SJC-12740

AUTOMILE HOLDINGS, LLC, & others[1] vs. MATTHEW McGOVERN & others.[2]

Suffolk. October 1, 2019. - January 14, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Corporation, Close corporation. Contract, Agreement not to compete, Performance and breach. Damages, Breach of contract. Injunction. Practice, Civil, Injunctive relief.

Civil action commenced in the Superior Court Department on November 21, 2017.

The case was heard by Mitchell H. Kaplan, J.

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[1] AMR Real Estate Holdings, LLC; AMR Real Estate Holdings, LLC, Hanover Series; AMR Real Estate Holdings, LLC, Westwood Series; AMR Real Estate Holdings, LLC, West Roxbury Series; AMR Real Estate Holdings, LLC, West Roxbury II Series; AMR Real Estate Holdings, LLC, Walpole Series; AMR Real Estate Holdings, LLC North Hampton Series; AMR Real Estate Holdings II, LLC; Saco Auto Holdings, LLC; Saco Real Estate Holdings, LLC; Real Estate Holdings, LLC, Saco I Series; Saco Real Estate Holdings, LLC, Saco II Series; Saco Real Estate Holdings, LLC, Saco III Series; Saco Real Estate Holdings, LLC, Saco IV Series; AMR Auto Holdings-TY, LLC; AMR Auto Holdings-TH, LLC; AMR Auto Holdings-TO, LLC; and AMR Auto Holdings-LN, LLC.

[2] McGovern Auto Group Corp. Services, Inc.; and Timothy Fallows.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Benjamin M. McGovern (Robert M. Shaw also present) for the defendants.
Liam T. O'Connell (Brian K. Lee also present) for the plaintiffs.

KAFKER, J. At issue in the instant case is an "anti-raiding" restrictive covenant entered into between an automotive dealership group and a former executive and minority owner. The provision at issue prohibited defendant Matthew McGovern from soliciting or hiring employees from his former company for a defined period of time. The restriction was designed to prevent McGovern from "raiding" the company by targeting and soliciting key employees to work for him. In spite of this provision, McGovern went on to hire numerous employees from his former company in breach of the restrictive covenant. This suit quickly followed.

A judge in the Superior Court concluded that the restrictive covenant at issue was enforceable. He determined that, in the case at bar, the anti-raiding purpose of the provision constituted a legitimate business interest. The judge further concluded that McGovern had committed a breach of the covenant by hiring at least three employees from his former company. Further, the judge found that McGovern had

misrepresented the nature of a transaction to the court in order to obfuscate his violation of the restrictive covenant. The judge declined to enjoin the three employees McGovern had hired from continuing to work for him. Instead, the judge issued injunctive relief extending the length of the restrictive covenant for one additional year beyond the end date provided for in the contract. On appeal, the parties contest whether such a provision is necessary to protect a legitimate business interest. They also disagree as to whether the judge may use the court's equitable powers to extend the length of the restrictive covenant beyond the terms of the contract.

We conclude that, in the factual circumstances of this case, the restrictive covenant was necessary to protect a legitimate business interest. In reaching that conclusion, we observe that the restrictive covenant at issue is more properly considered as arising from the sale of a business rather than from an employment agreement, and thus is to be more liberally construed.

It is clear from the record below, and at this point appears undisputed, that the defendant committed a breach of the anti-raiding provision. However, the equitable remedy fashioned by the trial judge, which expanded the restrictive covenant beyond its plain terms, constituted an abuse of discretion where, as here, the plaintiffs had not yet attempted to

calculate monetary damages. As a matter of public policy, we strongly disfavor restrictive covenants, and the use of an equitable remedy to extend such a restriction beyond the plain terms of the contract, even in the context of a sale of a business, was not warranted without a finding that damages would be inadequate.

1. Facts. We summarize the facts as found by the trial judge,[3] supplemented by uncontested facts from the record. See Connor v. Benedict, 481 Mass. 567, 568 (2019).

a. Background. In November 2007, David Rosenberg founded Prime Motor Group (Prime)[4] with McGovern and David Abrams. The company was a closely held corporation created to manage a number of retail automobile dealerships in New England. Abrams was a friend of Rosenberg, and his company, Abrams Capital, became the majority shareholder in Prime. Rosenberg, Rosenberg's father, and McGovern became minority shareholders. McGovern was initially employed as Prime's chief financial officer. He later became the vice-president of operations.

[3] The parties waived detailed findings of fact and conclusions of law. The judge nevertheless provided some oral findings in open court upon issuing his decision.

[4] The plaintiffs in this case consist of a group of limited liability companies that are affiliated with, and collectively operate as, Prime Motor Group. For simplicity, we will refer to these entities as "Prime dealerships" or simply "Prime," except where specifically noted.

Rosenberg worked as the company's chief executive officer and president.

In 2015, disagreements arose among Rosenberg, Abrams, and McGovern in relation to a decision to sell the company. In February 2016, these disagreements led Abrams and Rosenberg to terminate McGovern's employment. At the time of his termination, McGovern was not subject to a noncompete agreement. McGovern also did not have a right to redeem his minority interest in Prime upon termination. As this was a closely held corporation, however, he was owed fiduciary duties. See Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 850 (1976).

b. Sale of McGovern's interest in Prime. At the time of McGovern's termination, Rosenberg offered to purchase McGovern's minority interest. Because Prime was a closely held corporation, McGovern's minority interest was illiquid. Thus, Rosenberg only offered to purchase McGovern's interest subject to a thirty percent discount on its fair market value. Rosenberg also wanted McGovern to agree to a five-year nonsolicitation provision. McGovern rejected the offer.

Abrams and Rosenberg subsequently took steps to pressure McGovern to sell his interest in Prime prior to an expected liquidity event. First, they amended Prime's operating agreement to remove a provision that allowed for the distribution of profits sufficient to cover the owners' tax

liabilities. Such provisions are commonplace, and without it, McGovern faced a tax liability of between $500,000 and $600,000 for the 2015 tax year. Additionally, Abrams and Rosenberg denied McGovern access to Prime's financial information, leaving McGovern unable to calculate his expected tax obligation for the 2016 tax year. Abrams and Rosenberg also demanded that McGovern and his wife return the company vehicles they had been using and threatened to report McGovern to the authorities as being in possession of stolen automobiles. As the trial judge remarked, these tactics amounted to Rosenberg and Abrams applying "as much pressure as they could manage to put on [McGovern] to take the best deal they could get" in purchasing McGovern's minority stake before the company's anticipated liquidity event.

At the same time that Abrams and Rosenberg were pressuring McGovern to sell his interest in Prime, McGovern was in the process of starting his own competing automotive group, McGovern Motors. McGovern was thus short on cash both to cover his tax liability and to fund his new business. Due to this financial pressure, McGovern entered into negotiations with Abrams and Rosenberg to sell his interest in Prime. McGovern was represented by counsel in these negotiations, as was Prime.

McGovern, Abrams, and Rosenberg eventually reached an agreement to repurchase McGovern's interest in the company in October 2016 (2016 repurchase agreement). Pursuant to the

agreement, Prime's other owners would buy out McGovern's minority share based on a June 2016 valuation. According to Rosenberg's testimony at trial, Rosenberg and Abrams agreed not to discount the value of McGovern's ownership interest, despite the fact that Prime was a closely held corporation. McGovern was instead given the full value of his minority interest, as calculated by the June 2016 valuation. In exchange for receiving the full value of his interest, McGovern agreed to an eighteen-month restrictive covenant. Specifically, McGovern agreed not to directly or indirectly "hire or solicit any employee or consultant of [Prime] or encourage any such employee or consultant to leave such employment or hire any such employee or consultant who has left such employment, except pursuant to a general solicitation which is not directed specifically to any such employees."[5] This restrictive covenant was set to expire in April 2018.

c. Post-2016 repurchase agreement hiring activities and signing of 2017 agreement. After leaving Prime, McGovern worked to develop McGovern Motors, which came to comprise six

[5] The restrictive covenant contained within the 2016 repurchase agreement also provided that McGovern could not directly or indirectly "cause, induce or encourage any supplier or licensor of any Company to reduce, change or terminate their relationship with any Company." As defined in the agreement, "Company" referred to the limited liability companies that collectively operate as Prime Motor Group.

dealerships. Despite agreeing to the restrictive covenant contained within the 2016 repurchase agreement, McGovern went on to hire at least fifteen former Prime employees to work at McGovern Motors. Upon learning that McGovern had hired former Prime employees, Rosenberg threatened to sue. McGovern denied engaging in any specific solicitation of Prime employees, insisting that his hiring practices fell within the general solicitation exception to the 2016 restrictive covenant. The parties eventually agreed to enter into a new agreement in February 2017 (2017 agreement), which, according to its terms, was entered into "[i]n order to avoid the cost of litigation relating to this dispute."[6]

Pursuant to the 2017 agreement, Rosenberg and Abrams agreed not to pursue legal action against McGovern for violating the 2016 repurchase agreement's restrictive covenant, provided that he abide by the terms of the 2017 agreement. In exchange, McGovern agreed to enter into a more robust restrictive covenant that would be extended in duration for four additional months, ending in August 2018.

Pursuant to the 2017 agreement's restrictive covenant, McGovern agreed, inter alia, not to "directly or indirectly

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[6] The trial judge explicitly stated that he was "unable to determine whether [McGovern hired former Prime employees] in violation of the [2016 repurchase agreement]."

. . . solicit for hire or hire" Prime employees, "or encourage [Prime employees] to leave the employment" of Prime through August 8, 2018.[7] Notably, it did not include an exception for general solicitation, as the 2016 repurchase agreement had. With regard to available remedies, the 2017 agreement provided that

> "in the event McGovern or McGovern Motors breaches [the 2017 agreement], Prime shall be entitled to all damages and remedies available under applicable law, and further, McGovern and McGovern Motors consent to the entry of preliminary or permanent injunctive relief as a remedy for a violation of this Agreement, without the need to prove irreparable harm or to post a bond."

The 2017 agreement also stated that, subject to the amendment to the 2016 repurchase agreement's restrictive covenant, "all other provisions of the [2016 repurchase agreement] shall remain in full force and effect." Despite the terms of the 2017 agreement, McGovern again went on to solicit and hire additional Prime employees.

d. Breaches of 2017 agreement. After signing the 2017 agreement, McGovern hired Courtney Price and Greg Howle, both former Prime employees. Prime soon learned that McGovern had

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[7] The 2017 agreement's restrictive covenant extended not only to Prime employees, but also to consultants. Pursuant to the covenant, McGovern could not "retain as a consultant or contractor, or otherwise accept the services, either directly or indirectly, of any individual who is or was . . . an employee or consultant of Prime" during the relevant period.

hired Price, and demanded that McGovern fire her. McGovern complied, terminating Price's employment in or around August 2017.[8] In the fall of 2017, Prime learned that Howle, who had previously been terminated from Prime, had also been hired by McGovern. Prime immediately filed suit and sought a preliminary injunction to enjoin McGovern from continuing to employ Howle and to extend the 2017 restrictive covenant for an additional eighteen months. A judge in the Superior Court concluded that because Prime had fired Howle, it did not have a legitimate business interest in preventing Howle from working for McGovern, and declined to grant injunctive relief. The judge stated that although Prime had a legitimate interest in not having "a long-time senior executive who's just left solicit [Prime's] very employees," that interest did not apply to a former employee that Prime itself had chosen to fire. The judge did, however, conclude that the restrictive covenant would become enforceable when "used to prohibit raiding of current employees or employees who become non-current because they're resigning to go work for . . . McGovern, and an injunction would enter to prevent that." Despite this, Prime later learned that McGovern had hired three

[8] After a judge in the Superior Court ruled that Prime did not have a legitimate business interest in protecting Price, McGovern rehired her.

other Prime employees who are the subject of the instant litigation: Timothy Fallows, James Tully, and Zachary Casey.

i. Timothy Fallows. Fallows was hired by Prime in February 2013. He worked as a sales manager at Prime dealerships on Cape Cod and in Hanover. As part of his employment with Prime, Fallows signed a confidentiality and nonsolicitation agreement. In the spring of 2017, Fallows left the company. The judge found that the circumstances surrounding his departure from Prime "[were not] entirely clear." Immediately following his departure from Prime, Fallows went to work at a Chevrolet dealership. After six weeks, he quit his job there and began working at a Volkswagen dealership. Fallows subsequently lost his job at the Volkswagen dealership and was hired by McGovern in November 2017.

ii. James Tully. Tully was hired by Prime in April 2013. He initially worked as a sales consultant, but was later promoted to commercial vehicle manager. Tully was apparently not considered a valued employee by the company. Prime was uninterested in a line of business that Tully sought to pursue, and when Tully resigned in April 2017, Rosenberg viewed the resignation positively. In an e-mail message to another Prime employee, Rosenberg stated that Tully's resignation was "a good thing," as Tully was "[w]ay overpaid, and thinks he deserves more." Subsequent to his resignation from Prime, Tully was

hired by McGovern to deal with physical plant issues at McGovern Motors. At no point during his prior employment with Prime had Tully been given responsibilities relating to Prime's facilities maintenance.

iii. Zachary Casey. Casey began working for Prime in the fall of 2007, when Prime bought out another automotive group for which Casey had been working. Casey had initially worked as a sales manager, but he rose rapidly through the ranks at Prime. Prime eventually paid to send Casey to a year-long program in Virginia in which participants are trained to become general managers of automotive dealerships. Shortly thereafter, in the summer of 2016 Casey was promoted to general manager of three Prime dealerships in Maine.

In the fall of 2017, Casey met with McGovern to discuss potentially joining McGovern Motors and buying equity in the company. Pursuant to these discussions, Casey subsequently resigned from his position with Prime in December 2017. He was not subject to a noncompetition agreement at the time of his departure from Prime.[9]

[9] Casey testified that by December 2017, he was aware of the ongoing legal dispute between McGovern and Prime, and that it involved a restrictive covenant governing McGovern's ability to hire former Prime employees.

In January 2018, Casey agreed to buy McGovern's interest[10] in Toyota of Nashua, an automotive dealership in Nashua, New Hampshire, that formed part of McGovern Motors. Casey was not represented by counsel during this transaction, and McGovern set the purchase price. In order for Casey to place a down payment on the purchase price, McGovern sent a check to Casey's father, who wired a near equivalent amount of money to Casey. Casey then remitted that money to McGovern as a down payment. McGovern did not obtain approval from Toyota prior to initiating the sale to Casey.

e. Initial procedural history and representations to the court. Upon learning that Casey had purportedly taken a job with McGovern, Prime again sought a preliminary injunction in January 2018, asserting that McGovern had violated the 2017 agreement. In response, McGovern represented that he had not hired Casey as an employee. In a sworn affidavit, McGovern stated that Casey had not been hired as a general manager for McGovern but, rather, had purchased McGovern's interest in the dealership. McGovern did not reveal to the court that he had lent the money for the down payment to Casey, that Toyota had

[10] Specifically, Casey agreed to buy McGovern's entire interest in the holding company that owned a majority interest in the Toyota dealership.

not yet approved the sale, or that Toyota's approval was necessary before the sale could be effectuated.

Upon learning of the transaction between Casey and McGovern, Rosenberg sent the purchase agreement to a market representation manager for Toyota, stating that he believed it to be a sham transaction. When Toyota learned of the transaction and threatened to terminate its relationship with the dealership, Casey and McGovern rescinded the sale and McGovern returned the down payment to Casey.[11] Despite the rescission, from January 2018 onward, Casey has assumed the role of general manager at the Toyota of Nashua dealership.

f. Subsequent procedural history. After conducting expedited discovery on McGovern's purported sale to Casey, Prime renewed its motion for a preliminary injunction and amended its complaint.[12] This third request by Prime for a preliminary

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[11] The trial judge did not make a finding whether the Toyota dealership sale was actually a sham transaction. While the judge made it clear that McGovern was using the sale to side-step the terms of the 2017 agreement, the judge nevertheless expressed uncertainty whether the transaction would have fallen apart if Rosenberg had not informed Toyota of the purchase. He appeared to credit Casey's testimony that Casey was genuinely looking to buy equity in a dealership when he chose to enter into the transaction with McGovern.

[12] Prime's operative second amended complaint, filed on March 16, 2018, includes claims of breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with contractual or advantageous business relations, and misappropriation of trade secrets.

injunction sought to enjoin McGovern from continuing to employ Casey, Fallows, and Tully and requested an eighteen-month extension of the restrictive covenant. The operative complaint sought damages, an eighteen-month extension of the restrictive covenant period, declaratory judgment as to McGovern's violations of the 2017 agreement, attorney's fees, and additional injunctive relief.

On April 25, 2018, the judge granted preliminary injunctive relief as to the enforcement of the 2017 agreement going forward, enjoining McGovern from soliciting or hiring former Prime employees "until further order of the court." The judge declined at that time to issue a preliminary injunction as to McGovern's employment of Casey, Fallows, and Tully, or to extend the length of the 2017 restrictive covenant, concluding that further factual development was necessary. The judge instead advanced and consolidated those preliminary injunctive requests with the merits of the plaintiffs' equitable claims, pursuant to Mass. R. Civ. P. 65, 365 Mass. 832 (1974),[13] and scheduled a

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[13] Rule 65 provides, in relevant part:

> "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. This subdivision (b)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury."

jury-waived trial for June 2018, two months before the restrictive covenant was set to expire.

After a five-day trial commencing on June 20, 2018, the judge found that McGovern had entered into a binding contract with Prime upon signing the 2017 agreement. The judge indicated that the restrictive covenant contained within the 2017 agreement was best characterized as an anti-raiding provision, which was "intended to protect the buyer of a business or an interest in a business . . . from losing key employees." The judge concluded that this was a protectable business interest, but that, unlike the protection of trade secrets, confidential information, or good will, it was difficult to determine "what kind of injunctive relief could be entered to protect this particular business interest after there's been a breach of contract, that is[,] after the soliciting or the hiring has occurred."

The judge found that McGovern had committed a breach the anti-raiding provision by hiring Fallows and Tully. The judge also found that McGovern had violated the 2017 agreement by encouraging Casey to leave Prime and later employing Casey as the general manager of Toyota of Nashua. The judge did not, however, enter equitable relief against McGovern Motors with

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Mass. R. Civ. P. 65 (b) (2), 365 Mass. 832 (1974).

respect to Fallows, Tully, or Casey. The judge concluded that Fallows was not a particularly valued employee at Prime, and that Prime had "no significant or valid business interest . . . that would be advanced by entering any injunctive relief with respect to [him]." Similarly, the judge concluded that Prime did not consider Tully to be a valued employee and that "no legitimate business purpose would be advanced by entering any injunctive relief with respect to [him]." With respect to Casey, however, the judge concluded that he was "just the kind of employee that the anti-raiding provisions that had been negotiated in the contract [were] designed to protect from solicitation by . . . McGovern," as Prime had "spent a considerable sum sending him to school so that he could learn how to be a general manager of an automobile dealership."

While recognizing the substantial investment that Prime had made in Casey, the judge also recognized that, by the time of trial, Casey had "already moved [from Maine] to New Hampshire, sold his house, [and] presumably [had] entered his kids in school in New Hampshire." The judge thus concluded that there was "no way that the Court can order . . . Casey's relationship with Prime to be repaired." Accordingly, the judge determined that enjoining Casey from continuing to work for McGovern Motors would effectively serve as punishment to Casey, despite the fact that he was not a defendant to the suit, and would provide no

benefit to Prime. The judge thus declined to enter injunctive relief with respect to Casey. He did conclude, however, "that if Prime is able to establish that it suffered any damages as a result of the breach of contract as it relates to . . . Casey, then it would be entitled to monetary relief."

Rather than decline to enter any equitable relief, the judge extended the length of the restrictive covenant in the 2017 agreement by one year, i.e., to August 8, 2019. The judge conceded that the law was "less than clear" as to his ability to extend the time period of a restrictive covenant beyond its expiration date in the contract, but he did so, relying on the general proposition that trial judges have broad discretion to grant or deny injunctive relief. Because the trial was limited to the plaintiffs' equitable claims, the judge did not make any findings as to damages, which have yet to be litigated. In a posttrial bench memorandum, the plaintiffs indicated that they valued the restrictive covenant in the 2016 repurchase agreement at $2 million.

The judge entered his order as a final judgment pursuant to Mass. R. Civ. P. 54 (b), 365 Mass. 820 (1974),[14] so as to allow

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[14] Rule 54 (b) provides in relevant part:

> "When more than one claim for relief is presented in an action . . . , the court may direct the entry of a final judgment as to one or more but fewer than all of the claims

the parties to appeal from the judgment immediately. McGovern appealed, and we transferred the appeal to this court on our own motion.

On appeal, McGovern argues that the 2017 agreement's restrictive covenant does not serve a legitimate business interest, and that either the judge lacked the authority to extend the duration of the restrictive covenant or such an extension was improper without a showing as to the inadequacy of damages.[15]

During oral argument before this court on October 1, 2019, and in a postargument letter submitted to the court, Prime argued that because the extension period had since expired, this appeal should be considered moot. However, the issue whether

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> . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

Mass. R. Civ. P. 54 (b), 365 Mass. 820 (1974).

[15] We note that, subsequent to the events at issue in this litigation, the Legislature passed the Massachusetts Noncompetition Agreement Act, which sets out requirements for an employee noncompetition agreement to be valid and enforceable. See St. 2018, c. 228, § 21. The legislation only applies to employee noncompetition agreements entered into on or after October 1, 2018. See St. 2018, c. 228, § 71. By its terms, the legislation does not apply to nonsolicitation agreements or agreements made in connection with the sale of a business. See G. L. c. 149, § 24L (explicitly exempting "covenants not to solicit or hire employees of the employer" and agreements "disposing of the ownership interest of a business entity" from the definition of "noncompetition agreement").

and when a trial judge may exercise equitable authority to extend a restrictive covenant beyond its plain terms is one that we have not explicitly addressed, and has been the subject of conflicting decisions in the United States Court of Appeals for the First Circuit and the Superior Court. Similarly, the permissibility of anti-raiding provisions has not yet been addressed by this court. Accordingly, "[w]e exercise our discretion to reach the merits of [this] appeal regardless [of] whether the matter may currently be moot, because the issues are significant and have been fully briefed and it is in the public interest to do so." Doe v. Police Comm'r of Boston, 460 Mass. 342, 343 n.3 (2011).

2. Discussion. As an initial matter, we consider whether the anti-raiding provision in the 2017 agreement is an enforceable restrictive covenant necessary to protect a legitimate business interest. We conclude that it is.

a. Standard of analysis for restrictive covenants. We have long recognized a public interest in the ability of individuals to be able to carry on their trade freely. Club Aluminum Co. v. Young, 263 Mass. 223, 226 (1928). See Kroeger v. Stop & Shop Cos., 13 Mass. App. Ct. 310, 312 (1982) ("Reluctance to give full effect to post-employment restraints has a long history in the law"). Out of this concern for an individual's ability to earn a living, covenants restraining

competition are only enforceable to the extent that they are reasonable. See Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 102 (1979); All Stainless, Inc. v. Colby, 364 Mass. 773, 778 (1974); Kroeger, supra. See also Oxford Global Resources, LLC v. Hernandez, 480 Mass. 462, 471 (2018) (observing that "same principles" apply to both noncompetition and nonsolicitation provisions); Restatement (Second) of Contracts § 186 (1981). Such a restrictive covenant is only reasonable, and thus enforceable, if it is (1) necessary to protect a legitimate business interest, (2) reasonably limited in time and space, and (3) consonant with the public interest. Boulanger v. Dunkin' Donuts Inc., 442 Mass. 635, 639 (2004), cert. denied, 544 U.S. 922 (2005). If the covenant is found to be too broad "in time, in space or in any other respect," the court will only enforce the agreement "to the extent that is reasonable and to the extent that it is severable for the purposes of enforcement." All Stainless, Inc., supra.

Because we assess the reasonableness of covenants restraining competition "in light of the facts in each case," the context in which the covenant arises affects our analysis. Boulanger, 442 Mass. at 639. Such covenants typically arise in the context of an employment agreement or a sale of a business. Id. Whether a restrictive covenant arises in one context or the other has been considered relevant to the parties' relative

bargaining power, the hardship to the promisor of abiding by the terms of the restrictive covenant, and thus the over-all reasonableness of the restriction.

Restrictive covenants arising in the context of an employment agreement traditionally restrain the ability of an employee to compete with his or her employer for a certain period of time posttermination in a specific geographic area. See, e.g., All Stainless, Inc., 364 Mass. at 774-775 (involving restrictive covenant prohibiting employee from competing with employer in New England or New York for two-year period posttermination). Such postemployment restraints are often the product of unequal bargaining power. Restatement (Second) of Contracts § 188 (1981). Employees are "likely to give scant attention to the hardship [they] may later suffer through loss of [their] livelihood." Id. They often also agree to such restraints without the assistance of counsel. See Wells v. Wells, 9 Mass. App. Ct. 321, 323-328 (1980).

By contrast, "[c]oncern about the restricted individual and the probability of unequal bargaining power between an employer and an employee recedes when the restriction arises in the context of the sale of a business or . . . the sale of an interest in a business." Id. at 324. Buyers and sellers are more likely to have equal bargaining power and legal representation, the seller is likely to be able to rely on the

proceeds of the sale to temporarily refrain from competition with the buyer, and the seller is typically paid a premium for agreeing not to compete with the buyer. See Alexander & Alexander, Inc. v. Danahy, 21 Mass. App. Ct. 488, 496 (1986). Moreover, where the sale includes good will, "a broad noncompetition agreement may be necessary to assure that the buyer receives that which he [or she] purchased." Id. In light of these significant differences, restrictive covenants entered into as part of a sale of a business are examined less critically than those entered into as part of an employment agreement. Boulanger, 442 Mass. at 639.

Whether a restrictive covenant arises in the context of an employment agreement or a sale of a business is particularly relevant where, as here, the parties dispute whether the restriction is necessary to protect a legitimate business interest.[16] In the employer-employee context, the legitimate business interests that may be protected consist of trade secrets, confidential information, and good will. New England Canteen Serv., Inc. v. Ashley, 372 Mass. 671, 674 (1977). By contrast, "in the buyer-seller context, restrictions 'are not rendered unenforceable merely because they protect an interest

[16] On appeal, McGovern does not argue that the 2017 agreement's restrictive covenant, as written, was unreasonable in scope or that it was injurious to the public interest.

we might not recognize in any employment setting.'" Wells, 9 Mass. App. Ct. at 325, quoting Whitinsville Plaza, Inc., 378 Mass. at 102. Rather, "[u]nreasonableness in time, space, or product line, or obstruction of the public interest, are the principal bars to enforcement." Wells, supra, quoting Whitinsville Plaza, Inc., supra at 102-103. Where a covenant is connected both to the sale of a business and to an employment relationship, "[i]t is [thus] important to identify at the outset to which aspect of the arrangement" the restrictive covenant "primarily relate[s]." Alexander & Alexander, Inc., 21 Mass. App. Ct. at 496. See Boulanger, 442 Mass. at 640 (examining whether covenant contained within franchise agreement more closely resembles employment covenant or sale of business covenant). With these principles in mind, we examine how to classify the restrictive covenant contained within the 2017 agreement.

b. Classification of 2017 agreement. The issue whether the 2017 restrictive covenant may be characterized as arising within the employer-employee or sale of a business context is not completely straightforward. It has elements of both. See Alexander & Alexander, Inc., 21 Mass. App. Ct. at 495-496. McGovern was a high-level executive but also a founder and minority shareholder in the company with whom he signed the agreement. His employment had been terminated before either the

2016 or 2017 agreement. Those agreements were also directed at buying out his interest in the company, not defining the terms and conditions or termination of his employment. That being said, the sale of McGovern's business interest did not resemble a prototypical arm's-length transaction with a third-party purchaser. Rather, Rosenberg and Abrams pressured McGovern to sell his interest to them, despite the fact that Abrams's company was the majority shareholder in a closely held corporation and owed a fiduciary duty of utmost good faith and loyalty in its dealings with minority shareholders. See Wilkes, 370 Mass. at 850.

Further, the restrictive covenant at issue was not unrelated to McGovern's prior employment in the company. According to Rosenberg, the 2016 restrictive covenant was formulated in response to McGovern's role, or at least the knowledge he had acquired, as vice-president of operations, an employment position within the company, rather than his position as minority owner of the company. At the same time, the restrictive covenant in the 2016 repurchase agreement was an integral part of the sale of McGovern's minority interest, and the 2017 agreement served as a settlement agreement of the dispute arising out of that agreement. See Alexander & Alexander, Inc., 21 Mass. App. Ct. at 497 (where restrictive covenants were treated as "integral part" of agreement for sale

of business, "there is no reason for us to view them as something other than what they purport to be").

Upon examination of the context and characteristics of the 2017 anti-raiding provision, we conclude that the restrictive covenant is more appropriately deemed to arise within the sale of a business rather than the employment context. When McGovern entered into negotiations that led to the 2016 repurchase agreement, he was no longer a Prime employee and remained free to compete with that business. By the time he negotiated the 2017 agreement, McGovern's employment was long past. The 2016 and 2017 agreements were therefore much more closely associated with the sale of McGovern's business interest than his prior employment, particularly the 2017 agreement. Further, McGovern was aided by counsel throughout the negotiation process and, as the trial judge found, he was no longer in an unequal bargaining position typical of the employer-employee context by the time he entered into the 2017 agreement.[17] See Wells, 9 Mass. App. Ct.

[17] We also note that McGovern had significantly more bargaining power than a standard employee. He was a cofounder and former minority owner who had also worked as an executive for the very company against which he was negotiating. See Kroeger v. Stop & Shop Cos., 13 Mass. App. Ct. 310, 319 (1982) (key employee's elevated bargaining status "enlarge[s] judicial tolerance of restraints by an employer which might be seen as unreasonable between parties of unequal bargaining strength"). Additionally, McGovern was also in the process of developing his own automotive group, demonstrating that he had a sophisticated understanding of the intricacies of the corporate form.

at 323–328 (compulsion typically present in employment context). Although it does not fit neatly into either category, we conclude that the 2017 anti-raiding restriction should be analyzed as arising within the context of a sale of business interest, not an employment agreement. See Boulanger, 442 Mass. at 640.

In determining that the 2017 anti-raiding covenant is more properly considered as arising from the sale of a business interest rather than a restrictive covenant in employment, we do recognize that the 2017 covenant placed some limitation on the employment rights of Prime employees who were not parties to the agreement. They could not be raided, and therefore employed, by McGovern. That restriction on employment does not, however, present the same concerns as traditional noncompetition agreements in the employment context. Rather than directly prohibiting an employee from going to work for any competitor within a certain geographic region, the restrictive covenant contained within the 2017 agreement only indirectly prohibited employment with a single competitor. Contrast Marine Contrs. Co. v. Hurley, 365 Mass. 280, 283 (1974) (restrictive covenant prohibiting employee from competing with employer, directly or indirectly, within one hundred mile radius of Boston for five years); All Stainless, Inc., 364 Mass. at 774-775 (prohibiting employee from competing in New England or New York for two-year

period posttermination). Nor has evidence been presented to indicate that McGovern Motors is the only, or even the primary, competitor to Prime in the region. Thus, the 2017 restrictive covenant does not implicate concerns about "an individual's ability to earn a living and to protect against monopoly" to the same extent as a traditional employee noncompetition agreement. See Wells, 9 Mass. App. Ct. at 323.

To summarize, in light of McGovern's bargaining power and legal representation, as well as the covenant's direct connection to McGovern's sale of his minority interest and only indirect connection to his prior employment, we conclude that the restrictive covenant contained within the 2017 agreement is more akin to the sale of a business interest than to an employment relationship. Having concluded that the 2017 restrictive covenant arose in a context akin to the sale of a business, we next turn to whether the anti-raiding purpose of the covenant constitutes a legitimate business interest in this context.

c. Anti-raiding interest. We note at the outset that protection from "ordinary competition" is not a legitimate business interest in any context, and a restrictive covenant "designed solely for that purpose will not be enforced." See Marine Contrs. Co., 365 Mass. at 287-288. While trade secrets, confidential information, and conventional good will do

constitute legitimate business interests in the employment context, the trial judge found that the anti-raiding provision at issue did not pertain to those interests. However, "[r]easonable business interest[s] in the buyer-seller setting" extend beyond conventional notions of client good will to encompass more expansive interests. Wells, 9 Mass. App. Ct. at 323–328.

The anti-raiding interest at issue here was a specific one. Prime did not simply seek to restrict former employees from competing. To the contrary, Prime did not typically ask its employees to sign noncompetition agreements. Prime employees were, as a general matter, thus free to compete with the company upon their departure. Rather, the interest at issue here pertained specifically to preventing McGovern from raiding Prime of its key employees after his termination. In the circumstances of the instant case, we conclude that Prime's anti-raiding interest was a legitimate one.

Far from stifling ordinary competition, the restrictive covenant permitted McGovern to compete so long as he did not use his inside knowledge to raid Prime's key employees. As an executive and part owner, McGovern was familiar with Prime's employee workforce and was well placed to identify key employees integral to the company's success. For those employees he wished to poach, he could use his inside knowledge of the

company, including its salary structure and internal management dynamics, to successfully solicit them. For example, the record reflects that McGovern was aware of, and perhaps dictated, Fallows's starting salary at Prime. Armed with information about Prime employees' existing compensation plans, McGovern could tailor any solicitation offer to provide more competitive benefits than Prime. He was also aware of the particular strengths, experience, and training of different Prime employees. The 2016 restrictive covenant was thus formulated to ensure that McGovern's competing business did not gain an unfair advantage by using this inside information, in combination with McGovern's position as a competitor, to raid Prime. Importantly, as mentioned supra, regular Prime employees were not generally subject to noncompetition agreements, and the 2016 restrictive covenant only prevented Prime employees from working for McGovern, who was one competitor among several in the region. In the context of the 2017 agreement, which itself sought to settle claims pertaining to purported solicitation in violation of the 2016 repurchase agreement, Prime's interest in preventing McGovern from raiding the company of key employees was a legitimate one.

Additionally, McGovern was able to sell his minority interest at a premium because he agreed to the restrictive covenant contained within the 2016 repurchase agreement. The

purchase price of McGovern's minority interest was determined based on a June 2016 third-party valuation of Prime, which had estimated the fair market value of the entire automotive dealership group. As Rosenberg testified, McGovern's minority interest in Prime, a closely held corporation, was illiquid and would typically be purchased at a discounted value. Rosenberg's uncontested testimony indicates that Rosenberg and Abrams nonetheless agreed to pay McGovern the full value of his minority interest, based on the June 2016 valuation, in exchange for McGovern's willingness to agree to the restrictive covenant contained within the 2016 repurchase agreement. As Rosenberg testified, "if Abrams and I were going to pay . . . McGovern a significant sum of money . . . for his membership interest, then we did not want him to raid our company." The 2017 agreement, which was aimed at shoring up the protections of the restrictive covenant contained within the 2016 repurchase agreement, thus served the legitimate business interest of ensuring that McGovern did not "derogate from the value of the business" interest he sold to the other owners of Prime in 2016. Boulanger, 442 Mass. at 645–646. See Wells, 9 Mass. App. Ct. at 324 (same). Cf. Alexander & Alexander, Inc., 21 Mass. App. Ct. at 496 ("Where the sale of the business includes good will, as this sale did, a broad noncompetition agreement may be necessary to assure that the buyer receives that which he purchased").

Thus, in light of McGovern's prior position within Prime, his present position as a competitor well poised to steal Prime employees, and the additional consideration he received in exchange for agreeing to the restrictive covenant, Prime had a legitimate anti-raiding business interest.

The reasonableness of Prime's anti-raiding interest is exemplified by McGovern's solicitation of Casey. After acquiring the Toyota of Nashua dealership, McGovern experienced a number of challenges to increasing the store's profitability. He felt he needed to "change the culture" of the dealership to improve its performance. McGovern testified that he sought out Casey because he knew that Casey was a very talented and intelligent general manager who worked well with employees. Because McGovern and Casey had formed a personal friendship, McGovern was aware that Casey was looking to acquire an equity ownership interest in a dealership. As the trial judge found, "Casey was just the kind of employee that the anti-raiding provisions . . . [were] designed to protect from solicitation by . . . McGovern." Had McGovern abided by the terms of the 2017 restrictive covenant and refrained from soliciting Casey, it seems unlikely that Casey would have left Prime when he did, thereby depriving Prime of a key employee, and derogating the value of the business interest McGovern sold to Prime.

d. Injunction extending length of 2017 agreement's restrictive covenant. Having concluded that the 2017 restrictive covenant was necessary to protect a legitimate business interest, we next turn to the propriety of the equitable remedy. In so doing, we review the allowance of injunctive relief for error of law or abuse of discretion. See King v. Town Clerk of Townsend, 480 Mass. 7, 9 (2018); U.S. Bank Nat'l Ass'n v. Schumacher, 467 Mass. 421, 427 (2014).

The judge in this case elected to extend the restrictive covenant contained within the 2017 agreement for an additional year. In fashioning equitable relief, he made clear that he had considered "how to enter relief that would actually serve as a benefit to Prime and not just a penalty to McGovern," as well as "how to fashion relief that would in some measure achieve for Prime what it bargained for in [the restrictive covenant] of the 2017 agreement." The judge explained that he was heavily influenced by evidence suggesting that McGovern had "willfully ignored" the terms of the 2017 agreement and "repeatedly hired people in a manner that [McGovern] knew would be a violation of that agreement." Additionally, the judge found that when Prime's first motion for a preliminary injunction was denied in December 2017, McGovern "became emboldened in his willingness to ignore the contractual provisions that he [had] entered into." Moreover, in response to Prime's second motion for a preliminary

injunction in January 2018, McGovern submitted an affidavit to the court that, "to say [it] charitably, was less than candid." In light of this behavior, which understandably tried the patience of the judge, he felt compelled to extend the restrictive covenant period an additional year beyond the terms of the 2017 agreement.

On appeal, McGovern argues that the trial judge lacked the authority to fashion such an equitable remedy or, in the alternative, that such a remedy was not warranted here. We conclude that while there may be circumstances in which extending a restrictive covenant beyond its original term may be appropriate in the context of the sale of a business interest, the existing record of this case does not warrant such an extension.

At least in the employment context, we have emphasized the gravity of, and have strictly enforced, restrictions on awarding equitable relief beyond the scope of a restrictive covenant contained within a traditional noncompetition agreement. Because such agreements serve as a direct restraint on an individual employee's ability to earn a living, we have not allowed the extension of the period of restraint beyond the

terms of the agreement.[18] See All Stainless, Inc., 364 Mass. at 777 ("because the period of the [restrictive covenant] has expired, [the plaintiff] is left to the recovery of any damages arising from [the violation of the covenant]"); Sherman v. Pfefferkorn, 241 Mass. 468, 477 (1922) (holding, in context of employment noncompetition agreement, that "the contract bounds the rights of the parties as to time, and after the expiration of the period the prohibition ceases to exist; on this record the plaintiff ought not to be afforded equitable relief for a time beyond that for which the individual defendant contracted"). See also EMC Corp. v. Arturi, 655 F.3d 75, 77 (1st Cir. 2011) (as explained by Justice Souter, writing for First Circuit in employment case, "[t]he unequivocal character of the [Massachusetts] rule [regarding extending the terms of employment restrictive covenants] creates a frosty climate for [a company's] attempt to avoid it" [footnote omitted]); A-Copy, Inc. v. Michaelson, 599 F.2d 450, 452 (1st Cir. 1978) (explaining, in another case involving restrictive covenant in employment context, that "the Supreme Judicial Court of Massachusetts has indicated that when the period of restraint has expired, even where the delay was substantially caused by

[18] We need not decide today whether there are any possible circumstances under which a traditional employee noncompetition agreement equitably may be extended beyond its terms.

the time consumed in legal appeals, specific relief is inappropriate and the injured party is left to his damages remedy").[19] As discussed supra, however, the restrictive covenant at issue is not a traditional noncompetition provision arising in the context of an employment agreement. We now consider whether, and under what circumstances, a judge may equitably extend the length of a restrictive covenant like the one at issue here, which arises in the context of a sale of business rather than employment.

Covenants restricting competition arise within the realm of contract law. As such, "[u]nder freedom of contract principles, generally, parties are held to the express terms of their contract." TAL Fin. Corp. v. CSC Consulting, Inc., 446 Mass. 422, 430 (2006). Cf. Shahin v. I.E.S. Inc., 83 Mass. App. Ct. 908, 909 (2013); National Med. Care, Inc. v. Zigelbaum, 18 Mass. App. Ct. 570, 575–576 (1984) ("We cannot rewrite the contract to cure an oversight or relieve a party from the consequences of the failure to adhere to its plain terms"). Those terms plainly

[19] In limited circumstances, we have been willing, even in the employment context, to enforce a restrictive covenant beyond its expiration date by mutual agreement, see Middlesex Neurological Assocs., Inc. v. Cohen, 3 Mass. App. Ct. 126, 127 n.1 (1975). We have also been willing to extend the duration of a restrictive covenant in the context of the sale of a business where no end date had been present in the written contract and one was originally fashioned by a trial judge, see Wells v. Wells, 9 Mass. App. Ct. 321, 327-328 (1980). No such circumstance is present here.

include the time period set out in the contract. Moreover, as discussed supra, we greatly disfavor restrictions on an individual's ability to freely earn a living.

The restrictive covenant at issue here does not, however, preclude anyone from earning a living. McGovern was allowed to freely compete so long as he did not raid his former employer's employees. The provision also did not prohibit Prime employees from competing with Prime generally, but just prevented them from working for McGovern Motors specifically, which appears to have been one competitor among several in the region. The anti-raiding provision also served a legitimate purpose, which was, as explained supra, to ensure that Prime received the value of its purchase of McGovern's interest in the company. This interest would have been derogated if McGovern was allowed to raid the company after he sold his ownership share. If the anti-raiding provision was not enforced, Prime would not receive the value of its purchase price.

In this context, we conclude that awarding equitable relief that extends the scope of the restrictive covenant beyond its plain terms may be proper, but only if the party seeking to expand the terms of the restrictive covenant has demonstrated that monetary damages would provide inadequate relief. This requires more than a mere articulation of the harm that the plaintiff has suffered. Rather, a plaintiff must either

demonstrate why monetary damages cannot be reasonably estimated, or calculate the monetary damages incurred and demonstrate why damages would nonetheless be insufficient such that extraordinary relief is warranted.

Here, the record does not reflect that Prime sought to extend the injunction beyond the terms of the contract due to either the inability to calculate or the inadequacy of damages.[20] Nor does the record demonstrate the type of threat to an ongoing business that cannot be compensated by money damages, or that money damages might not be available due to the precarious state of the raider's finances. Rather, Rosenberg indicated at trial that Prime had not yet attempted to perform a damages calculation, although it intended to seek damages after the trial in equity. Thus, there are no findings before this court as to the inadequacy of monetary damages, or the basis for that

[20] We note that the 2017 agreement provides that Prime is entitled to "all damages and remedies available under applicable law," and that McGovern "consent[s] to the entry of preliminary or permanent injunctive relief . . . without the need to prove irreparable harm." While this provision appears to remove the irreparable harm requirement from the burden in seeking a preliminary injunction, we do not read it as eliminating the need to demonstrate the insufficiency of damages to extend the preliminary injunction. It is not a tolling agreement. Both parties have recognized that the 2017 agreement does not include a tolling provision to extend the expiration of the covenant pending the resolution of litigation for breaches of the agreement. Neither party contends that this provision serves the same purpose. Indeed, neither party makes any argument whatsoever regarding the significance or effect of this provision.

inadequacy. Indeed, because the trial was limited to the merits of the plaintiffs' equitable claims, the trial judge explicitly avoided making any findings as to damages.

To be sure, "the task of quantifying the consequences of violating a noncompetition clause is a particularly difficult and elusive one." Kroeger, 13 Mass. App. Ct. at 322. Nonetheless, Rosenberg conceded at trial that "some" of the harm stemming from Casey's resignation and decision to work for McGovern could be quantified, although Prime had not yet made any effort to do so. Prime has also indicated that it valued the 2016 repurchase agreement's restrictive covenant at $2 million. Although this is a difficult task, and one that must take place while the clock continues to tick on the time limit governed by the restrictive covenant, we conclude that it must still be undertaken prior to a court-ordered extension of the restriction.[21]

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[21] As previously noted, this agreement contained no tolling provision. Prime was a sophisticated party represented by capable counsel, yet it did not insist on the inclusion of such a provision in the 2017 agreement. See EMC Corp. v. Arturi, 655 F.3d 75, 77 (1st Cir. 2011) ("Being forewarned, [the plaintiff] could have contracted . . . for tolling the term of the restriction during litigation, or for a period of restriction to commence upon preliminary finding of breach. But it did not").

Nor was there any other mutually assented to extension or stay of the restrictive covenant. Mutually assented to extensions have been deemed enforceable, as they present a different set of concerns from court-ordered extensions. See

We recognize that the trial judge extended the duration of the restrictive covenant in response to McGovern's misrepresentations to the court and his otherwise apparent disregard of the court's guidance on the first preliminary injunction motion. McGovern's sharp and slick business practices are undoubtedly deeply troubling,[22] but the judge must nevertheless first evaluate the adequacy of monetary damages before extending a restrictive covenant beyond the clear terms of the provision. There is no evidence in this record to indicate that money damages could not adequately compensate Prime for its lost employees or that McGovern's finances are so precarious that equitable relief must be accelerated. Accordingly, we conclude it was an abuse of discretion for the trial judge to extend the duration of the restrictive covenant

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Middlesex Neurological Assocs., Inc., 3 Mass. App. Ct. at 127 n.1.

[22] We note that the same could be said for Rosenberg and Abram's conduct in trying to induce McGovern to sell his minority interest in Prime before a liquidity event. As discussed, Abram's company was the majority shareholder in a closely held corporation and thus owed a fiduciary duty "to deal with the minority with the utmost good faith and loyalty." Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 850 (1976). Despite this, Abrams and Rosenberg went so far as to amend Prime's operating agreement to prevent McGovern from gaining access to the company's financial information or receiving a distribution of profits sufficient to cover his tax liabilities.

absent a finding that monetary damages would provide inadequate relief.[23]

3. Conclusion. For the foregoing reasons, we reverse the judgment of the Superior Court extending the length of the 2017 restrictive covenant. The case is remanded to the Superior Court for further proceedings consistent with this opinion.[24]

So ordered.

[23] The trial judge declined to enjoin Fallows, Tully, or Casey from continuing to work for McGovern, and Prime has not appealed from these rulings. Accordingly, we need not address the propriety of exercising the trial court's equitable powers to prohibit an individual from continuing to work for a competitor, where the competitor is subject to a restrictive covenant but the individual employee is not.

[24] Under the 2017 agreement, the "prevailing party" in litigation to enforce the rights contained within that agreement is entitled to reasonable attorney's fees. The plaintiffs have requested an award of appellate attorneys' fees pursuant to this provision. In light of this court's ruling, the request for attorney's fees is denied. See Yorke Mgt. v. Castro, 406 Mass. 17, 20 (1989).