

## **Hair Today - Gone Tomorrow!**

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Here's the situation. Hair Salon 1 (HS1) caters to wealthy women, customers who willingly pay \$200 plus for a hair cut and colouring. About three years ago, the business was sold to a newcomer to the industry. The selling price was \$450,000. Part of the agreement was that the original owner would stay with the salon for one year and not compete with a new business for three years. The use of a non-compete clause in the sale of a business is a common practice.

The day following the end of the non-compete agreement, the original owner of HS1 opened a new business, Hair Salon 2 (HS2), just down the same street from the original business. Over the coming weeks, a number of the hair stylists and colour technicians from HS1 also moved to the new business. Unfortunately for the owner of HS1, a significant portion of the clientele of HS1 joined the procession. The owners and staff of HS2 had contacted their regular customers at HS1 of the move. According to the owner of HS1, business has been devastated, resulting in the filing of a \$6.4 million law suit against the owners and staff of HS2.

In order to gather support for the law suit, the owner of HS1 hired private investigators to go through the trash of HS2 and had "mystery" shoppers pose as clients of HS2. Of particular interest was information about colour formulations used for specific clients. This information, as well as customer contact and appointment information, is found on what is referred to as a "colour card."

The new owner of HS1 considers the "colour card" information to be the property of HS1; thus, none of this information should have been removed from HS1. The owner of HS2 claims that, when he owned HS1, such information was considered to be the property of the individual staff members and that this policy was never changed under the new ownership (Kelly, 2009a). The original owner, however, does admit that the staff made copies of this information when they left; the original documents were left at HS1.

The practice of removing colour card information when one leaves the employ of another salon and taking one's clientele with them is normal, even though the new owners of a salon may not appreciate the situation (Kelly, 2009a). If this is the case, then a buyer of an established business of this nature would account for this event when agreeing on a price for the business. One of the advantages of buying an established business is the "goodwill" that is associated with the business; however, in the service industry, a buyer has to recognize that, unlike the case involving the sale of products, there is no separation between the service provider and the service. Also, as with any customer-business relationship, it is the customer who determines what business will be patronized. It would be naive for a new owner to believe that he or she can control where decides to shop.

In order to gather supportive evidence for the law suit, the new owner of HS1 received court approval to search the premises of HS2. In this case, an Anton Piller order was issued to allow the new owner of HS1 to search the premises of HS2 without giving prior notice to HS1. The reason for having such an order is to avoid the possibility of having evidence destroyed before the visit is avoided, knowing that such a search will take place. Under the order, lawyers, forensic technicians, and a videographer searched the premises of HS2. Other investigators also searched the home of the owner of HS2. Interestingly, to ensure that a peaceful atmosphere was maintained during all search activity, representatives from the local police force were present at both locations (Kelly, 2009a).

The search led to the copying of the contents of the cell phones of the staff at HS2; the cloning of the contents of the computers at HS2 and at the home of the owner of HS2; and the seizure of customer files, with the latter information being held by an independent auditor, with no access to the latter data by HS2. After all this was done (i.e., execution of the Anton Piller order), the position of the court was to reverse the decision to grant the order, meaning that the plaintiff in the case would not have access to the information collected.

It is clear that this ordeal has resulted in a loss of business for HS1 (Kelly, 2009b), the customers have gone elsewhere, perhaps to HS2, which is very busy (Kelly, 2009b). Because of the departure of many staff members, HS1 has had to advertise for hair stylists and colourists who have their own clientele, since the remaining HS1 staff appears not to have as well developed a following as the departed staff (cf. Kelly, 2009b). Given the nature of the ads run by HS1, the salon appears to be engaging in the same “raiding of staff” behaviour that it has accused HS2 of carrying out, even if HS1 considers it not to be of the same magnitude (Kelly, 2009b).

Finally, while the status of the seized colour cards has yet to be resolved, the independent court-appointed (auditor) supervising lawyer holding the cards did offer one week of the cards to HS2; HS2 declined the offer (Kelly, 2009b). It appears to be an all-or-nothing situation. In the mean time, it appears that HS2 will have to rebuild its database of client names, hair-care requirements, and appointment schedules. Based on the report by Kelly (2009b), HS2 is off to a good start, while HS1 appears to be slow coming out of the starting gate.

**Focus:** Service retailing, characteristics of services [intangible, inseparable, perishable (no inventory storage), individual, inconsistent], conflict (inter-type, intra-type, vertical), exercise of power (reward, coercive, expert, referent, legitimate), Anton Piller order, customer (marketing) orientation, goodwill, non-compete clause.

### Questions:

1. Define each of the concepts identified above. Explain how each concept, if applicable, applies to the case.

2. If the original business transaction involved the sale of a convenience store, would a non-compete clause be necessary? Explain. Why is the use of a non-compete clause a good idea when dealing with the sale of a business, particularly if it is based on a service?
3. Based on the information provided, did the owner of HS2 meet all of the requirements set out in the original transaction of sale for HS1? Explain.
4. Based on the information provided, does the owner of HS1 have any legal grounds to win a legal judgement against the owner of HS2 and the staff members who left to go to HS2? Explain.
5. If you were the buyer of HS1, what would the nature of the agreement of sale be like (i.e., what would you put in the contract with respect to what the seller could and could not do)? Explain. Would all of the covenants in the agreement which you have identified be legal and defensible in court in the event of a violation by the other party?
6. Do a literature search of actual case situations where the buyer of a business included a non-compete clause with respect to the seller of the business. What was the nature of the non-compete clause in each case? In particular, review the situation involving Papa John's Pizza and Michael Cortina, a former VP for Domestic Operations for Papa John's.

[Source: The facts in this case were drawn from Kelly, Cathal. (2009a, June 17). Hair-pulling in Yorkville. *The Toronto Star*, pp. A1, A21; Kelly, Cathal. (2009b, June 18). Hair-pulling in Yorkville: part II, pp. A1, A19.]