Case In Point

Alberta Court of Appeal Considers Restrictive Covenants and Fiduciary Duties

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In *Evans v. The Sports Corporation*, the Alberta Court of Appeal provides some important guidance on what classes of employees will be considered fiduciaries and what type of conduct will constitute solicitation of clients.

Richard Evans was employed for six years by The Sports Corporation ("TSC") as a sports agent responsible for TSC prospects and clients coming out of the "Czech-Slovak Pipeline." His initial Employment Agreement contained a restrictive covenant prohibiting the solicitation of TSC employees and clients for 24 months. That Agreement was renewed for a further three years. Five days before the expiration of the Agreement, Evans gave notice of his intention to leave. TSC then asked him to leave immediately and withheld his final five days of wages.

Before his departure, Evans advised clients of his imminent departure and made arrangements with two other TSC employees to enter into a business relationship. Both these individuals then brought TSC clients to Evans' new agency. Ultimately the business relationship between the individuals and Evans failed, and they returned to TSC. Many clients, however, remained with Evans.

Evans sued TSC for wages and bonuses owing, and TSC countersued for breach of the restrictive covenant and a fiduciary duty owed to it. Evans' claim was granted in part but the trial judge also found him in breach of the restrictive covenant and the fiduciary duty he owed to TSC. Evans appealed this finding.

The Alberta Court of Appeal reviewed the Employment Agreement and concluded that the non-solicitation clause relating to clients was unenforceable because it was ambiguous and had an "undeterminable" reach. Specifically, the Court found that the clause could be read "as prohibiting solicitation of past clients of TSC," and that it was "difficult to understand" how that could be reasonable.

However, the Court agreed with the trial judge that Evans, who was neither a director nor shareholder of TSC, was a fiduciary in the circumstances of this case. It stated that the status of a fiduciary "relates to the responsibilities entrusted to an employee, including any attendant power to affect the economic interests of the company." Evans had primary responsibility for the "Czech-Slovak Pipeline," and TSC entrusted clients to his care. Much of the revenue he received after he left TSC was from players who had been with TSC, a situation which the Court of Appeal characterized as "akin to the appropriation of a corporate opportunity; namely, players entrusted to Evans to develop on behalf of TSC were diverted to his own benefit."

Evans' argument that TSC's termination of his employment relieved against any ongoing fiduciary obligations was rejected by the Court, which found that the failure to pay five days of wages did not repudiate the Employment Agreement.

As a fiduciary, Evans had a duty not to solicit clients of TSC for a reasonable period of time: "the general rule is that while 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." The Court stated that "a key employee cannot avoid the prohibition against soliciting by having someone else do the solicitation for him." While the evidence relating to solicitation was "thin", the Court concluded that Evans at least knew of the two TSC employees' efforts on his behalf and accepted the benefit of those efforts. It concluded that Evans "was already contacting players before he left, on his own, or through [one of the employees] and it is reasonable to infer that he intended to continue contacting players, through [the other employees], after he left TSC." Consequently, Evans had breached his fiduciary duty not to solicit TSC clients.

With respect to damages, the Court upheld the trial judge's award of $207,463.47, and reasoned that the breach of his

fiduciary duty caused the same damage as a breach of the restrictive covenant in his Employment Agreement.

This case provides useful guidance for employers in drafting clear and reasonable non-solicitation covenants, and serves as a reminder that courts seem willing to use fiduciary obligations in respect of an expanding class of employees to protect employers from solicitation of clients.