
CANADA / JUDGMENT

Wilson M. Beck Insurance Services Inc. v. Moroz

2008 BCSC 113

COURT

Supreme Court of British Columbia

DECIDED

30 January 2008

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2008 BCSC 113 Wilson M. Beck Insurance Services Inc. v. Moroz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wilson M. Beck Insurance Services Inc. v. Moroz,

2008 BCSC 113

Date:20080130

Docket: S078033

Registry: Vancouver

Between:

Wilson M. Beck Insurance Services Inc.

Plaintiff

And:

Frederick Moroz

Defendant

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for the Plaintiff

R. S. Anderson

Counsel for the Defendant

N.T. Mitha and P.D. McLean

Date and Place of Trial/Hearing:

December 7, 2007

Vancouver, B.C.

- [1] The plaintiff Wilson M. Beck Insurance Services Inc. applies for interlocutory injunctions restraining the defendant from soliciting its customers and mandating the return of materials believed to be in his possession.
- [2] The plaintiff is in the business of placing general and marine insurance and obtaining contract bonds for clients in the construction industry.
- [3] The defendant worked for the plaintiff from April, 2001 until November 2, 2007. He went to work for a competing firm on November 5, 2007.
- [4] The plaintiff alleges that prior to leaving its employ, the defendant took copies of client files and other materials in breach of his obligations toward the plaintiff pursuant to his employment contract and at common law, and, at least potentially, in breach of the parties' obligations under the Personal Information Protection and Electronic Documents Act. The plaintiff also alleges that the defendant has actively attempted to solicit customers of the plaintiff that he served while in their employ, both before and since his departure, in breach of his contractual and common law obligations.
- [5] On April 17, 2001 the defendant signed an Employment Agreement with the plaintiff. After setting out the plaintiff's duties, the agreement sets out specific restrictions on disclosure and ownership of records and sets out a restrictive covenant restraining contact with the plaintiff's customers for a period of two years. The relevant provisions include:
 - 3. Disclosure of Information. The Employee recognizes and acknowledges that the list of the Employer's customers, as it may exist from time to time, including all records or expiration of business produced by the Employee, is a valuable, special and unique asset of the Employer's business. The Employee will not, during or after the term of his/her employment, disclose the list of Employer's customers or any part thereof to any person, firm, corporation, association or other entity for any reason or purpose whatsoever. In the event of a breach or threatened breach by the Employee of the provisions of this paragraph, the Employer shall be entitled to an injunction restraining the Employee from disclosing, in whole or in part, the list of the Employer's customers, or from rendering any services to any person, firm, corporation, or other entity to whom such list, in whole or in part, has been disclosed or is threatened to be disclosed. Nothing herein shall be construed as prohibiting the Employer from pursuing any other remedies available to be Employer for such breach or threatened breach, including the recovery of damages and reasonable legal expenses from the Employee.

4. Records. It is further understood and agreed that in the event of a termination of his/her said employment for any reason whatsoever, the use, control, and ownership of expirations, dailies and all records including expiration of business, life insurance contracts, accident health contracts, fire, casualty, and surety contracts and records pertaining to Mutual Fund contracts, and all commissions and fees payable or to be payable there from, whether produced by the Employee, by the Employer, or by any other person, shall remain the property of the Employer.

IN CONSIDERATION of Employment granted to the Employee by the Employer, the Employee covenants for a period of (2) two years from the termination of employment with the Employer that he/she will not, on behalf of himself/herself, or on behalf of any other person, partnership, corporation or other entity, directly or indirectly

1. Contact or communicate with any customer of the Employer, which was such at any time during the period from the date hereof to the date of termination of employment, for the purpose of soliciting or selling insurance.
2. Solicit, divert or take away from the Employer any such customer or former customer.
3. Accept or receive any commissions or other monies resulting from or relating to the sale of insurance to any such customer or former customer; or
4. Solicit, employ or take away from the Employer any employee of the Employer, who was such at any time during the period from the date hereof to the date of termination of Employment.

THE EMPLOYEE ACKNOWLEDGES that he/she is in a position that he/she does obtain personal knowledge of and influence over the customers of the Employer and agrees that the foregoing restrictions are reasonable and that he/she voluntarily acknowledges and accepts this as part of the terms of employment and to execute and deliver this document which is part thereof.

- [6] The evidence respecting the removal of records is not particularly strong or convincing. The affidavit material sets out a circumstantial case. It is not at all clear that possession of the records said to be taken would confer a particular advantage or that the records could not be obtained by other means. The direct evidence given by Wilson M. Beck as to what he expected to find on the defendant's desk but did not, is similarly unpersuasive. None of that evidence advances the cause of this application.
- [7] The evidence respecting direct solicitation post-departure is much stronger. Mr. Beck deposes to a number of contacts by customers whose files had been serviced by the defendant, seeking to forward their files to his new firm.
- [8] These occur following an exchange of correspondence between the plaintiff and the defendant. On November 5, 2007, the plaintiff's president and chief operating officer sent the following letter to the defendant:

Further to our discussion on Friday, November 2, 2007 we wish to thank you for your many years of service and also to wish you success in your new career.

As discussed in our exit interview, we remind you of the provision of BC's Personal Information Privacy Act that stipulate the confidential nature of client information. It must not be shared with anyone for any reason. This includes divulging the existence of business relationships between our company and other firms and individuals.

Furthermore you have promised in your employment contract not to:

1. Contact or communicate with any customer of Wilson M. Beck Insurance Services Inc., for the purpose of soliciting insurance or surety business;
2. Solicit, divert or take away from Wilson M. Beck Insurance Servicing Inc. any customer or former customer;
3. Accept or receive any commissions or other monies resulting from the sale of insurance or surety business to any customer or former customer; or
4. Solicit, employ or take away from Wilson M. Beck Insurance Services Inc., any employee of that company.

If you have any documents or data in your possession relating in any way to our clients or our business relationships with people and companies, please return them immediately without making copies.

Nothing in the forgoing changes the terms of your contract with this company.

[9] The answer, on November 13, 2007, suggests that the defendant did not remember the agreement:

Thank you for your letter of November 5th, and for your well wishes. I also wish you continued success.

Your letter purports to set out certain terms for my employment contract. I am not aware of having entered into an employment contract which includes terms as they are set out in your letter. I would be grateful if you send me a copy of the document that you have in mind.

It is dated about the time the plaintiff began receiving "Letters of Brokerage" seeking the transfer of client business to Mr. Moroz' new employer.

[10] The defendant denies that he took any confidential documents. He acknowledges contacting about 40 of the 200 surety clients with whom he had frequent contact while he was employed by the plaintiff. He does not deny that he solicited business, but deposes that he does not "believe" he solicited business from the plaintiff.

[11] As to that allegation the defendant says:

- a. there is no evidence he has solicited clients in breach of the restrictive covenant;

- b. there is no evidence he has communicated with clients for the purposes of soliciting or selling insurance;
- c. alternatively, the restrictive covenant is unenforceable;
- d. alternatively, having breached the Defendant's employment contract, the Plaintiff cannot rely on the restrictive covenant; and
- e. alternatively, there was no consideration for executing the restrictive covenant.

[12] There is certainly some evidence that the defendant solicited clients by communicating directly with them and facilitating the transfer of their business to him. The behaviour the defendant acknowledges would on its face run afoul of the restrictive covenant contained in the employment agreement, if it is assumed that the employment agreement applies to the business the defendant serviced. The defendant alleges, however, that:

- a) there was no consideration for the agreement because it was imposed a day after the defendant actually went to work for the plaintiff;
- b) the restrictive covenant does not apply to the "surety" work the defendant actually performed for the plaintiff's clients because "surety bonds" are not "insurance"; and
- c) the restrictive covenant is unenforceable on public policy grounds because it is too broad.

[13] I have been offered detailed submissions respecting each of these objections to the Employment Agreement. It is not the task of the court at this stage of proceedings to determine whether these objections are ultimately tenable, but only to weigh them in an assessment of the strength of the case as a factor in determining the balance of convenience. I cannot say that I am persuaded that the timing of the execution of the Employment Agreement or the fact that "surety" may not be included in "insurance" in statutory and other contexts, are necessarily weaknesses in a contract signed by competent parties within a context that they both understood; nor am I persuaded by the submission that it makes sense for a contracting party to agree to the widest possible restriction, so as not to be bound by it later on public policy grounds and that this is an obvious way out of the clause as drafted.

[14] The question at this stage of this proceeding is what is just and equitable in the circumstances. The plaintiff carries the onus of establishing:

- a. there is a serious question to be tried as to the existence of the alleged right and breach thereof, actual or reasonably apprehended; and
- b. the balance of convenience favours the granting of an injunction.

Attorney General v. Wale

(1986), 9 B.C.L.R. (2d) 333 (C.A.)

RJR-MacDonald Inc. v. Canada (Attorney General),

[1994] 1 S.C.R. 311

Onkea Interactive Ltd. v. Smith,

2006 BCCA 521, (2006) 60 B.C.L.R. (4th) 29

[15] I accept the cautions drawn to the court's attention by the defendant respecting the extraordinary nature of the remedy, the need for an adequate evidentiary foundation, and the desirability of care in the exercise of the court's jurisdiction.

[16] On the question of whether there is a serious issue to be tried the defendant relies on R.J.R. Macdonald Inc. v. Canada (A.G.) [1994] 1 S.C.R. 311, at pp. 337-338:

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial.

[17] The defendant submits that the outcome of this application will effectively determine the rights of the parties. He submits that the trial will not likely proceed for a year or more, and that in the meantime the defendant will be prevented from soliciting "hundreds, if not thousands of clients" who are not necessarily current clients of the plaintiff. For this reason he urges that the court should, in fact, undertake a searching examination of the merits.

[18] Whether the defendant should ultimately be so restrained may turn on the limits of the employment contract, in its terms, or at law, but the duty of the defendant, even absent an agreement, is expressed in *Barton Insurance Brokers Ltd. v. Irwin* (1999), 63 B.C.L.R. (3d) 215, 170 D.L.R. (4th) 69 (B.C.C.A.). There, Hall, J.A., at paras. 17 and 18, observed:

Absent any express contractual terms, the law has developed to provide that a former employee will not be at liberty to act in an unfair way to a former employer. Whether it be called a fiduciary duty, a duty of good faith or a duty of confidence, the theme running through this whole area of the law is that in appropriate circumstances, a former employee may be found to have breached an enforceable duty owed to a former employer and may be successfully sued for injunctive relief or for damages.

Clearly, an employee has duties to a present employer not to divulge trade secrets or to work against the interests of his or her employer but the duty is not just limited to current employment. After leaving employment, an employee may be obligated not to pursue certain activities to the detriment of the former employer. For instance, it has been usually reckoned to be unfair conduct to permit a former employee to take with him or her customer lists to use for solicitation of business or to divulge trade secrets or to seek to appropriate maturing business opportunities for the former employer. On the other hand, I suppose to avoid what might otherwise be a condition of almost involuntary servitude, it has long been held that an employee is free to compete for custom with a former employer. As usual in human affairs, the difficulty is in the details and it is often difficult to know where to draw the line.

[emphasis added]

- [19] Whether this duty of "fairness" is properly characterized as such has been questioned, but it remains a statement of the law.
- [20] The starting point is that the plaintiff had a certain number of clients or customers, some of whom the defendant serviced. It is natural that a number of those customers might form a relationship with the person with whom they habitually dealt, and would come to see him, and not the firm for which he worked, as their principal contact. Nothing inhibits those customers who wish to continue with that person from notifying the company and taking their business to that person or that person's new employer.
- [21] As to those customers who might be open to persuasion, however, the general notion of a duty of fairness exemplified in *Barton*, supra, suggests that the defendants' responsibility as an employee does not comport with using the employment opportunity to act to the detriment of the employer. As between the employer and the employee the balance of convenience, in that regard, favours the employer.
- [22] The question of irreparable harm, that is harm that is not easily calculable, is clearly more acute at the early stages of the severed relationship. Customers always have the option to move their business, but the opportunity to prompt them to do so would be strongest at a time when there is such a change. To provide no relief at this stage would be, in effect, to rule that the restrictive covenant is presumptuously unenforceable, and to frustrate its purposes. I am not prepared to go so far at this stage. The agreement exists, and it says what it says. I cannot, at this point, rule on the basis that it has no pertinent meaning.
- [23] Accordingly, I am of the view that the relief sought in paragraph 5 ought to be granted. That is, that there shall be an interlocutory injunction enjoining the defendant from directly or indirectly soliciting any current customers of the plaintiff, or any person or entity that was a customer of the plaintiff during the defendant's tenure as an employee of the plaintiff.

- [24] No cogent case for the relief claimed in paragraphs 1 - 3 was made out by the Plaintiff. The relief claimed in paragraphs 4 and 6 is over-broad. The defendant is free to deal with customers who make bona fide choice to move their business to him: he is simply not permitted under any circumstances to directly or indirectly solicit or entice business from the plaintiff.
- [25] This injunction shall continue until the trial of this matter. Either of the parties is entitled to seek a review or reconsideration, if a trial has not been set within 120 days of this order.
- [26] The interesting questions respecting the formation of the contract including the restrictive covenant, or whether it covers the type of business the defendant was in fact performing are property matters for the trial and I will not comment further.
- [27] Costs will be in the cause.

The Honourable Mr. Justice McEwan

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