

Workwise

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A Win for Employers: Greater Obligations on Some Departing Employees

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SYNOPSIS

***Evans v The Sports Corporation*, 2013 ABCA 14** is the latest case from the Alberta Court of Appeal dealing with the obligations of departing employees to their former employers. *Evans* is important because it provides more guidance in the always uncertain areas of fiduciary duties and non-solicitation obligations of departing employees.

In light of recent caselaw which tends to favor the interests of departing employees, *Evans* serves as a counterbalance in favor of employers' interests. *Evans* expands the class of employees that will be considered to be fiduciaries and the scope of what conduct will be considered "solicitation". *Evans* also provides greater clarity on the strict body of law invalidating unreasonable restrictive covenants, including non-solicitation agreements.

FACTS

This case involved a sports agent, Evans, who was employed for 6 years by The Sports Corporation ("TSC"). His job was to assist in managing current and prospective NHL players. TSC had a strong network of prospects in Slovakia and the Czech Republic, and Evans was hired to take over management of the Czech-Slovak pipeline. As a condition of his employment, he signed a restrictive covenant containing a non-solicitation of employees and clients clause. Evans gave TSC some notice that he would be leaving and TSC told him not to bother coming into work. TSC withheld 5 days' wages owed to Evans. These actions were considered by the Court of Appeal to be a breach of contract, but not serious enough to allow Evans to claim wrongful dismissal.

Evans had arrangements with two other TSC employees, Kadlecek and Henys ("K" and "H"), that when Evans left TSC they would both leave TSC and join him. Evans did not personally solicit TSC's clients, and Evans did not directly ask K or H to actively solicit TSC's clients, but K and H were found to have solicited TSC's clients on Evans' behalf.

Many of the players, which were TSC clients, joined up with Evans' new agency after Evans left TSC.

DISCUSSION

Contractual Non-Solicitation

Respecting solicitation of clients, the agreement provided as follows:

He will not, either during the continuance of his employment under this agreement or for a period of 24 months thereafter, directly or indirectly through others, call on, solicit, divert or take away or attempts [sic] to call on, solicit, divert or take away any client of the Company which has been a client of the Company or any other company to whom Evans provided any services related to the Company's business. This provision shall not apply to those clients of the Company from whom Evans has received or is owed payments under section 4 of this Agreement (at para 8).

The Court cited *Globex Foreign Exchange v Kelcher*, 2011 ABCA 240 for the principle that if it is impossible to predict when you are breaching a restrictive covenant, it is in essence unreasonable. The Court also cited *Shafroon v KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, as follows: "a restrictive covenant is prima facie unenforceable unless it is shown to be reasonable. However, if the

covenant is ambiguous, in the sense that what is prohibited is not clear as to activity, time, or geography, it is not possible to demonstrate that it is reasonable”.

The Court considered the words “any client of the Company which has been a client of the Company or any other company to whom Evans provided any services related to the Company’s business” in the client non-solicitation clause. The Court noted that while this was presumably aimed at prohibiting solicitation of other people previously given services by Evans while they were clients of TSC or a related company, it could also be read as widely as prohibiting past clients of TSC which would be unreasonable. In the result, the Court found that the clause was not “plain or readily interpretable” but ambiguous and thus unenforceable as being unreasonable.

Fiduciary Duty

The Court of Appeal considered whether Evans was a fiduciary.

The Court noted that because of his position in developing close personal relationships with players, the element of vulnerability required for fiduciary status was present. The Court affirmed recent case law of lower Courts providing that fiduciary status does not depend on holding corporate office, but relates to the responsibilities entrusted to the employee.

The Court noted that the fact that the great majority of Evans’ clients after he left TSC were players originally entrusted to his care by TSC was akin to the appropriation of a corporate opportunity. In short, Evans was considered by the Court to be a fiduciary.

Fiduciary Duty of Non-Solicitation

Finding that Evans was a fiduciary, the Court went on to consider if he had obligations to not solicit clients of TSC.

The Court summarized relevant case law and found that while some professionals, like lawyers and dentists, are under a duty to inform clients of an impending departure and of the client’s right to choose the departing professional, the general rule for other fiduciaries is:

[W]hile a fiduciary can compete with a former employer, when it comes to former clients he must wait until they come to him of their own initiative.

Furthermore, a key employee cannot avoid the prohibition against soliciting by having someone else do the solicitation for him. ... Finally, a key employee may be allowed to contact former clients if the conduct is initiated as part of a general advertising campaign, and it may be that the duty not to solicit is not breached until a business relationship forms between the fiduciary and the former client.

In addition to those facts described above, the Court made the following findings:

1. Evans expected that K would solicit clients before referring them to Evans;
2. Evans knew the influence K and H had over the player-clients, “which strongly suggests that Evans knew they would be exercising their influence to cause players to follow them to Evans’ new company”;
3. Prior to leaving TSC, Evans contacted clients directly to tell them that his contract was coming to an end and they could contact him; and,
4. Evans had his TSC cellphone calls directed to his home phone.

The Court found that the facts supported the inference that Evans had breached his fiduciary duty of non-solicitation of clients of TSC, and noted:

When these facts are considered together, they reveal that Evans was not prepared to await the players coming to him on their own initiative ... He was the face of TSC, which offered agency services to the players. He had no compelling reason, therefore, to let them know, either by himself or through Henys, he was thinking of leaving TSC, except to suggest, by such contact, that the players might follow him when he left.

Other Issues

Another point raised in the case of some significance is the obligations of fiduciary employees that are terminated without just cause. In my opinion this issue was not clarified in *Evans*. Evans argued based on previous case law (*ADM Measurements Ltd.*, 2012 ABQB 150) that since he was wrongfully dismissed, he should not have any fiduciary obligations. The Court noted, “nor do we subscribe to the view that a termination of employment will automatically relieve a former employee of ongoing fiduciary obligations”. This could mean the Court was calling *ADM* bad law, but I do not think the Court meant to go so far: first, the Court did not have to comment since they found that Evans was not wrongfully dismissed; and, second, the literal reading of the statement does not preclude another Court from determining that the Court of Appeal only meant to rebut an argument that *any* termination would negate fiduciary duties.

Damages

The lower Court had found that Evans had breached the non-solicitation clauses respecting clients and employees, as well as his fiduciary duties of non-solicitation, but only awarded damages for breach of contract because the damages for breach of either were the same.

The Court of Appeal reasoned that although Evans' non-solicitation of clients clause was unenforceable, the damages that were awarded by the lower Court did not need to be adjusted because Evans breached a different clause (non-solicitation of employees of TSC), and the consequence of that breach was that clients left TSC and caused damage.

Perhaps more importantly, the Court found that his fiduciary breaches of non-solicitation of clients and employees caused the same damage as the contractual breaches would have caused. Accordingly, the Court upheld the lower Court damages award of \$207,463.47. No additional amount was awarded for breach of fiduciary duty.

Guidance

What Evans means:

1. *Evans* reinforces that employers should not use standard form non-solicitation clauses for employees they need protection against, especially if those clauses are old or dated. It also reinforces that drafting of these clauses must be very clear and specific and should be regularly reviewed to ensure they remain current or comply with changes in jurisprudence.
2. *Evans* is a cautionary tale for departing employees in mid-level management and other sensitive positions because these employees could be considered to be fiduciaries and thus obligated by fiduciary duties.
3. *Evans* places a great deal of importance on the fact that clients left the employer and went to the former employee. The Court used this fact in: establishing that Evans was a fiduciary; establishing that he breached his fiduciary obligations; and in fixing the damages of TSC. The Court appears to take evidence of many clients leaving a former employer as a piece of evidence supporting the inference that solicitation has occurred.

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