IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Three Step Fitness Inc. v Song,*
2026 BCSC 2156

Date: 20261105
Docket: S255290
Registry: New Westminster

Between:

Three Step Fitness Inc.

Plaintiff

And

Dael Song

Defendant

Before: The Honourable Justice Hoffman

Reasons for Judgment

Counsel for the Plaintiff:	D. Ahn J. Toledo, Articled Student
Counsel for the Defendant:	C. Chen J. Xia
Place and Date of Trial:	New Westminster, B.C. October 19-23, 2026
Place and Date of Judgment:	New Westminster, B.C. November 5, 2026

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Overview

[1] In this action, the plaintiff, Three Step Fitness ("Three Step"), seeks to enforce restrictive covenants, namely the non-competition and non-solicitation clauses, in its employment contract with the defendant, Dael Song, a licensed kinesiologist and former employee of Three Step.

[2] Three Step operates a clinic in Coquitlam from which it offers physiotherapy, Pilates, sports rehabilitation, and other medical treatments.

[3] Mr. Song was employed by Three Step in its Coquitlam clinic from April 2023 to August 31, 2024, as a kinesiologist and a personal trainer in Pilates.

[4] Three Step alleges that, after giving notice of his resignation from Three Step, Mr. Song commenced employment at two clinics in Port Moody and Burnaby that were direct competitors of Three Step. It further alleges that Mr. Song actively solicited Three Step's clients to continue their treatment at these competing clinics. Three Step claims that these breaches resulted in the loss of business and seeks compensation for these losses.

[5] In final submissions, Three Step sought damages for Mr. Song's alleged breaches of other aspects of the employment contract such as the conflict of interest and confidentiality clauses and a schedule containing Three Step's IT policy. It further argues that the defendant breached his duty of good faith to the plaintiff as his employer. However, for the reasons I will discuss below, these breaches were not pleaded and are, therefore, not properly before the court.

[6] The defendant takes the position that the non-competition clause in the employment contract is unenforceable. Further, he denies that he breached the non-solicitation clause. In the alternative, if the restrictive covenants are enforceable and it is established that they were breached, Mr. Song says that Three Step is unable to prove that it has suffered any losses as a result.

[7] For the reasons that follow, this action must be dismissed. The non-competition clause is not enforceable, and the evidence fails to establish that Mr. Song breached the non-solicitation clause.

Factual Background

[8] Ella Park is the founder and director of Three Step. Three of the witnesses in the trial share the last name but are not related. I will refer to Ella Park as Ms. Park, Mr. Sang Nam Park as Mr. Park and Ms. Hyun Sook Park by her full name. Ms. Park was born and educated in Korea. She has a bachelor's degree in sport science and education. After immigrating to Canada, she worked as a fitness trainer and became trained in Pilates. She started offering Pilates training to clients in 2013. In 2019, she established a clinic and began to hire part-time physiotherapists to offer rehabilitation services and specifically, what she referred to as "clinical Pilates". The Pilates services her clinic offers integrate specialized equipment and props into the exercises that clients are taught.

[9] Ms. Park testified that Pilates is a very effective tool for rehabilitation as, unlike passive physiotherapy treatments, it goes beyond pain management and focuses on spinal stability exercises to address underlying biomechanical issues which, in her view, promotes overall fitness.

[10] Ms. Park testified that when she started her clinic, Three Step was the only clinic in Coquitlam, Port Coquitlam, and Port Moody, referred to as the Tri-Cities area, that offered clinical Pilates. She described this area as having a large Korean population. By 2023, Three Step was operating in an increasingly competitive market, with at least seven other clinics offering clinical Pilates in the surrounding area. Ms. Park testified that the majority of her clients live within an 8- to 10-kilometer radius of the clinic.

[11] In 2023, Mr. Song was 23 years old and a recent graduate of the kinesiology program at Trinity Western University.

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[12] Mr. Song had never previously worked as a kinesiologist in a clinic setting. Upon graduation, he applied for employment opportunities at several clinics, including Three Step.

[13] Three Step and Mr. Song entered into an employment contract on or about April 22, 2023. Mr. Song commenced his employment a few days later.

[14] Ms. Park testified that the employment contract signed by Mr. Song is a standard form contract that she uses for every employee she hires at Three Step. The employment contract contains the following terms:

> **Conflict of Interest**: While employed with Company, you agree to be not employed by or engaged in other activities that competes or interferes with the Company without prior written permission.
>
> **Client List & Information**: Within two (2) weeks prior to the start of your employment with the Company, you agree to provide the Company with a complete list of your clients. Where no such list is provided to the Company pursuant to this Agreement, you acknowledge that you are not bringing any client to the Company;
>
> **Non Competition**: You will not, during the term of this Agreement and for a period of twelve (12) months following the cessation of your employment, notwithstanding a cessation of employment without cause, on your own behalf or on behalf of any entity, whether directly or indirectly, in any capacity whatsoever:
>
> a) carry on or be engaged in or have any financial or other interest in or be otherwise involved in any endeavour, activity or business in the City of Coquitlam, the City of Burnaby, the City of Port Coquitlam and the City of Port Moody all in the province of British Columbia (the "Territory"): (i) in a capacity which relates to the business of provision of Pilates, ICBC rehabilitation and personal training (the "Business"); and (ii) which is associated with, or for the benefit of, any competitor of the Company; or
>
> b) carry on or be engaged in or have any financial or other interest in or be otherwise involved in any endeavour, activity or business which is competitive with the Business in the Territory.
>
> **Non-Solicitation**: You agree that, during your employment and for a period of twelve (12) months following the cessation of your employment, for any reason, you shall not, on your own behalf or on behalf of or in connection with any other entity, without the prior written consent of the Company, directly or indirectly, in any capacity whatsoever, alone through or in connection with any entity:
>
> a) canvass or solicit the business of (or procure or assist the canvassing or soliciting of the business of) any customer or prospective customer for

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> any purpose which is competitive with the Business in the Territory. [I]f during the twelve (12) month period prior to your termination of employment with the Company you were involved in soliciting business from the customer or prospective customer and/or had direct knowledge of the company's plan to solicit business from the customer or prospective Customer;
>
> **Termination**: …You may terminate your employment under this Agreement at any time by providing the Company with three (3) months written notice. Where you provided the Company with written notice under this provision, the Company may waive such notice, in whole or in part, in which case your employment will terminate on the date specified by the Company.

[15] The contract also contained a confidentiality provision which defined "Confidential Information" as information "made known to [the employee] in the course of employment with the Company which is not generally known by persons outside the Company, including information … pertaining to … the Company's … clients."

[16] At the time Mr. Song commenced work at Three Step, he did not have any of his own clients and, therefore, did not provide a client list. During his time at the clinic, Mr. Song treated Three Step's existing clients.

[17] On June 17, 2024, Mr. Song sent an email to advise that he wished to terminate his employment, effective in mid-August 2024.

[18] On August 11, 2024, prior to completing his work at Three Step, Mr. Song began to work part time at Able Wellness Centre located on East Hastings Street in Burnaby. This clinic is a 14-18 kilometers drive by car from Three Step depending on the route taken. There is no direct evidence that Mr. Song treated any Three Step clients at Able Wellness.

[19] Three Step alleges that after Mr. Song left his position, seven of the clients that Mr. Song treated stopped receiving kinesiology treatments at Three Step. Three Step did not call any of these clients to testify and, instead, relies solely on their treatment records to establish that they failed to continue their treatment.

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[20] After giving notice at Three Step, Mr. Song also started to work part time as a kinesiologist at a clinic in Port Moody, called Aeris Physiotherapy. While at Aeris, Mr. Song treated two patients that he had previously treated at Three Step, Ms. Hyun Sook Park and Mr. Sang Nam Park. Mr. Song called both these former clients to testify.

Scope of the Action

[21] An issue arose during final submissions regarding the proper scope of this proceeding.

[22] In its submissions, Three Step alleges that Mr. Song breached other clauses of the contract in addition to the non-competition and non-solicitation clauses. Three Step further alleges that Mr. Song breached his common law implied duty of fidelity and good faith. Three Step says that these allegations are properly raised in the pleadings because it is pleaded at paragraph 16 of the notice of civil claim that Mr. Song "used the Plaintiff's confidential and proprietary information, including client lists and contact information, pricing information and curriculum to unfairly compete with the Plaintiff." Three Step also points to the relief sought in which general and special damages are sought for breach of contract.

[23] Mr. Song says that these additional breaches are neither referred to, nor particularized, in the pleadings and that the only two potential breaches before the Court are of the non-solicitation and the non-competition clauses. Mr. Song also points to the trial brief filed by Three Step in which it described the issues on liability succinctly as whether Mr. Song breached the employment contact, specifically the non-competition and non-solicitation clauses.

[24] From my review of the pleadings, I find that the scope of the breach of contract claim is confined to the allegations that Mr. Song breached the non-competition clause and the non-solicitation clause and that as a result, Mr. Song did not receive fair notice that his conduct in respect of other aspects of the contract or a common law duty of good faith would be at issue. No material facts are pleaded to

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describe how Mr. Song allegedly breached other clauses of the contract or any implied duty of good faith.

[25] While there was evidence led in the course of the trial about whether Mr. Song followed other aspects of the employment contract, such as the IT policy appended as a schedule, to ground a cause of action, the material facts and legal basis for these claims must be set out in the pleadings. The requirement to plead material facts is central to the purpose of pleadings: to inform the defendant of the case he or she must meet. This requirement is grounded in trial fairness. As Justice Burke observed in *Samuda v Knight,* 2019 BCSC 133 at para 20, “the defendants at trial should not have to guess what it is they are alleged to have done.”

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Issues

[26] The issues raised by the pleadings are straightforward:

1) Is the non-competition clause enforceable and if so, did Mr. Song breach it?

2) Is there any evidentiary basis to conclude that Mr. Song breached the non-solicitation clause?

3) If a breach of either or both clauses is established, has Three Step established that it suffered damages caused by the breach or breaches and if so, what is the quantum of those damages?

Legal Framework for Restrictive Covenants

[27] This case engages the law on restrictive covenants in the context of employment contracts.

[28] Employment contracts may contain clauses whereby an employee provides a covenant that they will not compete with their employer after their employment is terminated or that they will not solicit the employer’s customers. However, these restrictive covenants are restraints on trade and, as such, engage policy concerns that unreasonable restrictions on a person's ability to earn a living are contrary to the

public interest: *Valley First Financial Services Ltd. v Trach,* 2004 BCCA 312 at para 44.

[29] The Supreme Court of Canada in *Shafron v K.R.G. Insurance Brokers (Western) Inc.,* 2009 SCC 6 at para 16 [*Shafron*], adopted the words of Lord MacNaughton in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.* [1894] A.C. 535:

> The public have an interest in every person's carrying on his trade freely: so has the individual. 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. That is the general rule.

[30] The presumption of unenforceability is rebuttable. For example, a non-competition clause may be enforceable if it is reasonable as between the parties and with reference to the public interest more generally: *IRIS The Visual Group Western Canada Inc. v Park,* 2017 BCCA 301 at para 16 [*IRIS*], citing *Elsley v J.G. Collins Insurance Agencies,* 1978 CanLII 7 at p 923-924, [1978] 2 SCR 916 (SCC) [*Elsley*].

[31] As a result, the burden always lies on the person seeking to enforce the non-competition clause to establish that the clause is reasonable as between the parties. Once the clause is established to be reasonable as between the parties, the burden then shifts to the party resisting enforcement of the clause to demonstrate that the clause is unreasonable by reference to the public interest: *IRIS* at para 17.

[32] The analysis to assess whether a non-competition clause is reasonable as between the parties proceeds in steps.

[33] At the first step, the court considers the context in which the clause was imposed to determine the level of scrutiny it should be given. Courts distinguish between non-competition clauses in agreements to sell a business and those in employment contracts. The latter are subjected to a higher level of scrutiny. When a business is sold, typically part of the purchase price includes a payment for goodwill, and, in this context, it makes sense to require that the seller be held to its promise not to compete with the purchaser. By contrast, in the employment context, an employee does not typically receive a payment of goodwill. In addition, there is often

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an imbalance of power with the employee having reduced bargaining power and an employer having greater economic resources to pursue the employee in litigation: *IRIS* at paras 19-23.

[34] As Justice Hunter observed in *IRIS* at para 49, “One of the practical indications of a power imbalance is the use of standard form contracts drafted by one of the parties and presented to the other party without any negotiations.”

[35] In this case, there is no dispute that a heightened level of scrutiny applies because the agreement at issue is an employment contract.

[36] As set out by the Court of Appeal in *IRIS,* the analysis then moves to a second stage focused on determining whether the non-competition clause is reasonable as between the parties. In doing so, the court must consider whether the party seeking to enforce the non-competition clause can establish the following:

1) that they have a proprietary interest worthy of protection;

2) if so, that the interest cannot be adequately protected by other less restrictive means than the non-competition clause, such as a non-solicitation clause; and

3) if the non-competition clause is necessary to protect the interest, that its terms are reasonable by reference to the activity prohibited, the geographical area of the prohibition and the duration of the prohibition.

[37] With respect to the first of these criteria, in the context of employment contracts, courts have found the protection of confidential information and trade connections of the employer to be business interests worthy of protection: *IRIS* at para 27.

[38] Moving to the second question, where the interest sought to be protected by a non-competition clause in an employment contract is trade connections, courts have recognized that in most cases, a non-solicitation clause will provide adequate protection: *IRIS* at paras 29-30.

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[39] However, there may be exceptional circumstances arising from the type of business carried on by the employer where a non-solicitation clause alone would not provide adequate protection. This type of situation was described by Justice Dickson in *Elsley* at p 926:

> … an employer could not have a proprietary interest in people who were not actual or potential customers. Nevertheless, in exceptional cases, … the nature of the employment may justify a covenant prohibiting an employee not only from soliciting customers, but also from establishing his own business or working for others so as to be likely to appropriate the employer's trade connection through his acquaintance with the employer's customers. This may indeed be the only effective covenant to protect the proprietary interest of the employer. A simple non-solicitation clause would not suffice.

[40] With respect to the final step, if it is established that the non-solicitation clause offers insufficient protection of the employer's business interest, the court must then examine the scope of the non-competition clause and assess whether its spatial, temporal, and geographic restrictions are no broader than is necessary to protect the employer's interest: *IRIS* at para 33; *Elsley* at p 928.

[41] Where the scope of a non-competition or non-solicitation clause exceeds what is necessary to protect the employer's interest, it will be found to be unreasonable as between the parties and, therefore, is unenforceable: *IRIS* at para 36; see also *Phoenix Restorations Ltd. v Brownlee,* 2010 BCSC 1749 at para 41 [*Phoenix Restorations*].

[42] The clarity of a restrictive covenant is also a relevant consideration as to whether it is reasonable and, therefore, enforceable. As Hunter J.A. observed in *IRIS* at para 64, "an ambiguous clause cannot be a reasonable clause."

Analysis of the Non-Competition Clause

Findings of Fact re Contract Execution

[43] There is little dispute between the parties that Mr. Song was offered a job based on his interview with Ms. Park rather than his experience as a kinesiologist. Ms. Park testified that she thought Mr. Song was very "fresh, honest and genuine" and although she concluded that he had no practical experience because he was

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unable to accurately explain why certain exercises would be prescribed for certain conditions, she was confident that she could train him. Ms. Park also testified to her past experience of hiring practitioners with little experience and training them.

[44] Mr. Song testified that he was offered employment at the conclusion of the interview.

[45] Further to that verbal offer and shortly after this interview, Mr. Song received an offer letter dated April 22, 2023, along with a copy of the contract. The offer letter requested that he review the contract carefully and that he raise any questions or concerns with Ms. Park. The letter also described the contract as “foundational to our employment relationship”.

[46] Mr. Song testified that Ms. Park followed up with him the next day to see if he had signed the contract and he asked if he could have a bit more time to review it. Mr. Song testified that Ms. Park told him during this conversation that the contract was “just standard” and something that all the other clinics use. This alleged statement was not put to Ms. Park in cross-examination.

[47] Ms. Park’s evidence is consistent with Mr. Song’s evidence that she called Mr. Song to follow up and that he did not raise any questions or concerns during this call.

[48] I find as a fact that Ms. Park did not review any of the terms of the contract with Mr. Song, including the non-competition and non-solicitation clauses. She testified that she considered it Mr. Song’s responsibility to review the contract.

[49] Mr. Song testified, and I accept, that he did not review the terms of the contract carefully before signing it.

Findings of Fact Proprietary Interest of Three Step

[50] Ms. Park testified that it is important for the clinic to retain clients because they are its primary source of revenue. She also explained that, in her experience,

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clients receiving treatment through ICBC coverage are particularly valuable as they tend to be clients of the clinic for extended periods of time.

[51] I accept Ms. Park's evidence that 60% of her clinic's clientele are Korean and that many of them prefer to be treated by a practitioner who can speak Korean.

[52] Ms. Park testified that the purpose of the non-competition clause is to protect the clinic's client base. She described the Korean community in the Tri-Cities area as quite small and Korean-speaking practitioners trained by Three Step can be very attractive to other clinics who wish to serve this community. She explained that Burnaby is also included in the geographic scope of the non-competition clause because her clinic is located close to the border between Coquitlam and Burnaby.

[53] I also find that Three Step has not strictly enforced the competition clause with other employees when they have asked for exemptions. Ms. Park testified that she had relieved another employee from the non-competition clause when she approached her to ask for some flexibility to work at another clinic in Coquitlam. She also acknowledged granting a similar exception to another employee to work at a clinic in Burnaby because he had honestly communicated his request and needed the work hours to get permanent residency.

[54] Ms. Park testified that she offered Pilates training to Mr. Song and other practitioners at the clinic. She described developing written Pilates training materials together with the Three Step office manager, Ms. Jihye Lee, a process she says has taken numerous evenings and weekends over three years to develop and remains ongoing as the materials are being revised. In cross-examination, she acknowledged that at the time Mr. Song was receiving training, these training materials did not exist in the same form. Rather, he and other practitioners were given emails with instructions to follow up on movements demonstrated in training sessions.

[55] Mr. Song testified that at commencement of his employment, he received some more intensive training in Pilates from Ms. Park and Ms. Lee whenever he had free time. However, these sessions reduced in frequency to 20- to 30- minute

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sessions once a month. The training consisted of being shown movements, repeating the movements, and getting feedback. He described these sessions as optional and that practitioners did not attend if they conflicted with client sessions. With respect to training materials, Mr. Song testified that Ms. Park and Ms. Lee referred him to YouTube videos and encouraged him to come up with his own sequences. He was also told to use a store-bought Pilates reference book available at the clinic.

Conclusion re Non-Competition Clause

[56] There is no dispute that I must accord higher scrutiny to the enforcement of the non-competition clause given that it arises in the employment context. However, the specific facts before me also demonstrate that there was an imbalance of power justifying higher scrutiny. The employment contract is a 24-page standard form contract, and there was no negotiation between the parties. Further, despite the fact that Three Step regarded the contract as “foundational to [the] employment relationship”, Ms. Park took no time to explain the meaning or import of the detailed contract with Mr. Song who was accepting his first professional position after completing university.

[57] In keeping with the heightened scrutiny I must apply, I am not persuaded that Three Step has met its onus to establish that the terms of the competition clause are reasonable as between it and Mr. Song for the following reasons.

[58] First, I accept that Three Step has a legitimate proprietary interest in protecting its client base: See *Phoenix Restorations* at para 39. However, the evidence before me does not provide a sufficient basis to conclude that Three Step is in such an exceptional position that the non-solicitation clause, together with the confidentiality clause also included in the contract, would not be sufficient to protect this interest. As confirmed in *IRIS,* Three Step bears the onus to prove that the non-competition clause is necessary.

[59] Secondly, in my view, the geographic scope of the clause is broader than necessary. Burnaby is a very large municipality, and similar clinics in many areas

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within Burnaby would not be in direct competition with Three Step given the distance between them and because they service entirely different neighbourhoods.

[60] Finally, the scope of the restricted activities is also broader than necessary. The clause prevented Mr. Song from working in any “capacity which relates to the business of provision of Pilates, ICBC rehabilitation and personal training”. Ms. Park agreed on cross-examination that there are many businesses that offer personal training but do not offer Pilates or rehabilitation services but that employees who signed the contract would be prohibited from working at such places. It is difficult to see how a gym that offered only personal training would be a direct competitor of Three Step. Any concerns about a former employee soliciting clients to such a personal training business could be addressed by the non-solicitation clause.

[61] That the non-competition clause is not necessary is a sufficient basis on its own to conclude that it is unenforceable. Therefore, it is not necessary to consider whether the clause can be made enforceable by engaging in a blue pencil severance to read down the portions that unreasonably extend the scope of the clause as contemplated in *Shafron* at para 29.

[62] Accordingly, I conclude that the non-competition clause is not reasonable as between the parties and is not enforceable.

Analysis of the Non-Solicitation Clause

[63] Although the case law identifies that similar public policy concerns arise with respect to non-solicitation clauses in employment contracts, Mr. Song did not argue that the clause was unenforceable. Rather, his position is simply that the evidence before the court fails to establish that he engaged in any “solicitation” as that term is defined in the jurisprudence.

[64] Three Step says that the text communications between Sang Nam Park and Mr. Song establish that Mr. Song engaged in solicitation contrary to the employment contract. Three Step further argues that it can be inferred that Mr. Song solicited Ms. Hyun Sook Park away from Three Step because she stopped treatments at

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Three Step after Mr. Song stopped work there and commenced treatment with Mr. Song a few weeks later at Aeris Physiotherapy. It also seeks to have the Court draw the inference that because five other clients stopped attending Three Step, Mr. Song solicited those clients as well.

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What Constitutes Solicitation?

[65] The contract prohibited Mr. Song from canvassing or soliciting the business of any of Three Step's customers or prospective customers.

[66] In the context of employment agreements, courts in this province have adopted the definition of "solicit" as set out in Black's Law Dictionary: *Dr. P. Andreou Inc. v McCaig,* 2007 BCCA 159 at para 28 [*Dr. P Andreou*]; *Brouwer Claims v Doge et al,* 2002 BCSC 988 at paras 40-41 [*Brouwer*]:

> Solicit. To appeal for something: to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavour to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for; to try to obtain; and though the word implies a serious request, it requires no particular degree of importunity, entreaty, imploration, or supplication.

[67] The Supreme Court of Canada in *Committee for the Commonwealth of Canada v Canada,* 1991 CanLII 119 at paras 30-31, [1991] 1 SCR 139 (SCC), albeit in a different context, held that "solicitation" necessarily implies a request or invitation and "refers to conduct for the purpose of inciting someone to do something": cited in *Dr. P. Andreou* at para 35.

[68] In *Brouwer* at para 41*,* Justice Goepel, as he then was, held that "solicit" requires the taking of an active step.

[69] The following examples illustrate conduct that courts have held does not constitute solicitation:

- Informing clients of the employee's impending departure when to do otherwise would have demonstrated obvious discourtesy: *Petrela &*

Associates *v Kuehne,* 1998 CanLII 9326,1998 CarswellQue 3063 (QCCS), cited with approval in *Dr. P. Andreou* at para 29;

- Placing a newspaper advertisement to announce a new business location without mention of the association with the former employer: *Groupe Financier Assbec ltée v Dion,* 1994 CanLII 6325, 61 CPR (3d) 289 (QCCA), cited with approval in *Dr. P. Andreou* at para 33;

- Sending form letters to hundreds of clients to inform of a transition to a new firm, providing clients with their personal phone numbers and following up with personal phone calls: *Overseas Insurance Brokers Corporation v Ko,* 2018 ONSC 4612; *Capital Direct Lending Corp. v Blanchette,* 2019 BCSC 1068.

Evidence Relating to Mr. Song's Departure

[70] The only direct evidence that Three Step relies upon to establish solicitation is the text communication that took place between Mr. Song and Mr. Sang Nam Park in July 2024, the month before Mr. Song completed his employment at Three Step. This text communication starts with Mr. Song informing Mr. Park that ICBC had only approved one last set of 24 sessions expiring on September 11. In response to a request by Mr. Park to change his regular treatment times, Mr. Song advised Mr. Park that he would only be handling cases until the end of July and then he was going to be moving to work at Aeris Physiotherapy and Able Wellness. Mr. Park then asked if Aeris Physiotherapy was in Port Moody. Mr. Song responded yes. Then, Mr. Park asked if he could follow Mr. Song to the Port Moody clinic. Mr. Song said that was fine by him but indicated that it may be a while before he had the license in place to handle ICBC cases at the new clinic.

[71] Mr. Park testified that he lives in Port Moody and that Aeris Physiotherapy was closer to his home. Mr. Park had been receiving treatment from Mr. Song for just over a year. He explained that in their text exchange, he did not ask to have Mr. Song assign him a new practitioner at Three Step because his ICBC-funded

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treatments were coming to an end and he was not interested in starting over with a new practitioner who was unfamiliar with his condition.

[72] Mr. Park also testified that on the day of his last treatment with Mr. Song at Three Step, he offered to take Mr. Song for a coffee to thank him for helping him with his rehabilitation. Mr. Park was interested in why Mr. Song was leaving Three Step, but Mr. Song did not get into the details. Mr. Park asked Mr. Song to keep him posted when he was going to finish work at Three Step and to let him know when he was starting at Aeris Physiotherapy.

[73] Ms. Park and Ms. Lee testified that Three Step had procedures in place to transition a client from a departing practitioner to a new practitioner. Pursuant to these procedures, Mr. Song was expected to introduce his clients to Daniel Kim, the kinesiologist who was going to take over his clients. This introduction was expected to take place in person at the clinic during a treatment session. Mr. Song testified that he was aware of these procedures. However, he acknowledged that he may not have followed these procedures with all his patients. He explained that it was difficult to coordinate schedules with the other practitioners to make this happen.

[74] Mr. Song agreed on cross-examination that he did not introduce Mr. Sang Nam Park to Mr. Kim. Mr. Sang Nam Park testified that Mr. Song introduced him to Mr. Kim during a session. Mr. Song testified that he notified all the clients he treated that he was leaving, including Ms. Hyun Sook Park. However, Ms. Hyun Sook Park testified that she did not know that Mr. Song was leaving Three Step until she later saw him by coincidence when she went to Aeris Physiotherapy to inquire about starting treatment there.

[75] Ms. Hyun Sook Park testified, through an interpreter, that she decided to leave Three Step for reasons not relating to Mr. Song. Ms. Hyun Sook Park had been involved in a car accident in 2020 and was involved in litigation with respect to the accident. She started treatment at Three Step in July 2022 with Ms. Hena Kim. Her practitioner was then changed to David Choi and finally to Mr. Song in October

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2023. Ms. Hyun Sook Park testified that she was troubled by the fact that she had three different practitioners with little explanation.

[76] Ms. Hyun Sook Park also testified to administrative difficulties she experienced with the billing for her sessions which were supposed to be covered by ICBC. She said that the clinic contacted her to advise that due to a change in ICBC billing practices, ICBC was no longer going to cover the sessions directly and that she was going to have to pay for the sessions and seek reimbursement from ICBC. She testified that she told the clinic that she would follow up with her lawyer's office to have them contact the adjuster. She testified that Three Step staff phoned her repeatedly over this issue and even asked to contact her lawyer's office, which she found to be inappropriate. Ms. Hyun Sook Park testified that the stress caused by the repeated phone calls from the clinic made her decide to leave Three Step. She testified that she wrote a cheque for the outstanding bill amount and did not return to the clinic.

[77] Although counsel sought to demonstrate during cross-examination that Ms. Hyun Sook Park was mistaken as to when the billing dispute arose, I am not persuaded that this aspect of her evidence is unreliable. She appeared genuinely dissatisfied with the manner in which clinic staff had handled the billing issue. Her evidence is supported by the billing records, which confirm that she made a final payment of more than $360 on August 22, 2024. I also accept her evidence that it was merely coincidental that she learned Mr. Song had moved to Aeris Physiotherapy.

[78] When I consider the evidence as a whole, I am unable to conclude that Mr. Song took an active step to solicit Mr. Sang Nam Park. The text communication does not amount to solicitation as Mr. Song was merely advising Mr. Park as a matter of courtesy that he was no longer going to be working at Three Step. He then responded to questions posed by Mr. Park. Given the meaning of "solicit" as set out in the case law, this falls significantly short of the threshold for soliciting.

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[79] Similarly, with respect to Ms. Hyun Sook Park, I find that the evidence fails to establish on a balance of probabilities that Mr. Song took any active steps to solicit her as a client for Aeris Physiotherapy.

[80] Finally, there is no evidence from which it can reasonably be inferred that Mr. Song took any active steps to solicit the five other clients identified by Three Step who ceased attending the clinic following his departure. There is no evidence that Mr. Song treated any of these individuals at either Able Wellness or Aeris Physiotherapy. These clients may have chosen to leave Three Step for any number of reasons, and none was called as a witness to explain that decision. The burden rests with Three Step to establish not only that these clients left the clinic, but that they did so as a result of solicitation by Mr. Song. On the evidence before me, it has failed to do so.

Damages

[81] Having concluded that no breach has been established, it is unnecessary to consider damages.

[82] If I am wrong in my conclusions above and Mr. Song did breach the non-competition and non-solicitation clauses, I would nevertheless find that Three Step has failed to prove that any losses associated with the five other clients discussed above were caused by that breach. There was no evidence as to why those clients stopped attending the clinic, and I cannot infer that their departure resulted from any conduct by Mr. Song. The only evidence relating to damages was a billing summary report indicating that revenue from ICBC kinesiologist initial assessments and rehabilitation sessions declined by an average of approximately $3,000 per month during the six months following his departure.

[83] While I accept that difficulty in fixing the precise quantum of damages is not a bar to a damages award (*Stolba v Comwave,* 2017 BCSC 2254 at paras 110-113, aff'd 2019 BCCA 120), causation is an essential element that must be proven. Three Step has failed to meet its onus to prove causation.

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[84] Accordingly, the action is dismissed. Mr. Song, as the successful party, is presumptively entitled to his costs in this matter. If the parties wish to make submissions that there are reasons in this case to depart from the usual rules as to costs, they may seek leave to do so within 30 days of this judgment.

"Hoffman J."

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