Court of Queen's Bench of Alberta

Citation: MHK Insurance Inc v Wass, 2021 ABQB 721

Date: 20210909
Docket: 1703 16356
Registry: Edmonton

Between:

MHK Insurance Inc

Plaintiff

- and -

Ryan Wass, Kristina Kulak and HighStreet Insurance Group Inc

Defendants

Endorsement
of
W.S. Schlosser, Master of the Court of Queen's Bench of Alberta

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[1] This is an application for Summary Judgment based on non-competition agreements signed by Mr. Wass and Ms. Kulak. These Defendants left their employment with the Plaintiff, MHK Insurance Inc (MHK) and joined HighStreet Insurance Group Inc (HighStreet). After Mr. Wass and Ms. Kulak left, 40 MHK clients moved their business to HighStreet.

[2] The following clause is representative of the wording applicable to both employees (apart from the percentages adopted for the purpose of calculating compensation):

> 5. For a period of 24 months after the date of termination of the Employee's employment with MHK, however caused, the Employee will not for any reason, directly or indirectly, either as an individual or as a partner or joint venture or as an employee, principal, consultant, agent, shareholder, officer, director or sales representative for any person, firm, association, organization, syndicate, company or corporation, or on the Employee's own behalf, or in any other manner contact,

> solicit, sell, serve, direct or receive business from any person, firm or corporation in the Province of Alberta, which was a client of MHK at any time during the period of the Employee's employment with MHK, unless in respect of any such client, the Employee shall pay to MHK an amount equal to 250% of the total of all commissions or other income in respect of Insurance policies or related products and services of such client charged by MHK for premium periods commencing in the 12 month period immediately preceding the renewal date of said policies, or 250% of all such commissions or other income charged by MHK for the las 12 month period during which MHK served that client, whichever is greater.

The price in Mr. Wass' covenant was 250% of the commissions formerly earned by MHK. Ms. Kulak's was 180%.

[3] The effect of the clause does not restrain trade but permits it at a price. It recognizes the propriety interest and value of a broker's Book of Business. The effect of the clause is that if you leave your old brokerage firm and join a new one, and some of the old work comes with you (whether you solicit it or not), you have to pay for it as if you bought it. The rates of 180% and 250% are consistent with figures used in the industry. There is no countervailing evidence on this point.

[4] Mr. Wass had been a Senior Account Executive and the Director of Commercial Business Development at MHK. Ms. Kulak was the Account Manager for the same group of clients that moved their business to HighStreet. HighStreet was aware of the covenants and benefitted from acquiring the new clients.

[5] My initial reservations about this clause had to do with the words 'serve', or 'receive', as opposed to 'solicit', or 'sell', which is the type of language that is most frequently addressed by the decided cases. My reservations also had a pragmatic consideration that would potentially interfere with the enforceability of this covenant; an employee going to a new brokerage might not know the entire client list of the old firm, especially if it had a large Book of Business and might not be able to abide by the covenant for that reason. However, in this case the issue is moot because all of the clients on the Plaintiff's revised and admitted list were all former clients of MHK that had been served by Mr. Wass and Ms. Kulak.

[6] The clause is not a prohibition on conducting business with former customers or clients as in: ***Specialized Property Evaluation Control Services Ltd v Les Evaluations Marc Bourret Appraisals Inc,*** 2016 ABQB 85 at paras 55-56 per Tilleman J or ***H L Staebler Company Limited v Allan,*** 2008 ONCA 576.

[7] The clause does not restrain trade, it simply puts a price on some of it that is consistent with the price of purchasing it in the industry: ***Rhebergen v Creston Veterinary Clinic Ltd***, 2014 BCCA 97 at paras 26-42; ***Jones v Gerosa***, 2016 ABQB 207 at paras 178-185 (in Alberta) and, generally, ***J G Collins Ins Agencies v Elsley Estate***, [1978] 2 SCR 916 at para 22.

[8] The clause simply closes the door that might have permitted a former employee to *receive business from former clients in the absence of any active solicitation.* ***Evans v The Sports Corporation,*** 2013 ABCA 14 at paras 39-43.

[9] In the circumstances, I need not decide whether Mr. Wass' announcement of his relocation on LinkedIn amounted to solicitation.

[10] The amounts claimed are consistent with figures used in the industry. They are not evidently an unenforceable penalty; much less one that is extravagant and unconscionable. On this point see: ***Capital Steel Inc v Chandos Construction Ltd,*** 2019 ABCA 32 per Wakeling JA at paras 100 - 115 and 154 *et seq*.

[11] Time and geographic area are not excessive***. J G Collins,*** for example, approved a temporal limit of five years. Here it is only two, which is probably the minimum necessary to be effective given policy periods that would not be aligned with employment start and end dates. The geographic area covered (Alberta) is also not unreasonable.

[12] The clause protects the proprietary interest that a broker has in a species of property known as the Book of Business recognized in the insurance industry (eg ***J G Collins***). Insurance policy sales is a highly personalized business, making the old employer especially vulnerable when an employee moves to another firm, or sets up on their own. In a manner of speaking, Mr. Wass and Ms. Kulak were the face of business at MHK to the clients that came over to HighStreet.

[13] There is no evidence that the clause - as drafted - would impair consumer choice to the point where it should be unenforceable as a matter of public policy. I acknowledge the burden of sustaining the covenant falls to the Plaintiff. However, the burden of disqualifying it on the basis of unduly limiting consumer choice falls to the Respondents, who have presented no evidence on this point.

[14] It is also unnecessary to consider whether the clause might be invalid because it might be wide enough to capture something unrelated to the business of either brokerage firm; like selling a used chattel (the example used in the Defendants' argument was a photocopier) to a former client. This type of hypothetical has no application here as well. At issue are former clients of MHK purchasing the same or substantially the same product from the new broker rather than the old one. Accordingly, it is not necessary to contemplate bringing out the blue pencil (or the concept of notional severance and read the clause down) on the facts of this case. ***Shafron v KRG Insurance Brokers (Western) Inc,*** 2009 SCC 6 at paras 29 *et seq.*

[15] I need not decide whether HighStreet is liable based on the torts of interference with economic relations or inducing breach of contract. On the facts of this case, their liability is vicarious and derivative, ***Alberts et al v Mountjoy et al***, (1977) 16 O.R. (2d) 682.

Disposition

[16] The application is allowed for substantially the reasons set out in the Applicant's brief, notwithstanding the high level of advocacy on the part of the Defendants.

[17] The Defendants are jointly and severally liable in the amount of $1,176,330.00 with the caveat that Ms. Kulak's liability is limited to $870,484.20 according to the formula in the covenants. MHK may also have its party and party costs to be assessed.

Heard on the 19th day of August, 2021.
Dated at the City of Edmonton, Alberta this 9th day of September, 2021.

W.S. Schlosser
M.C.Q.B.A.

Appearances:

Craig Neuman, Q.C.
Neuman Thompson
for the Plaintiff

Thomas Duke
Miller Thomson LLP
for the Defendant, Ryan Wass

Riley Snider
Witten LLP
for the Defendant, HighStreet Insurance Group Inc

Kristina Kulak
Self Represented