



## Judge grants injunction prohibiting senior insurance executive from soliciting clients or recruiting employees of former employer.

A recent case dealt with the ability of senior employees to solicit customers of their previous employer and recruit former co-workers.

Kenneth Mendham was the leader of his employer's (Hub) marine insurance. Mendham had obtained a Chartered Insurance Professional designation with a major in marine insurance and had a number of contacts in the industry as a result of prior employment with an underwriting firm.

At Hub, Mendham organized industry events, handled matters such as sponsorships, and worked to enhance the yacht club insurance programs, introducing a number of successful innovations. In recognition of his services to the company, he was promoted several times and in January 2009 he was offered the position of Senior Vice-President, Customer Solution and Marine Insurance Division.

As a condition of this promotion, Mendham was required to sign a new employment agreement that contained a number of restrictive provisions.

Clause 7.0 of this agreement bound Mendham to "(a) treat confidentially all confidential information belonging to the company; and (b) not use or disclose the confidential information to any third party, except as required to fulfil the employee's employment responsibilities to the company."

Clause 8.02 provided that "while employed by the company and for a period of twelve (12) months following the termination of his/her employment with the company regardless of the reason for such termination or the party effecting it, the employee shall not:

- (a) promote, provide assistance to, carry on, be engaged in, employed by, concerned with, or interested in any business or enterprise that competes with the company. For the purposes of this Agreement any insurance sales or



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servicing business that is carrying on business in the Greater Vancouver Regional District shall be deemed to compete with the Company; (b) solicit or entice, or attempt to solicit or entice, either directly or indirectly, any customer, client or supplier of the Company to transfer their business from the Company to any other person or business; or (c) solicit or entice, or attempt to solicit or entice, either directly or indirectly, any employee of the Company to leave that employment.

On March 8, 2011, Mendham informed the president that he was resigning from Hub and expressed an interest in buying its marine division. On March 14, 2011, the president informed Mendham that Hub was not interested in selling the division. Mendham allegedly subsequently told the president that he would start his own business to compete with Hub, that he would comply only with those aspects of his employment agreement that he considered reasonable, and that clients and other employees would ultimately be likely to leave the company.

Several employees of Hub's North Vancouver office who had formerly worked with Mendham resigned in March and April 2011 to take employment with Otto, the new company started by Mendham. In the December 2011 issue of *Pacific Yachting* magazine, Navis placed a large advertisement clearly soliciting marine insurance business, advising readers to "call us for a quote" and adding "we are committed to providing the best coverage at a competitive price."

Hub soon found itself losing marine division clients to Navis, which was operating out of the Otto agency, with Hub's rate of policy renewals dropping from 8 or 9 out of every 10 clients to only 6.5.

Hub applied to the Supreme Court of British Columbia for an injunction ordering Mendham and Otto to return all its confidential client information and to comply with all the restrictions in Mendham's employment agreement pending trial of a lawsuit that it had initiated against them.

British Columbia Supreme Court Judge Bruce Greyell made a preliminary ruling that the anti-competition clause was unenforceable as being too broad, but that the other provisions of the agreement were valid, and issued an injunction until trial ordering



Mendham to comply with their terms for a period of 12 months from the termination of his employment with Hub.

Turning first to whether there was a fair question to be tried, Greyell considered it necessary to review the language of the restrictive covenants to make a preliminary assessment as to their enforceability, noting that it remained open to the trial judge to come to a different conclusion on a full hearing of the evidence. Noting that the critical issue when evaluating a restrictive covenant was its reasonableness, he stressed the unique situation in the insurance industry, which depends in large part on a close relationship between the broker and the client.

Within this context, Justice Greyell considered that Mendham was an integral part of Hub's business and a key component of Hub's relationship with its client base. Accordingly, Greyell held that there was a serious case to be tried that the non-disclosure of confidential information clause was enforceable. However, turning to clause 8.02 of the agreement, Greyell held that the non-competition clause under 8.02(a) was problematic because of the overly broad scope of the nature of the activities prohibited. Noting that "[i]t would have been a simple task for Hub to have restricted the language to matters that would have harmed its marine insurance business division," Greyell stated: "The language of the agreement is vague, uncertain and over reaching. In particular, I find language such as 'concerned with' and 'interested in' to be ambiguous and overly broad particularly when combined with 'in any business or enterprise that competes with the Company'. The clause would ban Mendham from doing virtually any function in any area of insurance brokerage in which Hub does business."

With regard to clauses 8.02 (b) and (c), restricting solicitation, Greyell ruled that Hub had established a strong *prima facie* case for their enforcement and found that there was evidence which, if proven at trial, indicated that Mendham had sought to solicit corporate opportunities for himself, including soliciting clients and soliciting employees to leave Hub and join him.

Moving on to the second test, that of irreparable harm, Greyell held that this test favoured Hub because the Judge found that Hub stood to lose customer relationships through the renewal process and potentially beyond that, it's very customer base in



marine insurance. Mendham, acting through Otto, does not have the same issue. While he may have reputational issues if an injunction is issued, he says that in any event he has neither solicited clients, nor employees and has not used confidential information. If this is the case then he will not be negatively affected by the issuance of the injunction. The result of the injunction is that he may be negatively affected from conducting advertising aimed at Hub's clients. The terms of the injunction are such that any such restriction[s] on him are temporary.

Finally, Greyell held that the balance of convenience favoured Hub, based on the considerations above, as well as the public interest in "the enforcement of lawful provisions in employment agreements."

In the result, Justice Greyell issued an injunction ordering Mendham to comply with all the terms of the agreement except the non-competition sub-clause for a period of 12 months from the termination of his employment.

In the present case, the judge made a preliminary determination that the non-competition clause was so broad as to constitute a "blanket" restraint on the former employee's freedom to compete and was therefore unreasonable. However, particularly within the insurance industry in which a broker plays a crucial role with respect to company clients, Greyell determined that the other restrictions were reasonable and justified the issuance of an injunction to enforce compliance.

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