

RESTRICTIVE COVENANTS

CONSTRUCTION OF NON-SOLICITATION CLAUSES

Baldwins (Ashby) v Maidstone

On 3 June 2011 the High Court handed down a judgment which addresses the construction of non-solicitation clauses where contact is initiated by a former client.

SUMMARY

The case concerned the construction of a restrictive covenant not to canvass, solicit or endeavour to entice away former clients

Mr Maidstone sold his accountancy practice to Baldwins for £1 million. The share sale agreement included a covenant protecting the goodwill in the company from Mr Maidstone “*canvassing, soliciting or endeavouring to entice away*” former clients. During the period of the covenant Mr Maidstone joined a new firm, Charnwoods. Baldwins soon became aware that it was losing clients to Charnwoods and proceedings were issued against Mr Maidstone alleging breach of the non-solicitation clause.

It progressed to a final hearing on whether solicitation had in fact occurred.

Mr Maidstone’s position was that some of his former clients had followed him to Charnwoods (there was no non-dealing clause), but that he had not “*canvassed, solicited or endeavoured to entice*” them away. At trial in March 2011 he called four clients to give evidence on his behalf, as well as the managing partner of Charnwoods.

HHJ Simon Brown QC held that on a true construction of the clause Mr Maidstone was in breach in respect of each of the named clients in dispute. Significantly this included occasions where the former Baldwins client had made the first contact with Mr Maidstone.

CONSTRUCTION OF THE CLAUSE

Solicitation was found to have occurred, including on occasions where the former client made the first contact.

In his detailed judgment, HHJ Simon Brown QC considered the proper construction of the non-solicitation clause in this case.

The objective of this type of clause – namely to protect the value of the goodwill – is critical to its interpretation. The boundary between acceptable and non-acceptable acts requires consideration of whether there has been a “specific and direct appeal” to former clients (Trego v Hunt [1986] AC 7).

It matters not who initiates the contact.

There must be an active component and a positive intention.

The Judge's findings help define the boundary between what is acceptable and what amounts to solicitation.

The contention on behalf of Mr Maidstone that where contact is initiated by a former client there can be no solicitation (drawing on Austin Knight v Hinds [1994] FLR 52) was not accepted. Rather, HHJ Simon Brown QC cited with approval the New Zealand case Equico Equipment Finance Ltd v Enright Employment Relations Authority, Auckland, NZ (17th July 2009), including the following passage: “It matters not who initiates the contact. The question of whether solicitation occurs depends upon the substance of what passes between the parties once they are in contact with each other. There is solicitation of a client by a former employee if the former employee in substance conveys the message that the former employee is willing to deal with the client and, by whatever means, encourages the client to do so.... [A] degree of “influence” is required. There must be an active component and a positive intention”.

ESTABLISHING BREACH

Mr Maidstone was found to be a dishonest and unreliable witness, who was clever, devious and arrogant. There was held to be a secret agreement between Mr Maidstone and Charnwoods to introduce new business solicited secretly from Baldwin’s client base. All of the clients called by Mr Maidstone were held to be unreliable and partisan.

Some of the precise findings as to which conduct crossed the boundary of acceptable behaviour in dealing with former clients are instructive in determining the true ambit of this type of non-solicitation clause. For example, Mr Maidstone merely telling a client who was seeking his advice that he was leaving Baldwins, and when asked, saying he was moving to Charnwoods did not amount to breach. However, when that client then indicated that he wanted to follow Mr Maidstone to Charnwoods, Mr Maidstone contacting Charnwoods and making the introduction did amount to breach. As did Mr Maidstone attending new client meetings with former clients, and taking steps to chase up a letter of engagement.

COMMENT

The judgment will provide helpful guidance to commercial and employment practitioners as to where the boundary lies between what is acceptable conduct and what amounts to solicitation in dealing with former clients. The express findings of dishonesty in this case also highlight the professional risks to those who act in breach of their legal obligations and attempt to conceal their actions.

[Kathleen Donnelly \(profile\)](#) appeared on behalf of the successful claimant, instructed by The Wilkes Partnership.

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