

**ATTENTION IS DRAWN TO THE
ORDER PROHIBITING PUBLICATION
OF CERTAIN INFORMATION REFERRED
TO IN THIS DETERMINATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**Prohibition on
publication order
paragraph [17].**

5349744
[2012] NZERA Wellington 57

BETWEEN	WILKINSON INSURANCE BROKERS LIMITED Applicant
AND	DAVID ALLAN
AND	MERIDIAN GENERAL BROKERS LIMITED Respondents

Member of Authority: P R Stapp

Representatives: Tim McGinn, Counsel for the Applicant
Costas Matsis, Counsel for the Respondents

Investigation Meeting: 8 and 9 February 2012 at Wellington

Determination: 29 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] David Allan is currently employed by Meridian General Brokers Limited (Meridian General). Mr Allan was employed from November 2003 to February 2011 at Wilkinson Insurance Brokers Limited (Wilkinson) following the purchase of the business of Robertson Insurance Management Systems Limited (RIMS) where Mr Allan had previously worked. Mr Allan was a minority shareholder in RIMS at the time that the sale was negotiated. His interest was worth \$550,000 of the sale price of \$1,500,000. He was a principal in RIMS. There was no restraint of trade provision in the sale and purchase agreement. However, Mr Allan signed an employment

agreement with Wilkinson (the 2003 employment agreement) after he started work at Wilkinson. There was a restraint provision and confidentiality provision included in that agreement.

[2] When Mr Allan decided to leave Wilkinson in February 2011 a dispute arose in regard to the enforcement of the restraint and confidentiality provisions.

[3] As such, Wilkinson claims that Mr Allan has:

- (a) Breached the restraint of trade;
- (b) Breached confidentiality;
- (c) Breached the of duty of fidelity;
- (d) Breached good faith.

[4] Wilkinson is seeking:

- a) Penalties have been claimed for breaches of the terms of the employment agreement against Mr Allan, and against Meridian General for aiding and abetting the breach of contract;
- b) Penalties for breaches of good faith by Mr Allan;
- c) Compliance orders relating to breaches of restraint and confidentiality;
- d) Any relief required under the Illegal Contracts Act in regard to the restraint of trade being reasonable and enforceable.

[5] Mr Allan and Meridian General denied all the applicant's claims. Both parties have asked for costs. There has been mediation, but the parties have pursued the matters to the Authority for it to determine.

The issues

[6] The issues the Authority is required to determine are:

- (a) Was Mr Allan bound by an enforceable restraint of trade provision in its original terms or as modified;

- (b) If the answer to the first question is yes, did Mr Allan breach the restraint;
- (c) Did Mr Allan breach his duty of fidelity to Wilkinson while he was still employed by Wilkinson? In other words what were the circumstances with Mr Allan's decision to leave?
- (d) Did Mr Allan breach his duty of good faith to Wilkinson before his employment was terminated and on what grounds?
- (e) Did Mr Allan breach any confidentiality by using confidential information belonging to Wilkinson, either during or after he left employment with Wilkinson?
- (f) Did Meridian aid and abet any breaches of Mr Allan's terms and conditions of employment with Wilkinson?
- (g) If there were any breaches of the employment agreement, what losses have been suffered by Wilkinson?
- (h) Finally, what remedies should Wilkinson receive to resolve the employment relationship problem?
- (i) Which party receives costs and how much?

Background

[7] When Mr Allan commenced his employment at Wilkinson after the sale of the RIMS book, he signed the 2003 employment agreement that contained a conflict of interest clause including 'no competition, restraint and confidentiality'. The provision of the restraint applied for three years, and 400 kilometres from an existing place of business of the company.

[8] In 2011 Mr Allan decided to leave Wilkinson. There is a dispute between Mr Allan and Julie Shanly, Operations Manager for Wilkinson, and Conrad Shanly, General Manager for Wilkinson, about the circumstances in which Mr Allan told them that he was leaving and what the notice period would be. Conrad and Julie Shanly say that Mr Allan did not communicate or act responsibly in telling them exactly what he was going to do and did not honour giving six months notice. They believed he

would be retiring. However, it later came to their notice that Mr Allan had decided to take up an offer to work at Meridian General.

[9] Mr Shanly was not able to come to terms with Mr Allan to give effect to managing the restraint and confidentiality provisions. Instead he had to manage the situation to stem any losses. As such it was decided by the directors of Wilkinson to immediately terminate Mr Allan's employment. He ceased working for Wilkinson on 7 February 2011. There has been a suspicion raised about the whereabouts of Mr Allan's notebook which he used to plan his work and meetings. Also Wilkinson has received a number of client authorisations transferring business to Meridian since Mr Allan's departure. Mr Allan started work at Meridian and signed an employment agreement on 23 June 2011.

(a) Restraint of trade provision and confidentiality

[10] Mr Allan was one of the owners of the RIMS book. I am satisfied that the proprietary interest related to the details and clients of the RIMS book and as such the parties entered into the restraint of trade provision at the same time as the sale. Agreement was reached on the restraint clause to apply for 3 years and within 400 kilometres, having regard to the background of the sale of the RIMS book, and the employment of Mr Allan at Wilkinson to cover any eventuality of him leaving. Therefore, I hold:

- a. That the sale of the business with the RIMS book contained goodwill including the employment arrangements for an on going relationship. This included the continuing work with established clients.
- b. That the period of the restraint was related to the commercial considerations, Mr Allan working for Wilkinson and continuing to service clients.
- c. That the business arrangements would be affected if the vendors were allowed to actively compete for their clients after the sale. This was especially so as it related to Mr Allan's direct involvement with the clients.
- d. That the purchase price was arrived at with consideration for protecting a proprietary interest against any unfair competition in the future. This involved a protection for a capital investment. I am satisfied that the restraint was therefore necessary as:

- (i) There was no restraint in the sale and purchase agreement, but the sale and purchase agreement and employment agreement were linked.
 - (ii) The purchase price and the sale of shares were sufficient to provide extra consideration for the restraint as it was linked with employment.
 - (iii) The employment agreement was signed by the parties and it is not applicable that such an agreement may have applied to others, or that no one else had a three year restraint.
 - (iv) The later offer of revised employment agreements with variations to the restraint is not enough to waive the restraint applying since Mr Allan had the choice to accept the offer or not. He chose not to take it up.
 - (v) That the ownership of the book moved to Wilkinson, so Mr Allan could not assume the clients were his simply because they were close to him and they wished to remain with him.
 - (vi) That Mr Allan stayed at Wilkinson for 7 years, but it is significant the amount of autonomy he was given and that his work involved direct contact with the client base including the RIMS book. Also it was accepted that the “assimilation” of the clients was not entirely fully achieved.
- e. That the reason for including the restraint in the employment agreement rather than the sale and purchase agreement was able to be explained. This related to Mr Allan being able to retain contact with RIMS clients, and this extended to a risk of Mr Allan leaving Wilkinson in the future.

- f. That Mr Allan received consideration from his share of the sale of the business and this explains the linkage to his employment with Wilkinson under the terms as agreed.

[11] The assertion has been made that the client base is effectively nationwide. Details of the names of a considerable number of clients have been provided, but lack full disclosure of their geographical distribution. This makes it very difficult to assess the appropriateness of a 400 kilometre restraint. There was no detailed evidence presented in regard to the dispersion of work and locality. However, some of the authorities to act as a broker produced in the Authority's investigation indicate clients involved are from Auckland, Napier, Christchurch, Nelson, and Wellington. Some of these would fit in the distance, but it is inconclusive about some of the others.

[12] Mr Allan accepted that it would possibly take up to three years for Wilkinson to recoup the capital investment. Mr Allan has confined his response to the restraint issue to a few sentences in his written statement and has not provided any reasons why the restraint is unreasonable, except to say that that is so. Mr Allan signed off the arrangement when he agreed to the employment agreement at the time. Also, he did not take any advantage of changing the arrangement when the opportunity was presented to him later and he turned down a proposed new employment agreement. In this regard to 2003 employment agreement continued to apply and is supported by Mr Allan's silence at the time.

[13] Mr Allan signed the 2003 agreement with the full knowledge that it would require testing and he could not have just assumed that it would be unenforceable. Therefore the considerations that he has raised that the restraint was unenforceable and his entitlement to work go with out saying, but as such he would have gone in to this with his eyes open with the knowledge that maybe the restraint would be enforceable, I hold. If that means as a consequence facing retirement then that has to be an outcome and can not be viewed on its own as being unreasonable. Mr Allan is bound by the agreement and is not able to now rely on considerations after the event to provide alternatives to the enforcement of the clause [paragraphs 18-26 of the first respondent's submissions].

[14] A final consideration is that the evidence does support Mr Allan having other opportunities to work, albeit not in his chosen field. Alternatively he suggested the option of retiring.

[15] I am satisfied that the restraint is enforceable as it was agreed at the time it was entered into. I am not satisfied that there is enough evidence for me to vary the time and the distance. First I have noted the time Mr Allan worked for Wilkinson and the commercial information presented. However, what matters is the time that the parties entered into the restraint and given it was reasonable then it should apply now. Second any variation of the distance would need more consideration with much more detailed information on the scope of any of Mr Allan's activities. Again as the distance was reasonable at the time, then it should continue to apply until such time as the parties mutually agree to vary it.

(b) Breaches

(i) The restraint

[16] I accept that Mr Allan left all his files behind. What happened to the notebook remains unexplained. Mr Wilkinson has accepted the number and the named clients involved that have been placed before the Authority in the evidence.

[17] Mr Allan assumed, and relied, wrongly as it happens, on the unenforceability of the restraint provision. I hold that both parties are responsible for failing to test the enforceability of the clause much earlier, and to avoid the situation that has now come about. However, Mr Allan's responsibility has been largely due to his failure to be communicative over what he was going to do when he decided to leave, even if he was uncertain about that. It is understandable that Wilkinson believed that he was retiring given the assumptions made and that Mr Allan did not dispel any notion of retiring, and did not know that he was planning to go and work for Meridian. Once it became apparent what was happening Wilkinson acted to try and protect its interest against Mr Allan. There is evidence that there have been clients of Wilkinson contacted by Mr Allan. I am satisfied that is enough proof for a breach of the restraint without needing to name them. Indeed, for completeness, I formalise an order prohibiting the names of these clients being published, because they have not been involved in the investigation meeting and are entitled to their privacy.

(ii) Confidentiality

[18] The alleged breaches of confidentiality relate to Mr Allan's use of the names of key people he knew about from his employment with Wilkinson and the RIMS book and the contacts he had with the clients, not the names of the clients themselves.

It has been alleged that breaches relate to Mr Allan's knowledge of the names of the contacts and the clients' insurance needs which include:

- a. The required scope of the insurance coverage,
- b. The portfolio assets needing coverage,
- c. The renewal information, and
- d. The level of brokerage fees.

[19] Mr Allen's use of his knowledge on the above matters is supported by the number of clients referred to in the evidence which have changed to Meridian General.

[20] Mr Allan has used his knowledge of the names of clients from Wilkinson when he went to work for Meridian General and contacted clients. He used the information on the presumption and advice that the restraint was unenforceable, and I accept that this was a genuinely held view.

(iii) Breaches of fidelity and good faith

[21] Mr Allan gave Wilkinson no advice of his departure yet he admitted that he approached clients and advised them he was leaving Wilkinson. This does not prove that he actively tried to deflect clients away from Wilkinson because there is evidence that at least two clients stayed. I accept that he left the client details behind and the whereabouts of his note book remains unexplained. He says he used the phone book to make contacts. This was supported by Mr Bernard Kane director of Meridian General. There was no permission and no arrangements given by Wilkinson for what he did.

[22] The alleged breach of good faith relating to Mr Allan leaving relates to the following:

- a. Mr Allan never communicated with Wilkinson as to his views over the enforceability of the restraint when it was proposed in the employment agreement.

- b. Mr Allan never raised any views and input on the proposed employment agreement that was put forward in 2008 and 2009 other than to simply refuse to accept them.
- c. Mr Allan did not communicate any information over any issues to do with him leaving the employment with Wilkinson. He never discussed any interest in the clients he was handling until later relying on justifying competing with Wilkinson.
- d. Mr Allan failed to be open about his intentions on retiring and or pursuing further employment elsewhere.

[23] There is no doubt that Mr Allan could have done more and been more communicative and responsive to Conrad Shanly and to Julie Shanly, I hold. However, I accept that he did not have any firm plans, retirement was a possibility, and when he learnt that Wilkinson was not replacing him he decided to work for another broker. He says he was also motivated by the time and effort he had put into the clients and their business and his belief that Wilkinson would not properly service the clients and they probably would leave anyway.

[24] I heard evidence from Mr Ron Schlatter, company director (SAL Mortgages Limited), about his role and dealings with Mr Allan and Wilkinson, but given the reply from Mr Allan the information from them both has been too conflicting to take it much further. Mr Allan's evidence raises a number of issues about Mr Schlatter's evidence. Therefore I have had little regard to Mr Schlatter's evidence.

[25] Mr Shanly tried to get a response from Mr Allan over what he was doing and to make arrangements, but was in the end left to manage the damage and set about to protect his business. I accept that the "flood" of authorities for change of broker was related to Mr Allan's departure, and subsequently his change of employment, but without any direct evidence from the clients concerned I am not prepared to make rulings on such serious matters and claims as to what the causes for the changes related to. There is a suggestion of a linkage existing because Mr Allan had such a direct hand in the clients' business, but without more evidence I am not able to make a determination that Mr Allan was acting deliberately and wilfully. Also, I hold that Mr Allan and Meridian had had discussions about trying to make some arrangements with Mr Shanly on or about 4 and 7 February, but it came to nothing.

(c) Aiding and abetting claims against Meridian General

[26] Meridian offered Mr Allan a position and knew of the existence of the restraint of trade in Mr Allan's employment agreement. It endeavoured to co-operate with any arrangements through its dealings with Mr Allan and Mr Allan's discussions with Mr Shanly. It is apparent that Mr Kane obtained advice and decided to rely on the assumption that the restraint was unenforceable because it was unreasonable. I hold that Meridian General did not aid and abet in a breach of the restraint and confidentiality clause by employing Mr Allan even although it had the full knowledge that the clause existed in Mr Allan's Wilkinson 2003 employment agreement and engaged him to work in the work covered by the restraint. Indeed Mr Kane confirmed Mr Allan used the telephone book to obtain client phone numbers that must have only happened on the basis of his memory. What Meridian General did was on the basis that it believed that the restraint was unenforceable based on legal advice. This is not a defence. Also it relied on employing Mr Allan after he had left Wilkinson, but I hold even in such a situation Meridian was able to benefit from Mr Allan's knowledge. I hold that as there was no action taken to test the enforceability of the restraint at the time Meridian's involvement. In this sense it has aided and abetted by ignoring the restraint provision when it was open to any arrangements being entered into if agreement could be reached.

(d) Losses and remedies

[27] I am not satisfied that Mr Allan's behaviour was necessarily deliberate and or wilful in the breaches alleged against him given his genuine belief that the restraint was unenforceable. In this regard I have had regard to the following:

- i. That two named clients remained with Wilkinson.
- ii. That Mr Allan genuinely believed that he was looking after the interests of the clients.
- iii. That Mr Allan gave evidence that he had no definite plans until the employment opportunity came about and he reached his conclusion that he needed to look after the clients.

- iv. That Mr Shanly could not recall any client he spoke to who could specifically verify the allegation. No clients were called as witnesses to verify any definite plans.
- v. There has been speculation about the clients behaviour.

[28] I am not satisfied that Meridian General, despite believing that the restraint was unenforceable, acted with any intent to gain, but did take advantage of Mr Allan's decision to leave Wilkinson. This is supported by the following:

- a. That 38 appointment letters relate to only 26 clients.
- b. That Meridian was not appointed to act for a number of clients referred to.
- c. That the brokerage amounts are estimates and that there is the possibility that clients could have left for any reason over the time the assessment has been made, and not just been related to Mr Allan. Also, Mr Kane's evidence suggests that there may have been other reasons clients would have changed brokers.

[29] On the claim for penalties I have decided that there should be no penalties because the issue of the restraint was one always as to whether or not it was enforceable. Mr Allan and Meridian General have the chance to comply now that the issue has been determined.

[30] Also, it is my decision that any monetary loss has not been established and the claim for damages cannot succeed. The loss has been attempted to be calculated by brokerage relating to the clients that have left Wilkinson. I am not satisfied that in the absence of any direct evidence from the clients concerned, that the purported losses are attributable directly to Mr Allan and Meridian. Indeed Mr Allan and Mr Kane have raised questions to rebut the actual amount of the losses claimed. Therefore the claim for damages is dismissed.

Orders of the Authority

[31] I order that Mr David Allan and Meridian General Brokers Limited comply with the restraint of trade as prescribed in the employment agreement and which would have applied from 7 February 2011. This order is to take effect immediately

on the date that Mr Allan is served with the determination and to continue for the unexpired period of the restraint.

[32] The claims for penalties are dismissed.

[33] The claim for damages has been dismissed.

[34] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority