THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 17437/2013

In the matter between:

GRAINCO (PTY) LTD	**APPLICANT**

And

JACOBUS ALEWYN VAN DER MERWE	**FIRST RESPONDENT**
JOHANNES JACOBUS KITSHOFF	**SECOND RESPONDENT**
PERDIGON (PTY) LTD	**THIRD RESPONDENT**

Coram: ROGERS J

Heard: **18 JUNE 2014**

Delivered: **11 JULY 2014**

JUDGMENT

ROGERS J:

Introduction

[1] The applicant ('GrainCo' or 'New GrainCo') seeks to restrain the first respondent ('Van der Merwe'), the second respondent ('Kitshoff') and the third respondent ('Perdigon') from (I summarise) soliciting its customers, passing off Perdigon as being associated with GrainCo, unlawfully interfering in GrainCo's contractual relations and publishing injurious falsehoods.

[2] The application was issued on 22 October 2013 in long form. The main founding affidavit ran to 63 pages plus 184 pages of annexures. The main answering affidavit, filed on 12 December 2013, was 150 pages plus 217 pages of annexures. On 19 February 2014 the applicant filed its replying affidavit, in the circumstances an admirably terse document of 32 pages plus a further 43 pages of annexures.

[3] The matter came before me on 18 June 2014. Mr AIS Redding SC, leading Mr T Dalrymple, appeared for GrainCo, and Mr J Newdigate SC, leading Mr HC van Rensburg, appeared for the respondents.

The facts

[4] Since many of the matters traversed in the papers are irrelevant to the arguments, I shall attempt to compress the factual background.

[5] Van der Merwe and Kitshoff established an agricultural trading and logistics business in May 2000 through a company referred to in the papers as Old GrainCo. The business succeeded and grew. The main shareholders of Old GrainCo were family trusts associated with Van der Merwe and Kitshoff respectively. Their precise shareholding is not stated in the papers. However, to judge by the amalgamation agreement referred to hereunder, an equity financier called Thembeka Capital (Pty) Ltd held 25,1% of Old GrainCo, the family trusts associated with Van der Merwe and

Kitshoff held 34,95% each (about 69,9% in total), and the remaining 5% was held by two other shareholders.[1]

[6] In terms of an agreement executed on 15 February 2007, Old GrainCo sold its business and all its assets to BKB Ltd ('BKB') with effect from 1 October 2006. The sale included the businesses conducted as divisions of Old GrainCo as well as Old GrainCo's shares in a subsidiary. Goodwill ('klandisiewaarde') was one of the assets listed in the schedule of assets sold. The purchase price was R28 450 430. BKB was to discharge the price by paying R4 million in cash to creditors of Old GrainCo and by issuing shares to Old GrainCo for the balance of the price. It was recorded that Old GrainCo would, immediately upon implementation, be placed in liquidation and its assets distributed to its shareholders . (The agreement was styled an 'amalgamation agreement' with reference to s 44 of the Income Tax Act 58 of 1962.)

[7] The amalgamation agreement was implemented and Old GrainCo liquidated, as a result of which the family trusts of Van der Merwe and Kitshoff collectively obtained, by way of a distribution from Old GrainCo, an 8,86% shareholding in BKB.

[8] BKB immediately on-sold the business and assets to New GrainCo (the applicant) on loan account for the same price.

[9] It was envisaged that Van der Merwe and Kitshoff would take up employment with New GrainCo though this was not mentioned in the amalgamation agreement and was not a condition to which it was subject. Service contracts between New GrainCo and them were executed in August 2007 with effect from 1 July 2007. Van der Merwe was employed as GrainCo's managing director and Kitshoff as the head of its trading division. They were both appointed as directors of GrainCo.

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[1] In terms of clause 6.1 of the amalgamation agreement, Thembeka was to receive 25,1% of the shares issued in satisfaction of the purchase price, while the family trusts of Van der Merwe and Kitshoff and two other shareholders (defined in the agreement as the 'Other Shareholders') were to receive the balance of the consideration in the proportion set out in annexure 'C' to the agreement. Annexure 'C', on my understanding, sets out the percentages in which the remaining 74,9 of the equity consideration would be divided among the four 'Other Shareholders', which I assume was *pro rata* to the proportions in which they held the remaining 74,9% in Old GrainCo.

[10] Clause 12 of the amalgamation agreement was headed ‘Restraint of Trade’. Clause 12.1 contained various definitions relevant to the other sub-clauses. Nothing turns on these definitions save to mention that the defined ‘restraint period’ was the period from the effective date (1 October 2006) to the fifth anniversary of the closing date. In the event, the fifth anniversary was 30 June 2012.

[11] In terms of clause 12.2 Old GrainCo, Van Der Merwe and Kitshoff agreed with BKB that none of them would do any of the following, directly or indirectly:

’12.2.1 during any of the years of the restraint period be interested in any entity which is interested in any competitive activity in the territory or themselves be interested in any competitive activity in the territory;

12.2.2 during any of the years of the restraint period do anything referred to in 12.2.1 outside the territory which has the effect of causing BKB prejudice in the territory;

12.2.3 during any of the years of the restraint period directly or indirectly canvass any customer and/or client of BKB for or on behalf of any entity in which they are interested, or on their own behalf;

12.2.4 at any time disclose the confidential information.’

[12] In terms of clause 12.3 Old GrainCo, Van der Merwe and Kitshoff agreed with BKB that none of them would, either for their own account or as representative or agent of any entity in which they were interested, persuade, induce, encourage or procure any BKB employee:

’12.3.1 to become employed by or interested, directly or indirectly, in any entity which is interested in a competitive activity;

12.3.2 to terminate such employee’s employment with any of BKB [*sic*]; or

12.3.3 to furnish any information or advice acquired by the hired employee as a result of his employment with any of BKB [*sic*], to any unauthorised person.’

[13] In clause 12.4 Old GrainCo, Van Der Merwe and Kitshoff acknowledged that the restraints were reasonable as to subject matter, period and territory and that the agreement was concluded on the basis that BKB would be entitled to the benefits of the restraints. Clause 12.5 provided for severability in respect of the various

components of the restraint. Clause 12.6 recorded that the restraints were to 'be given the widest possible interpretation'.

[14] Clause 12.8 provided that the provisions of clause 12 would be capable of acceptance and enforcement by BKB's successor-in-title. Clause 15 stated, more generally, that the agreement would also be for the benefit of and binding upon the 'successors in title and permitted assigns' of the parties or any of them. Although counsel did not refer to these clauses in argument, New GrainCo was clearly the successor-in-title to BKB and the assignee of its rights and obligations.

[15] The service contracts concluded by Van der Merwe and Kitshoff made clause 12 of the amalgamation agreement applicable to their employment. The service contracts were for a period of five years and expired on 30 June 2012, simultaneously with the restraints contained in clause 12. Van der Merwe and Kitshoff concluded new service contracts with effect from 1 July 2012. Those contracts were of indefinite duration. The contracts referred again to clause 12 of the amalgamation agreement though in the event clause 12 had by then ceased to be operative. GrainCo did not contend in these proceedings that Van der Merwe or Kitshoff were, after 30 June 2012, bound by the restraints contained in clause 12 of the amalgamation agreement or in their service contracts.

[16] The businesses of GrainCo and its subsidiaries grew and prospered for several years but came under increasing financial strain in 2012. Tension developed between BKB's board (in particular the latter's managing director, Mr W Edmayr) and Van der Merwe over the management of GrainCo's affairs. Van der Merwe considered that GrainCo's current trading model could not succeed without significant capital support from BKB, which the latter was unwilling to provide. Various proposals were mooted, which included a possible sale of BKB's business to Senwes Ltd (negotiations to that effect eventually failed), the possible acquisition by Van der Merwe of GrainCo's trading business, and a restructuring and scaling-down of GrainCo's trading operations. If Van der Merwe was to acquire the trading business, he wanted Kitshoff to join him. During January 2013 Van der Merwe raised the possibility of his being phased out as an employee of the business.

[17] Van der Merwe and Kitshoff presented various scenarios to Edmayr and the GrainCo board on 5 March 2013. Edmayr subsequently took the view that at this meeting Van der Merwe had given notice of his resignation with effect from 31 March 2013. Van der Merwe disputes this.

[18] 'Brainstorming' regarding the possible acquisition by Van der Merwe and Kitshoff of GrainCo's trading business continued for several weeks. According to the respondents, these discussions came to a halt on about 18 March 2013. BKB's non-executive chairman, Mr Chris Louw, flew down from Port Elizabeth and joined Edmayr in a meeting at GrainCo's offices in Paarl on 19 March 2013. When Van der Merwe joined this meeting, he was told by Edmayr that BKB's plan now was that Grainco's trading and logistics businesses would be scaled down and the company would embark upon a process in terms of s 189A of the Labour Relations Act to consult with employees who might be retrenched pursuant to the proposed restructuring. The s 189A process was to be headed by BKB's human resources manager, Ms Karen Posthumus.

[19] Posthumus, who was based in Port Elizabeth, arrived in Paarl on 25 March 2013 to begin the process of consultation. It emerged that Van der Merwe was not regarded as an affected employee because Edmayr said he had already resigned. Kitshoff, on the other hand, was an affected employee, ie he was notified that due to restructuring his employment with GrainCo might possibly be terminated. Among other affected employees were Joe Roberts (a senior trader), Anthea Emslie (chief of logistics) and Andre Hamann (internal accountant and head of bank finance).

[20] The respondents say that, with a scaling-down and retrenchment on the cards, Van der Merwe had discussions with Posthumus and BKB about the possibility that he would open a trading business which could employ retrenched staff members. Edmayr did not support this. Smit, according to the respondents, was ambivalent. At that stage Van der Merwe thought he was still subject to a restraint of trade. In late March 2013 he took legal opinion and was advised that he was not so bound.

[21] Although Van der Merwe disputed Edmayr's assertion that he had resigned, he decided not to contest the matter because he believed that BKB was intent on forcing him out. He thus regarded his employment with GrainCo as having terminated on 31 March 2013. This accords with the applicant's case as to the date of termination. Mr Hendrik Vermooten, previously employed elsewhere in the BKB group, succeeded Van der Merwe as GrainCo's managing director. (Vermooten made the founding affidavit.) Edmayr informed staff of this change by way of a circular dated 3 April 2013.

[22] Van der Merwe says that upon his departure he started actively planning his new trading venture.

[23] On 30 April 2013 Kitshoff, Roberts, Emslie and Hamann gave notice of their resignations. They were required to work out one month's notice. They thus worked at GrainCo until the end of May 2013. They all joined Van der Merwe's new trading venture, which opened its doors on 1 June 2013. The vehicle for the new business was Perdigon.

[24] Kitshoff, Roberts, Emslie and Hamann left GrainCo by way of resignation, not retrenchment. Interactions between BKB's management and Kitshoff during April 2013 indicated that he might be retrenched or offered a reduced remuneration package. Kitshoff was ambivalent about the merits of GrainCo's proposed new trading model. It seems, though, that by late April 2013 GrainCo was expecting Kitshoff to remain as the head trader in accordance with his existing service contract.

[25] Roberts, who was a trader, had requested GrainCo's management during April 2013 to offer him a retrenchment package, given that the restructuring was directed primarily at the trading division. GrainCo did not, however, offer him a package, from which one may infer that the company wished him to stay.

[26] I accept as a fact that Kitshoff, Roberts, Emslie and Hamann resigned from GrainCo because Van der Merwe had communicated to them that he intended to start a new trading business and would offer them positions. Roberts, Emslie and

Hamann had service contracts containing a one-year restraint of trade. The respondents say that during the s 189A process GrainCo's position was that employees affected by the restructuring would be released from their restraints. The respondents say that they believed this to apply not only to employees who were retrenched but also to those who (like Roberts, Emslie and Hamann) chose to resign. GrainCo denies that there was a general dispensation and alleges that the respondents were guilty of inducing Roberts, Emslie and Hammond to breach their contractual restraints.

[27] Three other GrainCo employees also joined Perdigon. These persons had been retrenched by GrainCo, and the latter accepts that in their case the restraints of trade were waived.

[28] At the end of July 2013 another GrainCo employee, Tharine Pijl (group financial manager), resigned. She was also subject to a one-year restraint. She commenced employment with Perdigon on 1 November 2013, about a week after the application was launched.

[29] GrainCo alleged in its papers that Van der Merwe, Kitshoff, Hamann and Pijl all gave misleading reasons to GrainCo, when departing, as to their future intentions. There are factual disputes on these allegations.

[30] It is difficult to ascertain from the papers to what extent GrainCo's trading and logistics operations underwent changes in consequence of the proposed restructuring and s 189A process. From a letter which Smit wrote to Posthumus on 17 April 2013 (with copies to Edmayr and Vermooten), it appears that the substantial down-scaling which Edmayr had communicated to Van der Merwe on 19 March 2013 had come as a surprise to Smit and did not carry the latter's approval. In its replying papers the applicant says that there was, in the event, no material down-scaling. By the end of the process GrainCo only had nine fewer employees than before.

[31] On the other hand, the minutes of s 189A discussions on 29 April 2013 indicate that, according to Vermooten, GrainCo would be revising its trading model

in order to focus as ‘a medium trader in niche markets trading’. In an email from Posthumus to Solidarity (the trade union) on 10 May 2013, the former said that future trading business would be conducted primarily with blue-chip clients. According to the respondents, Van der Merwe and Kitshoff had dinner with Vermooten on 12 June 2013, on which occasion Vermooten told them that all his restructuring targets had been achieved as a result of voluntary resignations, staff moving to Perdigon and one retrenchment, as a result of which GrainCo’s salary bill had been substantially reduced. Vermooten also allegedly said that GrainCo would reposition itself in the market and focus on storage, handling and back-to-back trading transactions.

[32] The reference to back-to-back trading transactions is briefly the following. GrainCo traded as an intermediary between producers and processors. If GrainCo’s buy and sell transactions were back-to-back, it would be protected from movements in market prices and its main risk would be the credit risk of the purchaser (the processor). Back-to-back trading transactions where the purchaser is a blue-chip customer carry very low credit risk. Prior to 2013 GrainCo’s trading model had not involved back-to-back transactions. Risk was instead hedged by way of futures contracts on SAFEX. However, if there were substantial movements in price the intermediary (here, GrainCo) could be called upon to make margin calls. This, according to the respondents, was why GrainCo required substantial capital, which BKB was unwilling to provide. They say that, whereas GrainCo has now become a niche back-to-back trader with blue-chip customers, Perdigon is operating on a risk-based model.

[33] The injurious falsehoods concern statements allegedly made by Van der Merwe and Kitshoff to customers as to GrainCo’s changed business model.

The main issues

[34] Because the five-year period specified in clause 12 of the amalgamation agreement and in the service contracts of Van der Merwe and Kitshoff came to an end in June 2012, the applicant cannot and does not rely, for relief, on the express restraints of trade.

[35] Certain issues raised in the papers have fallen away because the applicant's counsel at the hearing did not persist with them. These are the following:

(i) that the respondents infringed the 'GrainCo' trade mark allegedly owned by the applicant;

(ii) that Van der Merwe and Kitshoff should be interdicted because they are allegedly abusing confidential information acquired by them while they were directors and senior employees of GrainCo.

[36] The issues which remain can be summarised as follows:

(i) whether the sale of Old GrainCo's business (including its goodwill) to BKB gave rise to an implied prohibition against the canvassing of former customers and the effect in that regard of the express restraint clause; and if so,

(ii) whether the implied prohibition applies to all of New GrainCo's customers as at 1 June 2013 (as per the list annexed as 'NOM1' to the notice of motion) or only to those persons who were customers of Old GrainCo as at 1 October 2006 (the effective date of the amalgamation agreement); and, in the latter event, whether the applicant is entitled at this late stage to relief confined to customers as at 1 October 2006, given that this was not the basis on which it brought the application;

(iii) whether the respondents (as distinct from Old GrainCo) are bound by the implied prohibition;

(iv) whether, by virtue of the on-sale of the business by BKB to New GrainCo (the applicant), the latter can enforce the implied prohibition;

(v) whether the respondents were guilty of passing off Perdigon's business as being associated with GrainCo's business, having regard in particular to the fact that Perdigon's corporate documentation made reference to the name GrainCo;

(vi) whether the respondents unlawfully interfered in GrainCo's contractual relations, particularly by offering employment to Roberts, Emslie, Hamann and Pijl in circumstances where those employees were allegedly subject to one-year restraints;

(vii) whether the respondents disseminated injurious falsehoods concerning GrainCo to customers, in particular as to the scope of GrainCo's current operations and ambitions.

[37] In the founding papers the applicant claimed interim interdicts in the alternative to final interdicts if there should be disputes of fact. Although the alternative of interim relief was addressed in the applicant's heads of argument, Mr Redding did not deal with it in oral argument, though he did not abandon it. In my view it would not be appropriate to contemplate granting interim relief at this late stage. Perdigon has been conducting business for more than a year. The application was launched in October last year. No steps were taken to obtain an urgent hearing for the obtaining of interim relief. In any event, and in regard to the main relief claimed (para 1.1), my conclusion is not affected by factual disputes.

The canvassing of GrainCo's customers (para 1.1 of the notice of motion)

Introduction

[38] The first four issues summarised above concern the relief claimed in para 1.1 of the notice of motion. GrainCo's contention, based on the principle laid down in *Trego v Hunt* 1896 AC 7 and acted upon in *A Becker & Co (Pty) Ltd v Becker & Others* 1981 (3) SA 406 (A), is that the seller of a business inclusive of its goodwill is subject to an implied prohibition not to diminish the goodwill by canvassing the customers of the sold business and that in the present case the operation of the implied prohibition is not excluded by the restraints contained in clause 12. The implied prohibition, GrainCo submits, continues in force despite the fact that the restraints in clause 12 expired on 30 June 2012. (For convenience, I shall refer to the implied prohibition referred to in the foregoing cases as the implied *Trego* prohibition.)

[39] The respondents' answer is that *Becker* is distinguishable. In particular, clause 12 in the present case, unlike the restraint in the *Becker* case, is sufficient to exclude the implied *Trego* prohibition. The respondents submit that, in any event, the applicant (New GrainCo) was not the purchaser in terms of the amalgamation agreement (the purchaser was BKB) and that none of the respondents were sellers (the seller was Old GrainCo). If there were an implied *Trego* prohibition, GrainCo is not entitled to enforce it and none of the respondents is bound by it.

[40] Although Van der Merwe and Kitshoff started the Perdigon business shortly after leaving GrainCo, it is necessary throughout to bear in mind that we are not concerned with an employee restraint triggered upon the termination of the employee's service. We are concerned with an implied prohibition (against the canvassing of former clients) which was allegedly a legal incident of the sale of Old GrainCo's business to BKB as at 1 October 2006. In relation to the sale of the business, Old GrainCo, Van der Merwe and Kitshoff bound themselves to a five-year restraint. Van der Merwe and Kitshoff only started the Perdigon business in June 2013. Old GrainCo thus obtained the full benefit of the five-year restraint, in that for five years (and more) it was free from competition on the part of Van der Merwe and Kitshoff. Not only was it free from competition on their part but it had their active participation (as senior employees) in the generation of its profits (even though the amalgamation agreement itself did not requires them to take up employment with New GrainCo). By all accounts the business in New GrainCo's hands expanded and good profits were earned in the succeeding financial years, including the financial year ended 30 June 2012. It was thereafter that the New GrainCo operations, and particularly the trading business, began to take financial strain.

[41] It may be helpful, as an aid in the reading of what follows, to summarise my essential conclusions:

(i) If it were not for the authority of *Becker*, the correctness of which in my respectful view may warrant reconsideration, I would find that the express restraint in clause 12 excluded the operation of the implied *Trego* prohibition.

(ii) However I am bound by *Becker*. I thus consider that I am bound to find that, because the express restraint in the present case was wider than the implied prohibition and thus not inconsistent with it, the implied prohibition was not excluded.

(iii) The benefit of the implied prohibition passed from BKB to New GrainCo upon the sale of the business by the former to the latter.

(iv) However, the implied prohibition only bound the seller of the goodwill, namely Old GrainCo. Van der Merwe and Kitshoff were not bound by the implied prohibition.

They were permissibly subjected to an express restraint but that restraint expired in June 2012.

(v) But for the finding in (iv), I would have granted an interdict but in more limited form than claimed. In particular, I would have found that the implied prohibition applied only to customers, ie purchasers of GrainCo's goods and services, and not to its suppliers and brokers; that the customers in respect of whom the implied prohibition related were customers of the Old Grainco business as at 1 October 2006, not as at 30 June 2013 as claimed in the notice of motion; and that the interdict should be qualified to exclude, from its operation, customers who had ceased trading with GrainCo and were unlikely to resume trading with GrainCo as well as customers with whom GrainCo had elected to cease trading. I would also have limited the interdict to canvassing and would not have included 'dealing with' the customers.

Transfer of the benefit of the implied prohibition

[42] I now consider these matters in more detail. Point (iii) may be disposed of shortly. If the respondents are bound by an implied *Trego* prohibition, I would reject a contention that GrainCo is not entitled to enforce it. The implied prohibition would be an advantage of the purchased business, in the same way that a restraint of trade (whether as against employees or the seller of a business) is an advantage of the purchased business. The advantage conferred by the implied prohibition would, like the advantage conferred by express contractual restraints, be part of the goodwill of the business in the hands of the purchaser. If the purchaser on-sells the business together with its goodwill, these advantages pass to the new purchaser by way of cession of the right to enforce the restraints (*Botha & Another v Carapax Shadeports (Pty) Ltd* 1992 (1) SA 202 (A) at 211H-214G).

[43] The onward sale of the business by BKB to GrainCo expressly included goodwill and all rights pertaining to the business. In terms of clause 3.3 all rights and obligations under BKB's business contracts as defined were deemed to be ceded and assigned to GrainCo; and in terms of clause 4.1 ownership of the business and

its assets would be deemed on the effective date to have passed to and vested in GrainCo.

[44] In any event, clause 15 of the amalgamation agreement has the effect that the terms of the agreement, which would include any terms implied therein as a matter of law, are enforceable by New GrainCo as the successor-in-title and assignee of BKB.

The authorities on the implied prohibition

[45] Before considering the other issues which arise on this part of the case, it is necessary to examine more closely the legal basis for the implied prohibition. The leading case in this country is *Becker supra*. Judgements were delivered by Muller JA and Van Heerden AJA (as he then was). Both judgements represent the decision of the court, because three of the Judges of Appeal concurred in the judgment of Muller JA, and Muller JA and Van Heerden AJA each endorsed the other's judgment (see at 414H and 416H).

[46] The facts of that case were that with effect from 1 March 1972 the second defendant, a company owned by the first defendant, Becker, sold its business to the plaintiff. The assets sold included the goodwill of the business. In the same transaction, Becker sold the shares in another trading company, which also had goodwill, to the plaintiff. Clause 12 of the sale agreement recorded that the company had customers throughout South Africa and that they were the personal customers of Becker himself. The company and Becker gave a non-compete undertaking, to endure for five years from the effective date, ie until 1 March 1977. The restraint incorporated a prohibition against carrying on any business in competition with the business sold to the plaintiff and a prohibition against soliciting custom for any restrained business. Becker and the company acknowledged that the restraints were reasonable and were reasonably required by the plaintiff in protection of the businesses bought and sold in terms of the agreement.

[47] Becker and the company observed the restraint until 1 March 1977. Upon the expiry of the five-year period, Becker and the company, allegedly under the guise of

the third defendant (another entity controlled by Becker), began canvassing persons who were customers of the businesses at the date of the sale. The plaintiff instituted an action for an interdict to prevent Becker and his companies from canvassing the former clients. At the close of the plaintiff's case the defendants sought absolution from the instance on the basis that any implied prohibition against canvassing was excluded by the express restraints in clause 12 of the sale agreement and that the defendants, having complied with those restraints, were free after five years to compete with the plaintiff and to canvass the former clients. The trial judge granted absolution on this basis but his decision was reversed by the Appellate Division.

[48] In my view, the following principles can be distilled from the two judgments in the Appellate Division:

(i) A person who sells a business inclusive of its goodwill is not, in the absence of an express prohibition, precluded in general from competing with the purchaser.

(ii) Such a seller is, however, precluded from competing by canvassing persons who were customers of the business at the time of the sale.

(iii) The said prohibition arises not as a tacit term but as a term implied by law as one of the *naturalia* of a contract for the sale of a business incorporating goodwill.

(iv) The justification for the implied term is that, as a matter of public policy, a seller who has been paid for goodwill should not be allowed to undermine the value of what he has given by canvassing former customers.

(v) The implied term, like other *naturalia* of a contract, may be excluded by a contrary term in the contract.

(vi) However, the inclusion in the sale of agreement of an express restraint against competition will not exclude the implied term, even though the express restraint may overlap with the implied term (overlap in the sense that the express restraint would generally incorporate, but typically go beyond, a prohibition against canvassing former clients).

[49] Although the Appellate Division was concerned with the question whether absolution from the instance should have been granted by the trial court, the

judgments appear to have left no scope for the defendants to argue at the trial that they were not bound by the implied prohibition.

[50] The Appellate Division in *Becker* placed reliance on the decision of the House of Lords in *Trego v Hunt supra* and the judgment of a United States court in *Bergum v Weber* 288 P 2d 623 (1955). *Trego* did not involve the sale of a business. There Mrs Trego had taken in Mr Hunt as a partner for seven years on the basis that the goodwill of the business, which she had inherited from her late husband, would belong to her. After several years Mr Hunt began secretly to copy details of customers, apparently with a view to setting up a competing business. The court regarded Mr Hunt as being in the same position as the seller of a business because he had agreed that the goodwill would remain with Mrs Trego. The partnership agreement did not impose any express restraint on Mr Hunt so the inter-relationship between an express restraint and the implied prohibition did not arise for consideration. The House of Lords held that, by concluding a partnership agreement in terms whereof the goodwill was recognised as belonging to Mrs Trego, Mr Hunter was subject to an obligation not to undermine the goodwill by canvassing clients of the business.

[51] In *Bergum* there was a sale of business coupled with an express non-compete undertaking of one year. The District Court of Appeal held that there was an implied promise not to deprive the purchaser of the fruits of his bargain and that this was not negatived by or inconsistent with the express promise not to open a competing business for one year (see the summary of the case quoted by Muller JA at 415A-B and by Van Heerden AJA at 420C-421B).

[52] In regard to the impact of the express restraint against competition, Muller JA in *Becker* approved a submission by the plaintiff that ‘the sale of the goodwill and the restraint of trade were entirely separate provisions, and the sale of goodwill is not in any way tied up with the wording of the restraint clause’ (at 416A-B). He was unpersuaded that the parties had intended that the only restraint on the defendants would be the one provided for in clause 12 (416B-C).

[53] Van Heerden AJA approved the approach in *Bergum* as to the effect of an express restraint, namely that, in order for the express restraint to exclude the implied term, the express term 'must relate to the same subject matter as the covenant, which except for it, would have been implied', ie the express covenant 'must be inconsistent with the one which the law would imply'. In *Bergum* the court concluded that the express non-compete clause and the implied prohibition did not deal with the same subject matter and were not inconsistent: 'The implied covenant is as to an obligation assumed by the [seller]; the express covenant is a restriction on a right which, under the contract, he would have retained except for that covenant' (*Becker* at 420H-421B, quoting from *Bergum*). Van Heerden AJA considered the same to be true of the express restraint in *Becker* (at 421H-422A). I offer the following translation from Afrikaans of the relevant passage in Van Heerden AJA's judgment:

'If a sale contract does not contain such a term [ie an express restraint against competition], the seller is at liberty to compete with the purchaser, subject only to his obligation not to canvass his former clients. It is thus unnecessary to circumscribe this obligation expressly. If the buyer, however, wants to protect himself also against indirect competition, express provision must be made for such a term. It is true that there is automatically wrapped up in the [express] prohibition a prohibition also against direct intrusions on the goodwill, but I do not find in that consideration an inconsistency between the operation of the [express] prohibition and the applicability of the mentioned *naturale* after the expiry of the [express] prohibition. At most, the prohibition and the implied term [*'die regsgevolg'*] overlap for the period specified in the prohibition…'[2]

[54] I respectfully suggest that the conclusion in *Becker* and its approval of *Bergum* are matters which might warrant reconsideration by the Supreme Court of Appeal ('SCA'). In the judgment of the court *a quo* in *Becker*, FS Steyn J said the following:[3]

'I further hold the view that the inclusion of a restraint of trade clause in an agreement by which a business is sold, precludes the possibility of finding an implied term in such an

[2] I have taken the liberty, in the above translation, of changing '*naturalium'* to *'naturale'*, on the basis that the use of the former expression must have been an oversight. The correct neuter form of the substantive adjective *naturalis* is *naturale* while the plural is *'naturalia'* (see, eg, Van der Merwe *et al Contract General Principles* 4th Ed at 246).

[3] The judgment is not reported but I have procured a copy of it from the records of the SCA.

agreement that the vendors sold the goodwill of the business subject to another and special condition that he may never again make use of his personal business connection with customers whose customer connection with the business sold constituted an important element of the goodwill sold. The restraint of trade clause is the result of the parties involved in the sale directing their attention to the whole question of the preservation of the goodwill sold for the benefit of the purchaser and the restrictive covenant agreed upon by the parties is necessarily the bargain they decide to strike between themselves, and that arrangement shall be binding as between purchaser and seller even if it is contrary to any rule which might have been operative if the parties had not entered into an agreement on the subject.'

The learned judge went on to say that counsel had been unable to refer him to any authority, in England or South Africa, where such a restriction had been implied in the face of an express restraint of trade clause.

[55] I must say that the view of the learned trial judge makes good commercial sense and appears to me most likely to represent the common intention of the parties to a business sale agreement with a typical non-compete clause. It appears to me, if I may respectfully say, to be unrealistic and legally unsound to assert that the restraint clause and the sale of the goodwill are 'entirely separate provisions' and that the sale of the goodwill is 'not in any way tied up with the wording of the restraint clause'. So far from being unrelated, goodwill is the very thing to which the parties are applying their minds when they negotiate a restraint clause in the context of the sale of a business. Time and again one will see in the authorities, here and in other Commonwealth jurisdictions, that, where restraint clauses in business sales are attacked as being an unreasonable restriction on competition, the centre of attention in the justification debate is whether the restraint was reasonably necessary to protect the goodwill sold.[4]

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[4] In South Africa and Zimbabwe: *New United Yeast Distributors (Pty) Ltd v Brooks & Another* 1935 WLD 75 at 83-84; *Forman v Barnett* 1941 WLD 54 at 60; *Arlyn Butcheries (Pty) Ltd v Bosch* 1966 (2) SA 308 (W) at 309-310; *Brenda Hairstyles (Pty) Ltd & Others v Marshall* 1968 (2) SA 277 (O) at 280D-281D; *Diner v Carpet Manufacturing Co of SA Ltd* 1969 (2) SA 101 (D) at 105A-109D; *Commercial and Industrial Holdings (Pvt) Ltd & Another v Leigh-Smith & Others* 1982 (4) SA 226 (ZSC) at 232E-238C; *Basson v Chilwan & Others* 1993 (SA) 742 (A) at 777F-I. In England: *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 552; *Baldwins (Ashby) Ltd v Maidstone* [2011] EWHC B12 (Merc) paras 7-10; *Chitty on Contracts* 31st Ed paras 16-117 – 16-118; Peel *Treitel The Law of Contract* 13th Ed para 11-068. In Australia: *Bacchus Marsh Concentrated Milk Co Ltd (In Liquidation) v Joseph Nathan & Co Ltd* [1919] HCA 18; (1919) 26CLR 410 at 440-441; *Re Lloyd's Ships Holdings Pty Ltd & Another v Davos Pty Ltd & Others* [1987] FCA 70, particularly paras 42, 64, 94 and 125-128, where the express restraint was found to be unreasonable and unenforceable and where, as a result of such finding, the court enforced, in place

[56] It is also to be borne in mind, in this regard, that goodwill is by no means limited to the connection with existing customers (which is the subject of the implied *Trego* prohibition). This was recognised in *Trego* itself. Lord Herschell, in his speech, referred to a definition in an early case by Lord Eldon to the effect that goodwill is 'nothing more than the probability that the old customers will resort to the old place'.[5] Lord Herschell said that this was far too narrow a definition. He referred with approval to a later definition that goodwill meant every positive advantage in carrying on the business, whether connected with the premises or with the name of the firm or with any other matter, carrying with it the benefit of the business.[6] He said that, on this basis, a wider implied prohibition than merely canvassing former clients might have been justified when goodwill was sold (at 19). It might have been held, he suggested, that the seller was

'not entitled to derogate from his grant by seeking in any manner to withdraw from the purchaser the customers of the old business, as he would do by setting up a business in such a place or under such circumstances that it would immediately compete for the old customers.'

On the state of the English authorities, however, he thought that it was too late to adopt that view and that the implied prohibition had by judicial precedent been confined to the act of canvassing former customers (at 19-20).

[57] Lord MacNaghten expressed a similar view. Goodwill was the 'whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money'. He did not think that the ordinary person would suppose that a person might sell the goodwill of his business 'and then set to work to withdraw from the purchaser the benefit of his purchase'. On this view, a wider implied prohibition might have been justified. However, the authorities, which Lord MacNaghten said were then too late to question, showed that a person who has sold goodwill 'may do much to regain his former position, and yet keep on the windy side of the law' (at

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of the invalid express restraint, a more limited implied *Trego* prohibition; *Fisher & Others v GRC Services Pty Ltd & Others* [1997] QSC 215. In Canada: *Western United Insurance Brokers Ltd v Macdonald* 1994 CanLII 2344 (BCSC).

[5] *Cruttwell v Lyle* (1810) 17 Vesp 335 at 346 (also in Revised Reports Vol 11 at 101).

[6] *Per* Wood VC in *Churton v Douglas* (1859) Johns 174 at 188.

24). Nevertheless, there was an implied prohibition against actively canvassing former clients.

[58] The wide nature of the concept of goodwill, as stated in *Trego*, has frequently been repeated, with or without reference to that particular case. It is unnecessary to heap up citations. It suffices, in this country, to refer to what Harms JA said in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) para 15, namely that goodwill is 'the totality of attributes that lure or entice clients or potential clients to support a particular business'.

[59] I mention the nature of goodwill as described in *Trego* and frequently thereafter, because it shows that a restraint of trade in a business sale agreement is indeed directed at protecting the goodwill of the sold business. The goodwill is not confined to connection with existing customers, and the acts which might undermine the goodwill are not confined to the canvassing of former customers. But for the state of authorities in England in 1895 when *Trego* was decided, the House of Lords, it appears, would have thought that a wider prohibition, consistent with the typical restraint of trade, was justified as an implied term of the sale of a business with goodwill. Indeed, a stricter view of the implied prohibition has apparently been adopted in some American decisions (see *Williston on Contracts* 3rd Ed[7] Vol 14 §1640 at p 119 and footnote 9).

[60] The goodwill of the business thus comprises more than the connection with existing customers; it includes all those attractive features which may cause existing and new customers to patronise the business (see the reference to 'potential customers' in *Caterham Car Sales supra*; see also to similar effect *Weinberg v Mervis* 1953 (3) SA 863 (C) at 870, holding that protected goodwill included potential patients of a sold medical practice, and *Commercial and Industrial Holdings (Pvt) Ltd & Another v Leigh-Smith & Others* 1982 (4) SA 226 (ZSC) at 232H-233A, emphasising the prospect of expanded profit). A person who buys a business and bargains for an express restraint wants to secure for himself a reasonable period during which he can, without competition from the seller, exploit the attractive

[7] I cite the Third Edition (1972) as the Fourth (1990) is unfortunately not readily available to me.

features of the business so as to earn profit from existing and new customers. An express restraint, which would typically contain a general prohibition against competition in the same line of business, is directed at protecting these sources of profit from competition by prohibiting all acts of competition, including but not limited to active canvassing of former and new customers.

[61] An express restraint of trade in the context of the sale of the business can, as with an express restraint in the employment context, be attacked as an unreasonable restriction on competition (in regard to English law, see Heydon *The Restraint of Trade Doctrine* (1971) at 189-199, *Chitty on Contracts* 31st Ed Vol para 16-076 and Peel *Treitel The Law of Contract* 13th Ed para 11-068; in regard to American law, see *Williston op cit* §1641 and *Farnsworth on Contracts* 3rd Ed (2004) §5.3 Vol 2 at 29-31). In principle, the same sorts of considerations arise in determining whether the restraint is enforceable or not, though the law is more liberal than with restraints on employees. Even so, and as with employment restraints, the particular restraint might be shown to be unreasonable in the ambit of commercial activity restrained, geographic extent or temporal duration.[8] The question is whether the restraint as bargained for is a reasonable incident of the purchase of the goodwill. As stated by the authors of *Chitty supra* in para 16-094 (my underlining):

'In the case of the traditional categories of covenant to which the [restraint of trade] doctrine relates, the expression "the interest of the covenantee" connotes the proprietary or quasi proprietary interest of an employer in his trade secrets and trade connections and of a purchaser of a business in the goodwill of the enterprise he has acquired. It is the protection

[8] In the context of the sale of a business, there is authority in England that the ambit of commercial activity restrained and the geographical extent of the restraint are more significant factors in the reasonableness assessment than duration, so that a restraint might be imposed for the lifetime of the seller (*Connors Bros Ltd & Others v Connors* [1940] 4 All ER 179 (PC) at 195A-C, cited with approval by Van Heerden J (as he then was) in support of a 10-year restraint in *Diner v Carpet Manufacturing Co of SA Ltd* 1969 (2) SA 101 (D) at 109B-C: 'If a restraint is considered reasonable as to area it seems seldom in the case where the goodwill is concerned that the restriction will be held unreasonable because of restriction as to time'). Whether that accords with modern notions of public policy may be open to debate - see the reservations expressed by Georges JA in *Commercial and Industrial Holdings* footnote 6 *supra* at 237E-H. See also Heydon *op cit* at 198: 'The test for duration ought to depend on however long it will take for the seller's connexion with his customers to fade away' but adds that the courts have 'tended to be kind to covenantees' though 'there is little coherence in the decisions'. The 'fading-away' view of duration was mentioned in *Re Lloyd's Ships Holdings Pty Ltd & Another v Davos Pty Ltd & Others* [1987] FCA 70 in support of a 10-year restraint (para 78). See also, in the United States, *Farnsworth op cit* §5.3 in Vol 2 at 30-31 and footnote 40 and *Williston op cit* Vol 14 §1640 at p 132 footnote 10.

of such interests which furnishes the sole justification for a restraint and the restraint must therefore be no *more* than is reasonably necessary for that protection.'

[62] The position is the same in the United States. In *Farnsworth on Contracts op cit* the author says that such restraints are held justified by the buyer's need to protect the value of the goodwill purchased with the sale of the business. A restraint is frequently necessary to make the goodwill a transferable asset, ie if it were not permissible to bargain for and impose a restraint, purchasers would be reluctant to buy businesses together with their goodwill (Vol 2 §5.3 at 22).

[63] At the risk of stating the obvious, it is not permitted to buy monopoly.[9] So a court will not enforce a restraint, even in the context of the sale of goodwill, if the restraint goes further than is reasonably required to protect the goodwill for which the purchaser has paid. If, as was suggested by Muller JA in *Becker*, the express restraint and the sale of the goodwill are unrelated, on what basis is the express restraint then to be justified?

[64] In *Bergum* the basic principle on which the court acted was that 'the law implies in every contract a covenant that neither party will do anything that will deprive the other of the fruits of his bargain' (para 4). However, a vendor of a business who sets up in competition immediately after selling the business, who publishes general advertisements as to his trade, and who deals with former customers who approach him (which they might well do if he has built up a reputation) is undoubtedly acting in a manner which can be said to deprive the purchaser of the fruits of his bargain (as *Trego* recognised), yet all of this the vendor may do. The purchaser of a business has a protectable interest to prohibit this form of competition just as he has a protectable interest to prevent competition in the form of canvassing former customers, hence the permissibility of a reasonable restraint. When it comes to assessing the impact of an express restraint on the applicability of a limited implied prohibition, I do not think one can justify the survival of the implied prohibition on the ground that the implied prohibition, unlike the (rest

[9] Cf *Manousakis & Another v Renpal Entertainment CC* 1997 (4) SA 552 (C) at 561D: 'The purchaser of goodwill may not, even by means of a contractual restraint agreed to by the seller, eliminate competition as such' *per* Friedman JP with reference to *Basson v Chilwan & Others* 1993 (3) SA 742 (A) at 771D.

of the) express restraint, prevents the vendor from depriving the purchaser of the fruits of his bargain.

[65] I would thus respectfully suggest for consideration that where, in the sale of a business with goodwill, the purchaser has bargained for an express protection against competition for a specified period, the parties should generally be taken to have exhaustively regulated the protection they intended the purchaser to have in relation to the goodwill. It is not consistent with the express restraint to have an implied term which continues, after the expiry of the express restraint, to protect, through a prohibition of some though not all of the acts which were prohibited by the express restraint, part of the very goodwill protected by the express restraint.

[66] In advancing this view for possible consideration by the SCA in due course (whether in this matter or in another where it arises for decision), I may mention that, to the best of my research, the observation of Steyn J in the court *a quo* in *Becker*, to the effect that there appeared to be no authority in England where the implied *Trego* term had been held to operate in the face of an express restraint, is as true in 2014 as it was in 1979. The learned authors of *Chitty op cit* state as a general proposition that the implied *Trego* prohibition applies where there is no express restraint (para 16-119; see also *Farnsworth on Contracts supra* §5.3 Vol 2 at 22-23).

[67] The leading earlier case, the correctness of which formed the focus of attention in *Trego* and which was authoritatively approved in that case, was *Labouchere v Dawson* (1871-2) 13 Eq 322. That was the sale of a business and its goodwill without an express restraint. The plaintiff's argument in *Labouchere*, which Lord Romilly MR in essence accepted, was put thus (at 324-325):

'It is true that you sold it [the business] without binding yourself not to carry on the same business, yet you did sell it expressly including the goodwill, that goodwill being the probability of the old customers going to the new firm to which you have sold the business. The question is, may you go to those very persons and try to prevent their giving their custom to the new firm? It is very true you have not entered into an express covenant that you will not do that; but there is an implied covenant to that effect, for a person cannot sell a thing and destroy the value of it.'

[68] The view of goodwill acted upon in *Labouchere*, as reflected in the quoted contention, and thus of the implied restraint, was thought in *Trego* to be somewhat narrow and it was indicated that, but for *Labouchere* and similar authorities, a wider implied restraint might have been adopted, which would then have been closer to a typical non-compete clause. But the point to emphasise from *Labouchere* is that the implied term was conceived as operating by virtue of the absence of an express restraint.

[69] In *Pearson v Pearson* (1884) 27 Ch D 145, decided not long before *Trego*, the English Court of Appeal held that, where goodwill was sold but the agreement expressly stated that the vendor was entitled to compete in the same line of business, any covenant which the law would otherwise imply against canvassing former clients was inoperative. This conclusion was reached despite the fact that the express right to compete was stated in general terms without reference to canvassing.[10] Where there is a general express restraint against competition for a specified period, there is surely, *ex contrariis*, a general right to compete upon the expiry of that period.

[70] Ordinarily a contract for the sale of the business of any substance would contain an express restraint. However, there are occasions where there is no express restraint and in such cases the implied *Trego* prohibition has been held to operate.[11] But in *KRG Insurance Brokers (Western) Inc v Shafron* [2007] CanLII 79 (BCCA) the British Columbia Court of Appeal said, with reference to *Trego,* that an express provision dealing with competition ousts the implied term (para 30). In *Mid Island Track and Crane Ltd v Simian Cartage Inc* [2011] CanLII 677 (BCSC), a case involving an oral sale, the court said that it was precisely where there was no express restraint that the law implied the non-canvassing prohibition (para 50).

[71] In another Canadian case, *Unisource Canada Inc v Enterprise Paper Co Ltd & Others* [1999] CanLII 6553 (BCSC), Paris J, after reviewing authorities in Canada,

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[10] As pointed in Heydon *The Restraint of Trade Doctrine* (1971) at 177 footnote 15, *Trego* did not overrule *Pearson* on this point

[11] See, for example, the Canadian cases of *Jiffy People Sales (1966) Ltd & Others v Eliason & Others* (1975) 58 DLR (3d) 439 (BSSC), *JLR Holdings v Wisenberg* [1978] CanLII 1414 (ONCA) and *Mid Island Truck and Crane Ltd v Simian Cartage Inc* [2011] CanLII 677 (BCSC).

England, Australia and the United States, concluded that the implied *Trego* prohibition, whether conceptualised as one arising from an implied covenant or as an independent equitable obligation, had to be consistent with the 'factual matrix' of the sale and that any such obligation as might otherwise arise 'must give way in the face of an express clause in the agreement dealing with the same subject matter'.

[72] There are similarities between the facts of *Unisource* and the present case. The shareholders of a company, Messrs Mulhern and Plumb, had caused their company, Smith Paper Ltd, to sell its paper distribution business to an American company during 1990. A subsidiary of the latter took over the business. It was envisaged that Mulhern and Plumb would continue in employment with the new owner, which they did, Mulhern being appointed as its president. The sale agreement contained an express restraint clause in terms whereof Mulhern was prohibited, during his employment with the new owner and for a period of two years after the termination of such employment, from carrying on any competing business in the same geographical marketing area, including without limitation 'the direct or indirect solicitation of the business of any of the Company's customers with respect to the products sold and services performed by the Company'. There was also a prohibition against inducing or encouraging employees to leave the company. The sale agreement was silent on Plumb's right to compete.

[73] After several years Mulhern became disenchanted with the new controllers of the business, and it was agreed that he would retire early, which he did on 30 April 1992. Plumb also became unhappy and resigned in March 1994. In mid-1994 Mulhern acquired a controlling interest in another paper distribution company. Plumb and several other disenchanted employees joined Mulhern's company.

[74] Paris J, after the review of authorities and broad conclusions mentioned previously, and after considering various background circumstances, came to the conclusion that the implied *Trego* prohibition was contrary to the express restraint, viewed in its context. He said the following (paras 52-53):

'52. Everybody on both sides of the deal fully "expected" that Mulhern would stay on indefinitely… The non-competition clause was inserted to deal with the possibility that he might nonetheless leave and go into business again. Therefore, it must be taken that the

parties directed their minds to that issue. Alco [the purchaser] gauged the various factors and decided, having taken legal advice, that two years after leaving their employ would be a reasonable period of time for a non-competition clause, including the elements thereof specifically set out relating to customers and employees. After that the plaintiff would be on its own. It would have had time to build up its own goodwill… and the plaintiff would be free to get back into business in an unrestricted way. In my view that was what was in the contemplation of the parties.

53. It is argued… that it is obvious that if Alco had known that Mulhern would go back into business they would never have bought Smith and therefore the Court must imply an obligation on his part not to do so, or at least not to depreciate the goodwill of the business by soliciting his old customers or hiring his ex-employees. But the latter proposition does not necessarily follow from the former. It seems to me that a buyer under such circumstances assumes a risk which it presumably does its best to calculate. It cannot be certain that in future the vendors will not go back into business because the law simply will not permit that a person be prevented indefinitely from working in his usual occupation. That is a principle at least as fundamental as that a vendor must not depreciate the asset he has sold. In my view, therefore, in the circumstances the parties must be taken to have considered that factor and dealt with it in the non-competition clause.'

[75] If there are relatively few Commonwealth cases dealing with the applicability of the implied *Trego* prohibition to a case where there is an express restraint, I venture to suggest that it is because it would only rarely occur to business people that the express restraint was not exhaustive.

[76] Even in the United States the courts do not seem uniformly to have observed *Bergum*. In *Unisource supra* Paris J referred to several cases which had followed *Bergum*, even to the point of suggesting that the implied prohibition was not only in perpetuity but operated 'irrespective of any term in the contract' (see paras 30-31). On the other hand, Paris J mentioned (in para 41) a subsequent decision by the Appellate Division of the Supreme Court of New York, *Titus & Donnelly Inc v Alfred B Poto* 614 NYS 2d 10 (1994), where the following was said:

'Plaintiff's reliance upon *Mohawk Maintenance Co v Kessler* 52 NY 2d 276, 437 NYS 2d 646, 419 NE 2d 324, wherein an implied covenant was imposed upon the seller of the business to permanently refrain from soliciting former customers after the sale of a business and its goodwill is misplaced. The unlimited implied restrictions set forth therein are

inapplicable, where, as here, the parties, Poto and Titus, specifically negotiated and expressly agreed to impose a less onerous restriction upon the seller, Poto, after the sale, and to thereby forego the implied covenant recognised in *Mohawk*, by entering into an express non-competition agreement which was of limited duration, restricting solicitation of employees and customers by Poto only through February 28, 1993.'

[77] There are also other decisions in the United States which appear to reflect a less unyielding approach than in *Bergum* and *Mohawk.* Thus in *MGM Court Reporting Service Inc v Greenberg & Others* (1989) 74 NY 2d 691 the plaintiff had purchased the defendant's shares in a company which conducted a law reporting enterprise. In terms of the sale agreement the defendant was prohibited from performing services for three named clients of the business for five years. It was held by the Appellate Division of the Supreme Court of New York that this express restraint excluded the operation of the implied covenant (even though the express restraint was broader than the implied covenant, not being limited to canvassing). And in *First American Title Insurance Company of New York Inc v Benchmark Title Agency LLC* (2008) 48 AD 3d 327 the Appellate Division of the same court said, in affirming the lower court's decision:

'The restrictive covenants not to compete or solicit, set forth in the contract of sale, had expired. Furthermore, the expressly negotiated covenant not to compete superseded the normally implied common-law covenant, particularly where, as here, the customers are generally identifiable, and enjoining solicitation of former clients after the negotiated time period would be tantamount to preventing defendants from acting as a title insurer in Westchester County.'[12]

[78] In this country, the only later decision of the Appellate Division or SCA in which the principle in *Becker* has played a significant part is *Van der Watt & Another v Jonker & Others* [2011] ZASCA 140, to which I was also referred. I would respectfully suggest, however, that *Van der Watt* is not in truth an application of *Becker*, at least not to its full extent. In *Van der Watt*, persons who had formerly been associated in business agreed on a parting of the ways, on the basis that the Van der Watts would retain a business operating in Randfontein while Jonker would

[12] See also *North Atlantic Instruments Inc v Fred Haber & Another* (1998) 188 F3d 38 para 50 (this is part of a dissenting judgment – the majority judges determined the case against the defendants on a different basis).

retain various businesses known as the Agri group. Jonker agreed to pay the Van der Watts R2 million as part of the fair and equitable settlement of the commercial divorce. In terms of the separation agreement, the Van der Watts were subject to a 10-year restraint in the geographical areas serviced by the Agri businesses while Jonker was subject to a 10-year restraint within a radius of 80 km from Randfontein.

[79] The Van der Watts breached the restraint. The precise form of the restraint is not quoted in the SCA's judgment but its tenor can be gleaned from the interdict granted by the court *a quo*, in terms whereof the Van der Watts and the entities through which they were acting were restrained, for a period of 10 years, from being involved in a business which involved the trading, storage, handling, sale, marketing or distribution of fuel, oil and/or related products in the areas serviced by Jonker and the Agri group companies. The Van der Watts were also restrained for 10 years from providing financial support or acting as a consultant, adviser or agent of any person or entity conducting business in these respects (see para 2 of the SCA's judgment). The Van der Watts appealed the interdict but their appeal was dismissed.

[80] It appears from para 6 of the SCA's judgment that on the papers and in argument the litigants had approached the enforceability of the 10-year restraint along conventional lines, contending respectively that a protectable interest on the part of Jonker and the Agri group was absent or present. In its judgment, however, the SCA said that the appeal stood to be decided 'on a somewhat different basis to the one advanced by the parties and decided by the high court'. Prior to the hearing in the SCA, that court drew the parties' attention to the *Becker* decision. In his judgment, Madjiet JA said that the matter fell squarely within the *Becker* principles (para 10).

[81] I must respectfully observe that what was said in *Becker* is that, in the absence of an express restraint, a person who sells a business with goodwill is <u>not</u> restrained from competing with the purchaser of the business; the only implied prohibition is against canvassing the former customers of the business, and this prohibition was held in *Becker* to be unrelated to the express restraint or at least not inconsistent with it. *Becker* was not concerned with the enforceability of an express

non-compete restraint because in that case Becker and his companies had complied with the five-year restraint. All that was in issue was the existence of an implied prohibition against canvassing enduring beyond the five-year restraint.

[82] It is difficult to see, therefore, how the principle in *Becker* could be said to have disposed of the question of the enforceability of the 10-year non-compete restraint in *Van der Watt*. Jonker and the Agri companies were seeking to enforce a wide express non-complete clause travelling way beyond the implied prohibition adopted in *Becker*. Although the Van der Watts had among other things canvassed the Agri businesses' customers, the interdict sought and granted was not confined to such conduct. The interdict granted by the court *a quo* and upheld by the SCA enforced the non-compete clause in its totality.

[83] I do not suggest that the express restraint in *Van der Watt* should not have been enforced. Madjiet JA quoted in para 10 the wide definition of goodwill given by Harms JA in *Caterham Car Sales*. The court's ultimate conclusion was that the 10-year restraint was a reasonable one (para 14). If the 10-year restraint was reasonable (and it was for the Van der Watts to show that its enforcement would be contrary to public policy), that was because it reasonably protected the whole goodwill of the Agri businesses and not merely the value of existing customer connections. That seems to be in essence the basis on which the restraint was held by the SCA to be enforceable.

[84] Even where there is not an express restraint of trade, the implied *Trego* term is not free from difficulty. Does it operate in perpetuity? This question was not pertinently addressed in *Trego* or *Becker*; and it did not arise in *Van der Watt* because in the latter case the applicants only sought to enforce an express 10-year restraint. No temporal limitation was mentioned in *Trego* or *Becker*. If, in the latter case, the Appellate Division had thought that the implied prohibition was limited in point of time, the court would perhaps have been mentioned it, because by the time the latter court upheld the appeal, nearly nine years had elapsed from the date of the sale.

[85] Nevertheless, one might have thought that the component of goodwill protected by the implied term, namely the existing customer connection at the time of the sale, would typically diminish over time and that the goodwill of the business in the hands of the purchaser might start to be characterised by the later endeavours of the purchaser rather than the earlier endeavours of the seller. If, as the judgment of Van Heerden AJA in *Becker* reflects, the prohibition operates as an implied term founded on considerations of policy, the critical eye with which our law assesses restraints on competition should, I might have thought, be allowed to play its part in determining the scope of the implied prohibition. It is open to debate whether a restraint in perpetuity against canvassing of former clients would pass muster if assessed along conventional lines applicable to restraints of trade.[13]

[86] It may also be difficult to determine who are 'customers' for purposes of the implied prohibition. This difficulty was mentioned by Lord Davey in his speech in *Trego*. He also said that, in argument, he had been struck 'with the vagueness and difficulty of applying the injunction' granted in the early leading case which the House of Lords endorsed (*Labouchere v Dawson supra*). He observed that the injunction might 'operate most unequally' because, in a business of a special character, it might practically prevent the seller from carrying on business at all, whereas in a business of a different character the prohibition might have very little effect. But he concluded that *Labouchere* should be followed and that the difficulties 'should not prevent us from meting out such scanty measure of protection to the purchaser of goodwill as the circumstances permit of'. The question of who were 'customers' for purposes of an injunction was one of fact, to be decided when it arose according to the circumstances of the case (at 29).

[87] If the implied term is shaped by considerations of policy, and if on this basis it is not necessarily perpetual and does not necessarily apply to all the commercial relationships to which the seller has been privy in the old business, the question of

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[13] See footnote 8 above. See also *Williston op cit* Vol 14 §1641 at p 119 footnote 6 regarding the implied *Trego* prohibition: 'It has been suggested that this implied restriction exists only for such reasonable time as to give the old customers an opportunity to attach themselves to the purchaser's business: Suburban Ice Mfg. Co. v Mulvihill, 21 Oh App 438, 153 NE 204, but in general the courts have not dealt with this point, probably because the old customers are considered as attached to the business transferred to the vendee until they voluntarily sever that connection.'

onus would require consideration. In the case of an express restraint of trade, it is now well established in our law that the onus rests on the restrained party to show that the express clause is unenforceable as an unreasonable restraint against competition. That is so, however, because there is no doubt as to what the parties agreed. On general principle, the onus rests on a party who asserts that enforcement of the contract would, despite the maxim *pacta servanda sunt*, be contrary to public policy. The implied prohibition, although operating as a partial restraint of trade, stands on a different footing. It is not, in accordance with the analysis in *Becker*, founded on consensus but operates by law unless expressly excluded. If the scope of the term which the law implies (with respect to duration and affected commercial relations) is determined by the facts of the case (ie the nature of the business and the character of the goodwill), it would seem, in accordance with principle, that it would be for the enforcing party to establish the scope of the implied prohibition.

Exclusion of implied prohibition in present case

[88] I defer for the moment the question as to whether, if there is scope for an implied prohibition at all, Van der Merwe and Kitshoff would be bound by it. Unless the implied prohibition was excluded by the terms of the amalgamation agreement, Old GrainCo would at least have been bound by the implied prohibition. If the implied prohibition was, by virtue of the terms of the amalgamation agreement, excluded in the case of Old GrainCo, it would also have been excluded in the case of Van der Merwe and Kitshoff.

[89] It will be apparent from what I have already said that, if I were permitted to approach this case free from the authority of *Becker*, I would have found that the express restraint provisions of clause 12 of the amalgamation agreement excluded an implied *Trego* prohibition, which would have rendered it unnecessary to determine the scope of any term which should be implied in the absence of an express restraint.

[90] However, I am bound by the decision in *Becker*. Although, strictly speaking, the question of the exclusion of the implied term is a mixed question of fact and law

relating to the interpretation of the particular contract, the approach in *Becker* to the express restraint clause which featured in that case leaves little scope, as I see it, for a contention that an ordinary non-compete clause excludes the operation of the implied prohibition. There was nothing unusual about the express restraint clause in *Becker*, though commercial contracts often have more elaborate provisions. It will almost always be the case that the non-compete clause would include in its scope, but travel beyond, the implied *Trego* prohibition. *Becker* says, or comes very close to saying, that the implied prohibition can be excluded only if the restraint clause adds (or if the contract somewhere else says) that, after the expiry of the specified period, the seller may actively canvass the business of former clients. In my experience, at the bar and on the bench, I have never seen a restraint clause like that.

[91] Mr Newdigate, who for obvious tactical reasons put his case not on the basis that *Becker* was wrong but that it was distinguishable, submitted that the implied prohibition was excluded because the canvassing of customers was expressly addressed in clause 12.2.3 of the amalgamation agreement. I do not think, applying *Becker* fairly in accordance with its true import, that I can accept this distinction (though Mr Newdigate's submission would receive direct support from the decision of the Canadian court in *Unisource supra*). The restraint period was five years. There was a general prohibition against being interested in any 'competitive activity', defined as meaning 'an activity which is similar to or the same as the businesses conducted by' BKB and its subsidiaries as at the effective date, the signature date and the closing date. The prohibition against canvassing during the restraint period appears merely to emphasise an aspect of the more general prohibition.

[92] Importantly, though, the express prohibition against canvassing during the five-year period is directed at all customers and clients of BKB. This would include persons who became customers or clients of BKB (and later of GrainCo) after the effective and closing dates. As will appear hereunder, the implied *Trego* prohibition is in my opinion limited to persons who were customers of the sold business at the date of the sale of the business.

[93] It follows that the prohibition in clause 12.2.3 is an express restraint which incorporates within its scope, but travels beyond, the implied *Trego* prohibition. The wider restraint is on general principle legitimate, because goodwill includes the potential of the business to attract new custom. Based on the reasoning in *Becker*, the fact that there is an express restraint which includes, within its broader language, the active canvassing of former customers is not a basis for finding that the implied term is excluded. In *Becker* there was a general prohibition on conducting business in competition with the sold business and also a prohibition from being associated with or engaged in the soliciting of custom for a competing business. Clearly these prohibitions included, but went beyond, a prohibition against soliciting the customers of the sold business as at the date of the sale. Although the express prohibition on soliciting custom for a competing business was not limited to the soliciting of former customers of the sold business, the soliciting of such customers would undoubtedly have been within the scope of the express prohibition against soliciting and it is in relation to such customers that the purchaser would no doubt been most anxious to prevent soliciting.

Are Van der Merwe and Kitshoff bound?

[94] The next question is whether Van der Merwe and Kitshoff are subject to the implied prohibition. I think the answer is no. As will appear from my consideration of the remaining issues relating to the implied prohibition, I would, but for the negative answer to this question, have granted relief against Van der Merwe and Kitshoff, though in more limited terms than claimed. I would also then have granted relief against Perdigon on the basis that Van der Merwe and Kitshoff are its controlling mind and that it is their vehicle for perpetrating the violation of the prohibition.

[95] The reasoning in *Trego* and *Becker* rests on the basis that the seller, having parted with the goodwill and received payment for it, is as a matter of policy limited to a certain extent in undermining the value of what he has sold. The implied prohibition is, in accordance with *Becker*, an implied term arising from the sale of the goodwill. As a matter of principle, therefore, it is difficult to see on what basis the implied term can apply to anyone other than the seller. An implied term is by definition a term which the law implies into a main contract. In the case of the

implied *Trego* term, the type of contract which gives rise to the implication is a contract for the sale of goodwill. The implied term cannot exist *in vacuo*; it must be an adjunct to a main contract.

[96] In *Trego*, Mr Hunt was a direct party to the partnership agreement by which the goodwill was to vest in Mrs Trego. He was treated as being in the same position as if he had sold the goodwill to her. The Commonwealth cases in which the implied *Trego* term has been enforced have all, to the best of my research, been cases where the party bound by the implied prohibition is the seller. There are cases where the implied prohibition has been held to apply also to the sale of shares in a company which owns a business having goodwill. But in those cases, too, one is dealing with an implied prohibition binding on the seller, though in the case of shares the seller would only indirectly have been the owner of the goodwill.

[97] Whether the position is the same in the United States I cannot confidently say. In *Williston on Contracts supra* the author makes the general statement that the implied prohibition is 'binding on the personal representatives, assigns and successors of the seller' (Vol 14 §1640) and in footnote 10 he cites two cases which apparently support this view. I have not been able to obtain a copy of the first case. The second, *Ferris v Pett* (1919) 2 ALR 768 (RI), would not be authority for the view that the implied prohibition binds a 'representative', if by that term is intended, for example, a director or senior manager of a company which sells its business. In *Ferris* the plaintiff, who was an optician, was appointed as the administrator (what we would call executor) in the estate of his deceased father-in law. The latter was a doctor whose services had included testing eyes and prescribing spectacles. The plaintiff sold the deceased's practice together with its goodwill to the defendant but then began to solicit customers of the deceased's practice for his own practice as an optician. The defendant halted payments under the sale, alleging that the plaintiff was in breach of the implied prohibition. So in that case the person allegedly bound was the seller.

[98] Be that as it may, the present matter must be decided in accordance with our own law. Here, the seller was Old GrainCo. The seller bound itself to an express restraint in clause 12. Although it was envisaged that Old GrainCo would be

liquidated shortly after implementation, that company would, for as long as it existed, have been bound (on the basis of *Becker*) by the implied prohibition. Van der Merwe and Kitshoff were not the sellers of the business. The business vested in Old GrainCo, not them.

[99] Apart from the fact that the transaction was not one for the sale of the shares in Old GrainCo, Van der Merwe and Kitshoff were in any event not the shareholders of Old GrainCo. Family trusts with which they were associated owned 69,9% of the shares in Old GrainCo. The trusts were not parties to the amalgamation agreement. There was, furthermore, no evidence that the family trusts were the *alter egos* of Van der Merwe and Kitshoff respectively. There is no reason to believe that the trusts were not genuine trusts in terms whereof which the trustees were bound to hold the assets (including the shares in Old GrainCo) on trust for the purposes set out in the relevant trust deeds. One might suppose, though there is no evidence to this effect, that Van der Merwe and Kitshoff respectively were included in the range of persons who were discretionary income beneficiaries, and perhaps discretionary capital beneficiaries, of the trusts, but this does not allow one in law to blur the distinction between Van der Merwe and Kitshoff in their personal capacities on the one hand and the trustees of the two trusts on the other. It was the latter who, pursuant to the liquidation of Old GrainCo and the distribution of the latter's assets, received a portion (though not the whole) of the consideration paid by BKB for Old GrainCo's business.

[100] It may be said that, although Van der Merwe and Kitshoff were not the sellers of the business, its success and its goodwill had been brought about by their efforts as directors and senior employees of Old GrainCo. That is true, and on that account the purchaser might reasonably have insisted (as it did) on a restraint of trade which bound them, and no doubt the express restraint would have been found to be a reasonable one in the context of the transaction as a whole (see, for example, *Farnsworth on Contracts supra* §5.3 Vol 2 p 23 where the learned author, in dealing with the American law, cites in footnote 16 a case to this effect; and there are similar cases in the Commonwealth where restraints on key employees associated with the sold business have been regarded as akin to vendor restraints rather than employee restraints).

[101] However, the implied *Trego* prohibition cannot exist merely because Van der Merwe and Kitshoff agreed to be bound by an express restraint of trade. I have found no authority for the proposition that such a prohibition can be an implied term of an express restraint of trade contract *per se*. Suppose that Van der Merwe and Kitshoff had not been parties to the amalgamation agreement at all, as would have been the case but for the inclusion of clause 12. How then could it be said that they were bound by an implied term of the amalgamation agreement? If that be so, I do not see how they could become bound by an implied term, which would otherwise not have been applicable to them, merely because they agreed to bind themselves to the express restraint in clause 12.

[102] The *Becker* judgment insists that the implied prohibition arising from the sale of goodwill and the express restraint (if any) are distinct matters. On that analysis, the implied prohibition cannot be an incident of the express restraint. The implied prohibition, on the *Becker* analysis, owes its justification to something apart from the express restraint. For reasons which I have already explained, I consider that distinction to be open to question but, for as long as it is maintained, the express restraint cannot be the basis for an implied prohibition. And if the distinction is jettisoned, the basis for finding that the express restraint does not exclude the operation of the implied prohibition falls away.

[103] In *Manousakis & Another v Renpal Entertainment CC* 1997 (4) SA 552 (C) a full bench of this court rejected a submission that, on grounds of public policy, a person who was actively involved in the affairs of the sold business could not open or support or participate in a competing business (at 560A-D).

[104] I am aware that in *Becker* the plaintiff sued not only the seller of the jewellery business (the second defendant company) but Becker himself. However, the point now under consideration did not receive attention either in the court *a quo* or in the Appellate Division. In that case the second defendant company still existed and was sued in the proceedings, unlike the present case where Old GrainCo has long since ceased to exist. More importantly, the subject of the sale was not only the business conducted by the second defendant company but also the shares owned by Becker personally in another jewellery trading company, A & Z Wholesale Jewellers (Pty)

Ltd (see at 410B-C). The restraint of trade clause recorded that the customers of the seller were Becker's personal customers and that he was the beneficial owner of the entire issued share capital of the selling company and of A & Z Wholesale Jewellers (Pty) Ltd. As I have already mentioned, there is authority in other jurisdictions for the proposition that the sale of shares in a company which owns goodwill may give rise to an implied *Trego* prohibition, at least where the seller owns all the shares in the company or a majority stake. On that basis, there were sales both by Becker personally and by the second defendant company which attracted the operation of the implied prohibition.

[105] In *Van der Watt* a point was raised on behalf of the Van der Watts that Jonker could not enforce the restraint because the goodwill of the Agri businesses vested in the Agri companies, not in Jonker personally (para 7). The SCA rejected this contention, not on the basis of who could enforce and who was bound by an implied *Trego* prohibition, but on the basis that Jonker had contracted for the express restraint in his personal capacity. It was said that his 'protectable interest' arose from this restraint agreement itself. The restraint was enforced by the party in whose favour the restraint was expressly imposed and against the parties against whom it was expressly imposed.

[106] It might perhaps be possible, on appropriate facts, for a purchaser, who has purchased a business from a company, to establish a tacit contract between himself and the representatives of the company in terms whereof the representatives in their personal capacity will be bound by some or other restraint. That is a very different matter from a term implied by law. It was not alleged or proved in the present case that there was any such tacit contract between BKB/New GrainCo on the one hand and Van der Merwe and Kitshoff on the other. I would have thought that the express terms of the restraint by which Van der Merwe and Kitshoff agreed to be bound would be incompatible with a tacit contract containing an additional prohibition in perpetuity.

[107] On this basis, I would dismiss the relief sought in para 1.1 of the notice of motion. However, and in case this matter should go further, I consider it appropriate to explain why, but for this point, I would have granted relief to the applicant, though

not in the precise terms claimed. Under the remaining headings relating to this part of the relief, I make the assumption, contrary to my conclusion, that Van Der Merwe and Kitshoff are bound by an implied *Trego* prohibition.

[108] Before considering these further matters, I should mention here that Mr Redding on behalf of the applicant submitted that, even if Van der Merwe and Kitshoff were not contractually bound by an implied term, they were subject to a similar restraint on delictual principles relating to unlawful competition. That was not the case advanced in the founding papers and in any event I think it is unsound.

[109] Unless the purchaser of the goodwill bargains for a restraint binding not only on the seller but on persons actively involved in the sold business, the latter are free to compete with the purchaser and to do so in all respects. Here, as it happens, the purchaser (BKB) did bargain for a restraint binding on Van der Merwe and Kitshoff, and it was subsequently incorporated also into the employment contracts between New GrainCo on the one hand and Van der Merwe and Kitshoff on the other. They complied with the restraint for the specified period. I do not understand how, in the face of the express restraint in the amalgamation agreement and subsequently in the service contracts, there can be scope for an independent legal duty to refrain, after the period of the restraint, from taking part in a particular form of competitive activity, namely active canvassing of customers of the sold business.

Customers – as at what date?

[110] If Van der Merwe and Kitshoff were bound by an implied *Trego* prohibition, it would only prohibit the canvassing of persons who were customers of Old GrainCo as at 1 October 2006. In *Becker* the interdict sought by the purchaser related only to persons who were customers as at the date of the sale (see at 412G). Although the purchaser did not ask for more, it is clear from the reasoning in the Appellate Division that the implied prohibition would not extend beyond those customers. What Van Heerden AJA added was that the prohibition would not be inoperative in respect of a particular former customer merely because the latter had ceased to trade with the business. The seller would only be entitled to canvass such former customer if he was no longer trading with the sold business and if it appeared that he would not

resume trade with the sold business (at 419B-C). This is presumably on the basis that the historic connection with an inactive customer who does not intend to resume relations with the company is not part of the company's goodwill.

[111] It is not entirely clear to me whether the learned Judge of Appeal had in mind former customers who had ceased trading with the business prior to the date of the sale or former customers who ceased trading with the business after the date of the sale. I think his reasoning is applicable to both. Be that as it may, what is beyond doubt is that the implied prohibition only applies to a person who either was a subsisting customer at the date of the sale of the business or who had been a customer prior to the sale of the sold business. The implied prohibition does not apply to a person who only became a customer after the sale of the business.

[112] This limitation on the scope of the implied prohibition has, to the best of my research, been uniformly observed in Commonwealth jurisdictions. Typically the customers whom the seller may not canvass are referred to as 'former customers'. This is entirely in keeping with the justification for the implied prohibition. The implied prohibition is directed at protecting an existing customer connection forming part of the sold goodwill. I repeat that goodwill is by no means confined to existing customer connection, since goodwill incorporates attractive features which can be expected to generate new custom. However, whether for sound reasons or not, the English decisions culminating in *Trego*, and *Becker* in this country, have confined protection to the component of goodwill comprising existing customer connection.

[113] The matter can be tested in this way. If a business with goodwill were sold and no express restraint of trade were stipulated, the seller could the same day set up in business in competition with the purchaser. The only thing he could not do is canvass the existing customers of the sold business. This means that, immediately after the sale, the seller could start canvassing all potential customers other than the existing customers of the sold business. In the nature of things, the universe of other potential customers comprises all persons who were not customers of the sold business at the time of the sale. Now if that is so, I do not see how the customers whom the seller is prohibited from canvassing can expand over time to include later

customers merely because the seller did not set up in competition the next day but only, say, a year or two later.

[114] It follows that, on the premise that Van der Merwe and Kitshoff are bound by an implied prohibition, the relief available to GrainCo would have to be confined to customers as at 1 October 2006. The relief actually claimed by GrainCo is framed with reference to a list of customers of GrainCo as at 30 June 2013 ('NOM1' to the notice of motion). Relief in that form is not permissible.

[115] I do not agree with Mr Newdigate, though, that this in itself non-suits the applicant. The allegations in the founding papers repeatedly made reference to the value of existing customer connections at the date of the sale. The nature of the business appears to be such that many customers are likely to have been with the business for some years. In the absence of amendment, a court might not grant an applicant wider relief than claimed. In the present case, by contrast, one would be cutting down the relief claimed. Since the applicant chose to formulate its relief with reference to customers named in 'NOM1', I do not think it would be appropriate to grant a generalised interdict referring to all customers of the business as at 1 October 2006 (since this might include persons not listed in 'NOM1'). One could, however, permissibly grant an interdict limited to the canvassing of all such persons on the list as were customers of the business as at 1 October 2006.

[116] Mr Newdigate says that this was not the case which the respondents were called upon to meet. I do not accept that objection. I repeat that the applicant asserted the value of the goodwill as at the date of the sale and referred to the value of the customer base as it then existed. The respondents did not attempt to justify their active canvassing of customers on the basis that they were only targeting persons who had not already been customers of the business at the time of the sale. The distinction between existing customers at the date of the sale and new customers won by GrainCo after the sale was not mentioned anywhere in the papers.

Customers – scope of commercial relations

[117] I have said that the implied prohibition in this case, if applicable at all, would be limited to 'customers' of the business as at 1 October 2006. I have not yet considered who exactly would be regarded as 'customers' for this purpose. A trader conducting business typically has various types of commercial relations: he may buy goods from suppliers as stock or for use as fixed assets; he may obtain professional and other services to assist him in the conduct of his business; he may use brokers and intermediaries; and he may sell goods and services to customers. The value of all of these relations may be said to be incorporated within goodwill. In certain lines of business, sources of supply may be critical to the success of the business.

[118] Nevertheless, it is clear from *Trego* and *Becker* that the implied prohibition does not protect the whole of the goodwill nor does it prohibit any act which undermines goodwill apart from canvassing. The implied prohibition in those cases is formulated with reference to customers, which I take to be persons to whom the business supplies goods or services for consideration. In the absence of clear authority, I am not prepared to find that the implied prohibition extends beyond customers in this sense. In particular, I would not find in the present case that Van der Merwe and Kitshoff, if otherwise bound by the implied prohibition, were precluded from actively canvassing suppliers of produce or other goods and services or from actively recruiting brokers to help them in their business (provided the brokers did not become their agents for actively canvassing former customers).

[119] 'NOM1' is described in the founding affidavit as a list of 'customers/producers' as at 1 June 2013. 'Producers' presumably refers to persons who sell agricultural produce to GrainCo. They would not be within the ambit of 'customers' as I conceive it.

[120] In the answering affidavit, Van der Merwe attached a print-out from the website of South African Grain Information Services ('SAGIS') with a view to showing that various 'clients' in 'NOM1' were also listed on the SAGIS website. He said that the various role players in the industry were listed by their designations as 'commercial silo owners', 'end consumers', 'harbour silo owners', 'processors',

'traders without premises' and 'traders with premises'. Although Van der Merwe made these allegations with a view to showing that the identity of clients was not a confidential matter, it does suggest that 'NOM1' travels beyond customers in the conventional sense.

[121] If I were to grant relief, I would thus qualify the order by specifying that the respondents are only prohibited from actively canvassing those persons listed in 'NOM1' who were customers to whom Old GrainCo sold goods or services as at 1 October 2006.

Customers – GrainCo's various divisions

[122] The respondents criticised the founding papers for not specifying the departments of GrainCo with which any particular named customer did business. I do not think that this criticism is justified. The implied prohibition would apply to all customers (in the sense I use that term) of Old GrainCo as at 1 October 2006. It does not matter whether the person was a customer of the trading business or of some other division of Old GrainCo.

Customers with whom GrainCo no longer trades

[123] Another criticism raised by the respondents is that, pursuant to the restructuring of its business, GrainCo has indicated that it no longer wishes to do business with various of the entities which it lists as its customers. It appears that the respondents may, in the event, have misapprehended the extent of the actual restructuring. It is nevertheless not easy to discern from the papers precisely what has changed.

[124] The respondents' criticism highlights another aspect of the implied *Trego* prohibition which presents difficulty. What if GrainCo has chosen to cease doing business with some of the persons who were customers of the business as at 1 October 2006? If GrainCo wishes to deal with some of the listed persons but not with others, it might nevertheless find it advantageous to enforce the implied prohibition in respect of all of them so as to make Perdigon's life as difficult as

possible. And what if GrainCo currently deals with a listed customer but decides, a year or two after an interdict has been granted, to cease dealing with the customer? Again, it may suit GrainCo to hold Perdigon to the interdict to neutralise its force as a competitor in general.

[125] In *Becker*, Van Heerden AJA was of the view that there would be no implied prohibition in respect of former customers who did not intend to resume trade with the sold business (419C). On a parity of reasoning, I do not think the implied prohibition can apply in respect of former customers with whom the purchaser has chosen to discontinue trading. It would not be consistent with public policy to permit the purchaser of a business to restrict the seller's right to compete for such former customers, even by active solicitation.

[126] The manner in which Van Heerden AJA formulated the qualification at 419C suggests that he regarded the onus as resting on the seller to show that the former customer was unlikely to resume trade with the purchaser of the business. In the present case, the parties did not in their affidavits undertake in any detail the exercise of identifying those customers who were and were not affected by the GrainCo restructuring. Where the question is whether a currently inactive customer is likely to resume trade with the business, one might say that evidence of the customer's future intentions is as much available to the seller of the business as the purchaser (though the seller might be accused of solicitation in violation of *Becker* if he were to contact the customer in order to find out). It is different where the question is whether the purchaser of the business has chosen to cease trading with certain customers. That is a matter within the purchaser's knowledge. While this would not necessarily affect the incidence of onus, it is a factor to be borne in mind in determining whether, in motion proceedings, there is *bona fide* dispute of fact.

[127] The respondents have dealt in great detail with the restructuring decision as they understand it and with subsequent events and communications which they say confirm that things have changed at GrainCo. They have, against this background, asserted that GrainCo has indicated that it no longer wishes to do business with its full former customer base and intends rather to concentrate on niche blue-chip customers. I think that is enough to create a material dispute of fact.

[128] I therefore cannot assume that each and every customer on 'NOM1' is someone with whom GrainCo intends to continue trading. However, this is, once again, a matter which can I think be dealt with by way of an appropriate qualification to the interdict. The applicant has asserted (though this is factually disputed) that 'NOM1' lists all customers and producers as at 1 June 2013 with whom it 'has traded on an ongoing basis'. The interdict as granted could refer to all customers on the list who were customers of Old GrainCo as at 1 October 2006 and with whom the applicant intends to continue trading.

[129] I accept that an order in this form would create scope for material factual disputation in the future as to whether a particular customer is one whom the respondents may actively canvass. However, once one accepts in principle the appropriateness of the implied *Trego* prohibition, these sorts of difficulties are unavoidable, as Lord Davey observed in *Trego* itself. The question as to what constitutes active canvassing is itself not free from difficulty. If all the major processors in a particular district purchase produce from GrainCo and are thus existing GrainCo customers, the respondents might be precluded from communicating with them directly (by visits or telephonically or by correspondence) but the respondents could apparently place a general advertisement in a local newspaper which was likely to be read by all of the processors; the respondents could set up a physical office in that district with signboards indicating the business they wish to conduct (see *Labouchere supra* at 325-326). The mere fact that there was communication between the respondents and a former customer would not show that the interdict had been breached: Once a customer learnt from an advertisement or from another participant in the industry that the respondents were in business and once that customer took the first step to communicate with the respondents, the latter seemingly would be free to continue communicating with the customer. It might be virtually impossible for the applicant to ascertain how trading relations between Perdigon and one of GrainCo's former customers came about.

[130] The qualification that Van Heerden AJA recognised in *Becker* would also give rise to potential factual disputation after the grant of the interdict, because, regardless of the form of the interdict, the seller could not be precluded, as I read Van Heerden AJA's judgment, from actively canvassing a customer who is unlikely

to resume trade with the sold business. If the purchaser sought to enforce the interdict or take out contempt proceedings, the seller could assert that the customer in question no longer fell within the terms of the interdict and the facts would then need to be determined.

[131] If the question arose as to whether a particular customer could still be regarded as a *bona fide* customer (ie one with whom GrainCo wished to deal), the question could, objectively, be determined. Inferences might be drawn from the length of time for which there have been no trading transactions. Internal business plans might also shed light on the matter.

[132] If it were said that all of this is commercially impractical, I would be inclined to agree. That is a strong reason in policy for treating the express restraint as covering the ground.

Prohibition on 'dealing with' former customers?

[133] The formulation of para 1.1 of the notice of motion goes beyond soliciting/canvassing. It seeks to prohibit the respondents from 'dealing with' GrainCo's customers. Mr Redding accepted, I think, that this went too far. He said that the interdict against 'dealing with' the customers should be viewed as an adjunct to the interdict against canvassing former customers, in the sense that the respondents should be interdicted from dealing with former customers whom they have canvassed in violation of the *Trego* prohibition.

[134] I am doubtful whether an interdict could permissibly be granted prohibiting Perdigon from trading with former customers who have already switched their business to Perdigon, even if the switch occurred pursuant to unlawful canvassing of the customers by the respondents. If the customers are already trading with Perdigon, they would have an interest in relief which prohibited Perdigon from continuing to trade with them. In any event, the implied prohibition does not prevent the seller of a business from dealing with former customers, only from canvassing them. If the respondents have already successfully (though unlawfully) canvassed a former customer, the appropriate remedy would be damages. In short, if the interdict

were otherwise granted, it should not include an interdict against 'dealing with' former customers.

Passing off (para 1.2 of the notice of motion)

[135] I intend to deal with the remaining causes of action somewhat more briefly, in keeping with limited attention devoted to them in argument.

[136] The focus of the passing-off complaint was the use by Perdigon of corporate documentation which included the name GrainCo. The respondents' explanation is that Van der Merwe and Kitshoff had since 2002 jointly owned an investment company called Grainco Investments (Pty) Ltd ('GIPL') through which they purchased immovable property and listed and unlisted shares. At the time they established GIPL, the agricultural businesses later sold to BKB was still conducted by Old GrainCo. There was nothing sinister, therefore, in GIPL's historical name.

[137] When they set up the new agricultural trading business after leaving New GrainCo, they decided to use their existing company, GIPL. In terms of the Companies Act 71 of 2008 GIPL was obliged to place its full corporate name on its letterhead and commercial documentation. The company was thus reflected in such documentation as Grainco Investments (Pty) Ltd t/a Perdigon. The respondents pointed out that, in GIPL's name, the 'c' in Grainco' was in the lower case, unlike the name of the applicant (a point of little significance, to my mind). They also said that the name 'Perdigon' had received greater prominence (this is of greater significance). The respondents asserted that they had no desire to be associated with the applicant, particularly since (so they averred) it was well known in the marketplace that the applicant had suffered a downturn in its financial fortunes and that its trading business was struggling.

[138] The respondents say that, when they started the new business, they intended to change their company's name to its present name, Perdigon (Pty) Ltd, but could not use that name as the full corporate name until the name-change had been registered with the CIPC. Reservation of the new name was confirmed by the CIPC on 10 June 2013, just a week after the new business opened its doors. On 18 July

2013 the respondents received confirmation from the CIPC that the name-change had been registered on 21 June 2013. The respondents then arranged for corporate documentation to be revised. They could not, however, recover commercial documents which were already in the marketplace and which reflected the old name.

[139] The applicant alleged in its founding affidavit that as at September and October 2013 the first respondent was still using silo certificates with the name 'Perdigon t/a Grainco Investments'. Van Der Merwe responded to these allegations by stating that the documents annexed were not actual silo certificates but so-called 'screen shots' from the website of a service provider, ECS. He says Perdigon had applied to open an account with ECS under the name Perdigon[14] and that the name reflected on the screen shot was an error on the part of ECS. When, after the service of the application, the respondents learnt of the error, they took steps to have it corrected, which happened on 21 November 2013.

[140] I do not think it is an answer to a passing-off claim to say that one was obliged to reflect a particular name on one's corporate documentation because that was the company's name. There would be a passing-off if the use of the existing corporate name constituted a representation calculated to deceive members of the public into believing that Perdigon's goods and services were connected with GrainCo's business, in the sense that there was a reasonable likelihood that members of the public would be deceived into so thinking (*Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd* 1993 (2) SA 307 (A) at 315A-C). If the use of the corporate name was calculated to deceive, Perdigon's controllers should have used a different corporate vehicle or Perdigon should not have commenced business until its name had been changed.

[141] It is also not an answer to a passing-off claim to say that one did not intend the misrepresentation to deceive members of the public. At least insofar as the remedy of an interdict is concerned, it suffices that a misrepresentation has been made which is calculated to deceive ('calculated' in the sense that, objectively

[14] See account application at record 581-582: 'Business name: Perdigon'.

speaking, there is a reasonable likelihood that members of the public would be deceived). Even the proposition, that a court should not be astute to find that there is no reasonable likelihood of confusion where the competitor was intent on deceiving, has been questioned (*John Craig (Pty) Ltd v Dupa Clothing Industries (Pty) Ltd* 1977 (3) SA 144 (T) at 157H-158A; cf *Reckitt & Colman supra* at 318A-C).

[142] There must, however, at least be an intention to make a representation (ie a conscious or voluntary act). In the present case, I do not think that the respondents, after they received confirmation of the change of name on 18 July 2013 and changed the corporate documentation, intended that their company and its business should be described in any way as being 'Grainco' or any variant of that name. The fact that by then some customers were in possession of corporate documentation reflecting the old name cannot justify an interdict, which is aimed at apprehended injury in the future. In regard to the ECS screenshots, the respondents' version, which I must on the *Plascon-Evans* rule accept, is that they did not authorise ECS to display Perdigon's name in the way which ECS did.

[143] In support of the passing-off claim, the applicant also made reference to the content of Perdigon's website. The homepage stated, among other things, that 'at Perdigon, we cherish the existing long-term relationships that we have built over many years with our clients'. However, the website very prominently stated the name Perdigon and did not mention the name GrainCo. I do not think a new company whose employees have built up relationships with customers during prior employment are precluded from saying so.

[144] Similarly, I do not think objection can be taken to what was said, on the 'People' part of the website, regarding Van der Merwe's employment history, including as managing director of GrainCo. What was said was true. It would have been obvious to the reader, furthermore, that Van der Merwe was no longer employed by GrainCo.

[145] In short, I do not consider that anything said on the website constituted a representation that Perdigon was associated with GrainCo or the successor to its business.

[146] The applicant complained that Perdigon had established its office in the Paarl CBD directly opposite GrainCo's head office. This would not in itself indicate an attempt by Perdigon to associate itself with GrainCo. In any event, Van der Merwe explained in the answering affidavit that he selected the location because GrainCo itself was due to move during July 2013 to a new BKB development on the outskirts of Paarl. (It appears that this might not in the event have occurred, at least not by the time the application was launched in October 2013.)

[147] I thus do not think that GrainCo has established that, at the time the application was launched on 22 October 2013, there was a reasonable apprehension of continuing misrepresentations calculated to deceive. I therefore do not need to go into the evidence of the likelihood of confusion and of actual confusion in the earlier period, save to observe that it is not particularly strong.

Unlawful interference in contractual relations

[148] Although unlawful interference in contractual relations was dealt with in the founding affidavit,[15] no relief in respect thereof is claimed in the notice of motion.

[149] On the assumption that any relief could be claimed, I need only mention the following. In relation to supposed interference in contractual relations between GrainCo and its customers, it was not alleged or shown that the respondents were attempting to induce GrainCo's customers to breach existing contracts. What is alleged is that the respondents are attempting to get customers to switch loyalties. Customers could notionally terminate contractual relations with GrainCo by allowing existing contracts to lapse or by giving lawful notice of termination.

[150] In regard to the offering of employment to employees whose service contracts with GrainCo contained a one-year restraint, GrainCo did not join the employees in question and seek an order preventing them from working for Perdigon. The latter could not, in the absence of the joinder of the employees in question, be interdicted from continuing to employ those persons. To the extent that

[15] See paras 153-159 in relation to two customers and paras 160-169 in relation to former employees of GrainCo who were subject to one-year restraint of trade.

the respondents induced Roberts, Emslie, Hamann and Pijl to leave GrainCo, that is water under the bridge. All of them had resigned from GrainCo by the time the application was launched. The one-year restraints applicable to Roberts, Emslie and Hamann (if they were enforceable) expired at the end of May 2014, and the one-year restraint applicable to Pijl (again if enforceable) would expire at the end of August 2014.[16] I need express no opinion on the question whether, during the course of the restructuring process, GrainCo waived the restraints in respect of any of these employees. If GrainCo has any remedy, it must now lie in damages.

Injurious falsehood (para 1.5 of the notice of motion)

[151] The last cause of action is the alleged dissemination of injurious falsehoods. The evidence of this is thin and disputed. Only two incidents were alleged.

[152] The first one is based on an averment allegedly made by Mr Jordaan of Tiger Brands, a customer of GrainCo, during a visit which Smit and Vermooten paid him on 14 August 2013. Jordaan enquired whether it was correct that in future GrainCo would be concentrating on storage and handling and would only do trade to support that and whether the logistics division would cease to operate. Smit and Vermooten told Jordaan that this was incorrect and that GrainCo would be continuing with its trading business as usual and that the logistics business would not be closing. Jordaan told them that his enquiry was based on what Van der Merwe had told him a few weeks previously.

[153] In his answering affidavit, Van der Merwe pointed out that no confirmatory affidavits by Jordaan had been filed. He stated that he had not spoken with Jordaan since establishing Perdigon and commencing business on 1 June 2013 and that Perdigon had not done any business with Tiger Brands. He added that on his understanding it was in any event untrue that GrainCo's trading division would continue as usual.

[154] Nothing more was said by the applicant on the question of injurious falsehoods in the replying papers.

[155] The first complaint of injurious falsehood has not been made out. The evidence on which it is based is inadmissible and there is in any event a dispute of fact.

[156] The other complaint relates to a meeting which Smit and Vermooten had on 15 August 2013 with Messrs du Preez and Haasbroek of Grainvest, a registered SAFEX broker. Vermooten says that, 'against the background of what they indicated they had heard from Van der Merwe', SAFEX's representatives enquired whether GrainCo would no longer be trading as it traditionally had done and would be drastically scaling down and concentrating mainly on storage, handling and milling. Smit and Vermooten assured Grainvest that this was not the case.

[157] Again, no confirmatory affidavit by Du Preez or Haasbroek was filed. Van der Merwe said in his answering affidavit that he is personally well acquainted with Du Preez. His conversation with Du Preez concerning GrainCo's future plans took place, he says, while he was still employed with GrainCo and was in accordance with the instructions from Edmayr to communicate the position to customers.[17]

[158] This complaint has thus also not been made out.

Conclusion

[159] It follows from everything I have said that the application must be dismissed with costs, including those attendant on the employment of two counsel.

[17] Some support for this contention is to be found in Edmayr's email to senior staff on 26 March 2013 [record 490], in which he said that Van der Merwe and he had agreed that Van der Merwe and his team would speak to customers while communication with the press would be handled by Edmayr. He said that he would say (ie to the press) the following: 'Given the volatile markets and the excessive working capital requirements in the trading division of GrainCo we have reviewed our position in the market. We are accordingly looking at the business and there could be some restructuring and downscaling. We are however committed to the establishment and growth of our agri and food processing division (of which Gritco and our sugar business are the start) and will be looking at opportunities.' The s 189A letter and presentation to staff of the same date [record 496-498] said that three of the business divisions, namely Logistics, Trading and BKB Asia, were not performing optimally and were having an adverse impact on the business operation as a whole. BKB thus proposed to reduce and/or discontinue the operation of these divisions.

ROGERS J

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