IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hub International v. Redcliffe,*
2012 BCSC 1280

Date: 20120830
Docket: S125318
Registry: Vancouver

Between:

Hub International (Richmond Auto Mall) Ltd.,
Hub International (Brentwood) Ltd.
Hub International Canada West ULC (formerly called
Hub International Canada West Co.
d.b.a. Hub International Insurance Brokers

Plaintiffs

And

Christopher Redcliffe

Defendant

Before: The Honourable Mr. Justice Myers

Reasons for Judgment

Counsel for the plaintiffs:	Scott A. Dawson
Counsel for the defendant:	Timothy J. Delaney Tim Goepel
Place and Date of Hearing:	Vancouver, B.C. August 22, 2012
Place and Date of Judgment:	Vancouver, B.C. August 30, 2012

[1] The plaintiffs, who I will refer to collectively as Hub, apply for an injunction enforcing a restrictive covenant. The defendant, Mr. Redcliffe, was a former employee of Hub and no claim is made that he was a fiduciary. Hub is an insurance brokerage firm, and Mr. Redcliffe is currently involved in that business.

I. FACTS

[2] Before being employed by Hub, Mr. Redcliffe worked for Redcliffe Investments Ltd., an insurance brokerage company owned by his father. On March 31, 2011 Hub acquired Redcliffe Investments.

[3] The contract of sale between Hub and Mr. Redcliffe's father required Hub to offer employment to Mr. Redcliffe and the form of employment contract containing the restrictive covenant was attached to the

contract of sale. Mr. Redcliffe was not a party to that contract since he was not a shareholder of Redcliffe Investments Ltd. Mr. Redcliffe began work with Hub around the time of the acquisition and signed the employment agreement shortly after that.

[4] The restrictive covenant provided a prohibition against soliciting or doing insurance-related business with clients or prospective clients of Hub and Redcliffe Investments. For the former, the period of restriction was 12 months following termination of employment and for the latter 24 months. I will not set the clause out in full because there is no debate as to its interpretation.

[5] The agreement also defined and restricted the use of confidential information:

> The Employee will be provided with access to confidential proprietary information and knowledge relating to the business of the Company and the affairs of RF Clients, Clients and Prospective clients of the Company, which shall include but not be limited to customer files, internal materials, research, reports, client lists, policies and procedures (the "Confidential Information";

[6] On June 18, 2012, Mr. Redcliffe resigned from Hub. In June and early July he and Hub negotiated for the purchase by Mr. Redcliffe of some of Redcliffe Investment's former book of business, but the negotiations did not bear fruit.

[7] There is no serious dispute that Mr. Redcliffe has taken on some former accounts of Redcliffe Investments. Since that is prohibited by the covenant, there is no need for me to deal with whether he solicited the business or the clients contacted him.

II. ANALYSIS

The Court of Appeal has stated that the three-part injunction analysis of a fair question to be tried, irreparable harm and balance of convenience should be applied even in cases of breach of a negative covenant: *Belron Canada Inc. v. TCG International Inc.*, 2009 BCCA 577 at para. 23.

[8] More recently the Court of Appeal stated that, while an injunction is not to be considered through water-tight analytical compartments, "… seldom will an interlocutory injunction be issued when there is no irreparable harm.": *Edward Jones v. Voldeng*, 2012 BCCA 295 at para. 24.

A. The fair case to be tried or a strong ***prima facie*** case

[9] As stated above, there is no question Mr. Redcliffe is doing business with former clients of Redcliffe Investments. Therefore, the only question to consider here is the enforceability of the covenant, which Mr. Redclife says is too broad and therefore not enforceable.

[10] The considerations for the enforceability of a post-employment restrictive covenant were set out in *Aurum Ceramic Dental Laboratories Ltd. v. Hwang*, [1998] B.C.J. No. 190 (S.C.):

> [11] For a "post-employment" restraint to be enforced, the Courts have required the parties seeking to uphold the restraint to prove that the restraint has the following characteristics:
>
> (a) it protects a legitimate proprietary interest of the employer;

(b) the restraint is reasonable between the parties in terms of:

(i) temporal length;

(ii) spatial area covered;

(iii) nature of activities prohibited; and

(iv) overall fairness;

(c) the terms of the restraint are clear, certain and not vague; and

(d) the restraint is reasonable in terms of the public interest with the onus on the party seeking to strike out the restraint.

[11] Hub argues that because the restrictive covenant arose out of the sale of a business, it will be more readily enforced than one arising out of a straight employment contract: see *Shafron v. KRG Insurance Brokers (Western) Inc.,* 2009 SCC 6 at para. 19. Therefore, the onus is on the defendant to show that the clause is unreasonable. I do not think that principle is applicable here. While the backdrop to the hiring of Mr. Redcliffe was the purchase of the business, the business was purchased from his father. Mr. Redcliffe was not a shareholder. The only benefit he received in return for the covenant was his employment.

[12] Mr. Redcliffe argues that because this case will not come to trial until the two year outer-limit of the covenant will expire, an injunction will grant Hub its entire relief, and therefore it should be required to establish the enforceability of the covenant on a strong *prima-facie* case standard: see *6180 Fraser Holdings Inc. v. Ali, 2012 BCSC 247* at para. 14.

[13] Assuming, without deciding, that the plaintiff need demonstrate a strong *prima facie* case, I consider that burden to have been met. The covenant does not restrict Mr. Redcliffe from competition – it only restricts him from dealing with clients of Hub and Redcliffe Investments. That mutes any concern with respect to the covenant's unlimited geographic scope. And, I do not find the time periods of one and two years to be unreasonable. (I note that neither side referred me to comparable cases in which the reasonableness of a similar clause was considered.)

B. Irreparable Harm

[14] The issue of irreparable harm was dealt with extensively in the *Edward Jones* case. That case involved an investment adviser and a non-solicitation clause. Chiasson J.A. drew the distinction between a non-solicitation clause and a prohibition against competing:

> 37. Non-competition covenants restrict a departing employee from seeking business generally. It usually will not be possible to tell whether business is lost to the employee's new employer as a result of prohibited competition as opposed to legitimate competition. Such damages, not being calculable, generally do constitute irreparable harm. To similar effect are actions which may damage the reputation of a former employer, or the general use of confidential information.

[15] Earlier in his reasons he stated, at para. 35:

> There are common threads that do permeate the cases: loss of investment clients through solicitation generally results in damages that are calculable and, in the context of a non-solicitation covenant, the interests of an individual investment advisor and his or her clients often tips the balance of

convenience in favour of the investment advisor.

[16] Although the case at bar is an insurance brokerage case, I find it impossible to distinguish it from *Edward Jones*. While Hub stressed the importance of the relationship between an insurance broker and its client (for example the broker must have knowledge of the client's business), the same exists with an investment adviser.

[17] In coming to the conclusion that damages would be calculable, Chiasson J.A. referred to the highly regulated nature of the investment business:

> 36. The cases illustrate the general rule that the harm flowing from the violation of non-solicitation clauses usually differs from that which flows from the violation of non-competition clauses. The damages that flow from a violation of a non-solicitation covenant in the employment contract of an investment advisor generally are calculable because the industry is regulated heavily. The value of the portfolio of a departing client is known, as is the return to the brokerage firm of managing that portfolio. The evidence in this case illustrates the point. The respondent is able to state exactly the value of the accounts of Mr. Voldeng's former clients that have been transferred to RBC.

[18] Hub argues that the insurance brokerage business is not highly regulated and this case is therefore distinguishable. Since neither party addressed the respective regulatory regimes I cannot say whether there is a meaningful difference. However, the fundamental underlying question is whether the revenue derived from the client's business is readily ascertainable. There is no reason to think that is not the case and every reason to think it is, since the revenue is a commission based on insurance premiums and for that there will have to be a paper or electronic trail. Further, as in *Edward Jones*, Hub was able to calculate with great specificity the revenue generated by the relevant clients.

[19] Hub argues that Mr. Redcliffe will be unable to pay any damages. The only evidence of that is that Mr. Redcliffe deposed that he was not able to obtain financing for the purchase of the book of business discussed between him and Hub after he resigned. However, Hub's argument assumes a damage calculation based on the capital value of the accounts, but provided no authority supporting that measure of damages. It also assumes that Hub's asking price reflects the correct valuation of the asset. Further, when Mr. Redcliffe was negotiating the purchase, he was just starting out and had no accounts or income.

[20] Finally, Hub alleges that Mr. Redcliffe is attempting to capitalize on the goodwill that his father sold Hub because he is conducting business under the name Redcliffe Financial Ltd. Damages for that, it argues, would not be calculable. However, that is a passing off claim which has not been pleaded.

[21] I therefore conclude that Hub has not met the threshold of showing that it will suffer irreparable harm if the injunction is not granted. This is not one of the rare cases where an injunction should be granted in the absence of irreparable harm.

C. Balance of Convenience

[22] At para. 48 of *Edward Jones*, Chiasson J.A. said:

> I do agree with the judge's finding that an interlocutory injunction may cause irreparable harm to Mr. Voldeng because, if his conduct were found to be proper, it would not be possible to determine which of his clients would have shifted to RBC if he had been able to inform them of his new contact particulars.

[23] The same can be said in the case at bar.

D. Confidential Information

[24] Thus far I addressed only the non-solicitation and non-dealing clause. The alleged breaches of the prohibition against the use of confidential information related exclusively to client information. The analysis and conclusion with respect to irreparable damages must therefore be the same as that for the other clauses.

III. CONCLUSION

[25] The injunction is therefore refused.

"E.M. MYERS, J."