objective meaning of a contractual provision of this nature is the purpose or object for which the provision was included: *Turner v. Evans* (1853), 118 E.R. 860 (Q.B.); *Hadsley v. Dayer-Smith,* [1914] A.C. 979 (H.L.). Here, the purpose of clause 11, s. 2, is clearly set out in clause 11, s. 1: it is to discourage Dr. Rhebergen from using the advantages (the knowledge and close working relationship with the clinic's "patients and clients") gained through her employment with the clinic in order to compete for its "patients and clients". In construing the meaning of "setting up a veterinary practice" the court must ascribe a reasonable meaning to the phrase that is consistent with its purpose.

[76] Of some import is the factual matrix in which the agreement was reached. There are no other established veterinary clinics within a 60-mile radius generally or within a 100-mile radius in Canada. (The geographic coverage of clause 11, s. 2, is

limited to a 25-mile radius of the clinic's place of business in Creston.) In addition, the principal source of the clinic's business is the eight dairy herds in the Creston Valley, all of which are situated within the geographic scope of the clause. This is also Dr. Rhebergen's stated area of interest.

[77] The underlying action was commenced by Dr. Rhebergen. She sought a declaration that clause 11 of the agreement was "unreasonable, void in law, and unenforceable". In her notice of civil claim she pleaded:

> 10. The Plaintiff intends to set up a mobile dairy veterinary practice in Creston, BC and vicinity. [Emphasis added.]

[78] Her pleadings raise no issue of ambiguity with respect to the non-competition clause. Although her pleadings raise the issue of ambiguity in relation to clause 12, s. 4, which is not at issue in this appeal, she does not allege clause 11, s. 2, is ambiguous. The focus of Dr. Rhebergen's claim is that the clause is unreasonable because it amounts to a restraint of trade which, in the employment context, is unreasonable and therefore unenforceable. In its response, the clinic pleaded that there was no ambiguity in clause 11 or in the agreement in general. Dr. Rhebergen filed no reply on that issue and accordingly there was joinder on the issue that clause 11 was unambiguous. This issue became the subject of additional written submissions at trial.

[79] Can it be said, therefore, that in these circumstances there could be more than one reasonable interpretation of the words "to set up a practice" such that "it cannot be objectively said what agreement the parties made" (*Water Street Pictures Ltd.* at para. 26)? The chambers judge found that there was more than one reasonable interpretation, posing the following hypothetical scenarios:

> [24] … "[S]ets up a veterinary practice" can mean a variety of things. Does it prevent the plaintiff from practising veterinary medicine within that radius if her practice is based elsewhere? For example, if her office were outside the 25-mile radius, could she provide services inside the 25-mile radius? Conversely, does the covenant prohibit her from having an office within the 25-mile radius, but only doing veterinary work outside the 25-mile radius? What if she established an office with other veterinarians inside the 25-mile radius but did not personally conduct work within that radius? What if, as the plaintiff has suggested she may do, she seeks to set up a mobile veterinary practice with no specific physical location, but does some work within that radius? What if she joined another practice that started within that radius but did not herself participate in establishing it or "setting it up"?

[80] Justice Lowry, based on the reasoning in *Robertson v. Buchanan* (1904), 73 L.J. Ch. 408, also concludes that the provision is ambiguous because it does not identify to what extent Dr. Rhebergen's provision of veterinary services in the geographic scope of the clause would trigger the compensation provisions.

[81] With respect, it seems to me that both analyses ignore the plain and ordinary meaning of the words used by the parties, the factual matrix in which the agreement was made and the manner in which the issue was brought before the court.

[82] The plain and ordinary meaning of the words "to set up a practice" implies a degree of permanency that comes from a continuous or regular provision of professional services. The term used in *Robertson* (at 410) was "habitually". Clause 11, s. 1, which identifies the purpose of clause 11, s. 2, as the protection against direct competition by Dr. Rhebergen for the clinic's patients and clients by reason of her knowledge and close working relationship with them, also objectively informs the meaning of the phrase. The concern over direct competition by Dr. Rhebergen for a significant part of the clinic's business – the eight dairy herds – also implies a continuous provision of veterinary services.

[83] Dr. Rhebergen also used that language in para. 10 of her pleadings, quoted at para. 77 above, and in her affidavit in support of her application for a declaration of unenforceability, in which she refers to having "been approached by several people in the Creston community who have encouraged me to set up my own veterinary clinic so that they might have an alternative to the Creston Veterinary

Hospital" [emphasis added]. This terminology suggests a common understanding of what is meant by "to set up a practice". I agree with my colleague that resort cannot be had to extrinsic evidence of the parties' negotiations in determining whether the clause is ambiguous. However, Dr. Rhebergen's stated intention when she commenced this action was to "set up" a practice in order to compete with the clinic for its existing clients. In my view, Dr. Rhebergen's pleadings indicate she understood her proposed plan contravened clause 11, s. 2, and she cannot now be heard to say that the clause does not adequately delineate the compensable activity. Respectfully, I am unable to agree with my colleague that any provision that falls short of being "definitive" in all imaginable circumstances is ambiguous.

[84] The factual matrix for the agreement is also significant. The Creston Valley is a rural and relatively sparsely populated area of the province. In these circumstances, the distinction between "set up in practice" and "to practise" identified in *Robertson* is a distinction without a difference. It simply has no practical effect. In the absence of any other established clinic in the area, Dr. Rhebergen cannot provide veterinary services in the area without setting up her own practice. Moreover, the backbone of the clinic's business is the only eight dairy herds in the Creston Valley. Dr. Rhebergen was aware of this circumstance when she accepted the clinic's offer of employment, as this was her area of interest.

[85] Dr. Rhebergen effectively brings a stated case in the underlying action to determine if a mobile dairy veterinary practice is captured by clause 11, s. 2. The only dairy herds in the Creston Valley are the clinic's patients and clients. They are the target of her proposed practice and are situated within the 25-mile radius of Creston. I agree with Lowry J.A. that the issue is not where Dr. Rhebergen might open a clinic or base her mobile practice, but where that practice is conducted. In my opinion, the hypothetical scenarios posited by the chambers judge have no basis in the reality of a dairy practice in the Creston Valley. It matters not, in my view, where on the spectrum Dr. Rhebergen proposes to provide veterinary services within the 25-mile radius of Creston. If her intention is to provide those services on a regular or continuous basis they will, in my view, trigger the non-competition clause.

That is the only reasonable interpretation that, in my view, could be made on a fair reading of the clause.

[86] In the result, I would allow the appeal and dismiss the action.

"The Honourable Madam Justice D. Smith"

I agree:

"The Honourable Madam Justice Bennett"