Ontario Supreme Court
HUB Financial Inc. v. Molinaro
Date: 2002-06-21

HUB Financial Inc., Plaintiffs

and

Gianpiero Molinaro, P. Molinaro Insurance & Financial Services Inc., Silvia Molinaro, Tiew-Dwang Ding, Stan Lenaartowicz, Anne Evans and Smith & Fraser Insurance Brokers Limited, Defendants

Gianpiero Molinaro, Tiew-Dwang Ding, Stan Lenaartowicz and Anne Evans, Plaintiffs by Counterclaim

and

HUB Financial Inc., Lorne M. Brown, Munich Reinsurance Company, Lombard Canada Limited, Henry J. Rodrigues and Jonathan Matthews, Defendants by Counterclaim

Ontario Superior Court of Justice Cullity J.

Heard: May 6, 8-10, 13, 15-16, 2002

Judgment: June 21, 2002

Docket: 31728/99

John H. McNair, K. Dawtrey, for Plaintiffs and Defendants by Counterclaim

Thomas J. Hanrahan, for Defendants and Plaintiffs by Counterclaim

***Cullity J.*:**

1 The trial of this action proceeded only with respect to the claims against the defendants, Anne Evans and Stan Lenaartowicz, for breaches of fiduciary obligations and duties of confidentiality, loyalty and good faith, and the counterclaims of the defendants for intentional interference with contractual relations.

2 The material facts on which the action was based involved the Plaintiff's predecessors, MPA Financial Inc., and Jonathan Matthews Insurance Brokers Ltd. In these reasons I will not, as a general rule, distinguish between these different corporations and, according to the context, references to the "plaintiff", or to the "parties", will refer to, or include, the Plaintiff or whichever of its predecessors was carrying on the business with which the defendants were associated at the particular time.

3 The claims, and counterclaims, arose as a result of the actions of the parties shortly before, and after, the termination of their relationship as registered insurance brokers selling general insurance to individuals. The issues relate to their respective rights and duties with respect to the solicitation of clients in order to obtain their future business and commissions on future renewals of their insurance policies and the use of information relating to them for this purpose.

Background and Overview

4 The resolution of the issues depends upon the legal incidents of the relationship between the parties. Although counsel were agreed that the regulatory structure established pursuant to the *Registered Insurance Brokers Act* (the "Act") was not decisive of the issues, the contextual background it provides does, I believe, explain certain *sui generis* features of the relationship. The Act—which came into force in 1981—creates a corporation ("RIBO") to govern the activities of general insurance brokers in Ontario. An insurance broker is defined in Section 1 to include a person who deals directly with the public and who "acts or aids in any manner in soliciting, negotiating or procuring the making of any contract of insurance or reinsurance whether or not the person has agreements with insurers allowing the person to bind coverage and countersign insurance documents on behalf of insurers…".

5 RIBO is empowered to regulate the registration, professional competence, ethical conduct and insurance-related financial obligations of such brokers. All brokers registered under the Act are members of RIBO. A corporation, or partnership, that is to be registered must satisfy prescribed conditions, and designate as its "principal broker" an individual who is an insurance broker, who has prescribed qualifications and who directs and supervises the corporation or firm. The principal broker has a responsibility to ensure that the corporation, or partnership, and its employees who are registered insurance brokers, discharge the obligations imposed on registered brokers under the Act, the regulation made pursuant to it and the by-laws of RIBO. RIBO issues licences that are either restricted or unrestricted. A broker with a restricted licence must work under the supervision of a principal broker for a continuous period of two years and may not be a principal broker or a sole proprietor. The by-laws of RIBO provide for an examination to be passed before the restrictions are removed. A principal broker must hold an unrestricted licence and discharge a number of specific obligations set out in the by-laws with respect to the supervision of employees, including

those who are registered insurance brokers. One such obligation is to ensure that all such persons are covered by errors and omissions insurance.

6 At all relevant times the plaintiff was a registered insurance broker. Its president, Jonathan Matthews, was designated as its principal broker. Evans and Lenaartowicz were registered brokers with restricted licences who, until their departure in May or June, 1999, were engaged in selling insurance from which they, and the plaintiff, earned commissions under the latter's contracts with insurance companies. As the holders of restricted licences, they could not deal directly with the insurers even after the expiration of the period of two years required supervision, and they were, in effect, forced into an association with a principal broker such as the plaintiff. There appears to have been no statutory or regulatory reason why they could not work with more than one principal broker as long as RIBO was advised and they were covered by errors and omissions insurance. As far as general insurance was concerned, these defendants were associated only with the plaintiff and Matthews testified that he insisted on this even though he had different arrangement with another producer, Winston Pynn. Whether the defendants were employees of the plaintiff, or independent contractors with power to bind it as its sub-agents, is one of the issues in dispute in the litigation. Much of the difficulty attached to this issue arises because, although it was intended that the defendants would carry out their activities with a large degree of independence, and should not have the rights of employees, the regulatory system forced them to work with, and through, a principal broker such as the plaintiff.

7 The termination of the defendants' contractual relationship with the plaintiff occurred as a result of the plaintiff's unilateral decision to increase its share of the commissions to be divided between it and brokers ("producers"), including the defendants, who generated business by obtaining new clients and maintaining contact with them. In so doing, producers purported to act as representatives of the plaintiff. Applications for insurance they obtained were provided by them to the plaintiff and, if approved, policies would be issued by insurance companies pursuant to the plaintiff's contracts with them.

8 Evans and Lenaartowicz gave notice that they were terminating their association with the plaintiff on June 7, 1999 and June 10, 1999 respectively. Each became associated with another principal broker, Smith and Fraser Insurance Brokers Limited ("Smith & Fraser"), and each used information with respect to their respective clients and their policies—including the

expiration dates—for the purpose of contacting them and obtaining letters authorizing them and Smith & Fraser to be the “broker of record” on the books of the insurance company. On receiving notice from insurers of their receipt of these letters, the plaintiff wrote to clients informing them that the defendants were no longer associated with it, that the plaintiff remained their insurance brokerage and that no other broker had authority to “service” their policies.

9 The plaintiff commenced this action on June 21, 1999 and moved for interim and interlocutory injunctions to restrain the defendants from soliciting business from clients of the plaintiff or using or disclosing confidential information obtained in the course of providing services to the plaintiff including client lists, information relating to policies and other information relating to the business and affairs of the plaintiff. Low J. granted an *ex parte* interim injunction on June 22, 1999. On June 29, 1999, Pitt J. granted a more limited interlocutory injunction that was confined to the solicitation of business from clients of the plaintiff who had not been recruited by the defendants and confidential information other than that relating to clients that the defendants had recruited.

The Facts

10 Under the name, Jonathan Matthews Insurance Brokers Ltd., the plaintiff had carried on business as an insurance broker since 1980. A merger with two other companies occurred in October, 1998 and, thereafter, the new corporation continued the business as MPA Financial Inc. In December, 1998, the plaintiff was taken over by another insurance broker but continued to carry on business under the same name. In January of this year it amalgamated with two other corporations to form the The HUB Group Ontario (2000) Inc. At the commencement of the trial, the style of cause, was amended, on consent, to name that corporation as the Plaintiff.

11 The plaintiff had contracts with insurers who issued policies to clients whose applications it received. At first there were no producers and the plaintiff generated its own business. Although, as producers became associated with the plaintiff, Matthews became less actively involved in obtaining, and dealing with clients, the plaintiff continued to acquire walk-in business and referrals. It retained the full amounts of commissions received in respect of these “house-clients”. Commissions on new business generated by producers, and on renewals, were split between the plaintiff and the relevant producer on a 50/50 basis. In June,

1999, the plaintiff was associated with 12 producers. In addition, it had a number of employees on salary who were registered insurance brokers and acted as customer service representatives. These were concerned with receiving and computerizing the applications for insurance and other information about house clients and those introduced by the producers, providing online access for producers to the products available from, and the premiums charged by, insurers with whom the plaintiff had contracts, dealing with, and providing information to, the insurers, maintaining records of the policies issued and their expiry dates and providing information of these to producers. They would also deal with enquiries, or complaints, from clients from time to time although the producers were their clients' principal contacts.

12 The plaintiff's office was under the overall supervision of Jonathan Matthews and its general manager, Ms Roxanne Phillips. They testified at the trial as, also, did a senior customer service representative, Ms Jane Maxwell. She had responsibility for reviewing applications obtained from producers and, if they were in order, forwarding them to insurers. Matthews had the final say on whether particular applications would be accepted and on whether new producers would be engaged. He was obviously skilled in his profession and ran the business with a degree of informality as well as—at least in the case of Evans—with an attitude of some benevolence. This litigation can to a large extent be attributed to his disregard of legal formalities when new producers became associated with the business. Neither Evans nor Lenaartowicz signed a contract setting out the terms of the relationship with the plaintiff and, despite the evidence of Lenaartowicz to the contrary, I am satisfied that there was no oral agreement—or any discussion—of their respective rights and obligations upon the termination of the relationship or, in the terminology employed by the witnesses, of the ownership of each defendant's book of business.

13 One of the original defendants, Gianpiero Molinaro, did execute a written contract provided to him by Matthews. As well as providing specifically that, as a producer, Molinaro would be an independent contractor, and not an employee of the plaintiff, this agreement contained a covenant by him that, upon the termination of the agreement for any reason whatsoever, he would not solicit business from clients of the plaintiff for a period of 24 months. Matthews testified that he had told Molinaro that the plaintiff would own his book of business. Molinaro's recollection was that his rights if either party terminated the association had not been discussed but that a provision for a payment of $200,000 to his estate in the event of his

death was intended to be a payment in exchange for his book of business. This interpretation obtains some support from the words of the provision, although it was disputed by Matthews at the trial.

14 On the other hand, when another experienced producer, Winston Pynn, terminated his relationship with the plaintiff, he was allowed to take his book of business with him. This was in accordance with an oral agreement with Matthews. Similarly, a written contract with one of the other producers who, Matthews said, had been given special consideration, specifically addressed, and, to some extent, provided for, the producer's ownership of his book of business.

The evidence does not, in my judgment, permit a conclusion that there was any express agreement or tacit understanding between the parties with respect to the solicitation of clients by either defendant or the use of information with respect to clients, and their policies, in the event of the defendant's departure from the business. The questions were never addressed and there was no meeting of minds with respect to them. To the extent that Matthews' attention was even given to the question, he probably assumed that a departing producer's book of business would remain with the plaintiff. There is no evidence that such an assumption was communicated to, or shared by, the defendants or by producers other than, perhaps, Molinaro. Nor was there any significant expert, or other, evidence of prevailing practices, or understandings, on these matters among registered insurance brokers. To the extent that there was evidence, it suggests that loose and informal arrangements between principal brokers and producers were not unique to the plaintiff, or even unusual in the industry.

In these circumstances, I am satisfied that the legal incidents of the relationship between each defendant and the plaintiff can only be determined by a close scrutiny of the particular facts of their association. It will be convenient to consider first that between the plaintiff and Lenaartowicz.

(a) Lenaartowicz

Lenaartowicz came to Canada from Poland in 1987. He had previously graduated in engineering from a university in that country. Having failed to find employment in his profession in Canada, he commenced a career of selling life insurance in 1990 as an agent of

an insurance company. In 1992 or 1993 he passed qualifying examinations administered by RIBO and received a restricted certificate as a registered insurance broker selling general insurance. In this capacity, he became associated with the plaintiff in 1993.

As I have indicated, no written agreement was executed between the plaintiff and Lenaartowicz. There appears to have been just one meeting between him and Jonathan Matthews at which the terms of his association with the plaintiff were discussed. It was agreed orally that commissions paid by insurers to the plaintiff in respect of policies issued to customers found by Lenaartowicz would be split 50: 50 between him and the plaintiff. Matthews was emphatic that there was no agreement, or discussion, with respect to the ownership of Lenaartowicz's book of business and, as I have indicated, I prefer his evidence to that of Lenaartowicz on this point. I was satisfied while Matthews was testifying that he was speaking truthfully to the best of his recollection, that he was not concocting evidence and was not concerned to provide self-serving answers. A failure to discuss the ownership of the book of business was no exceptional for him. Lenaartowicz, however, testified that, at the meeting, he was shown a draft written contract which would recognize his ownership but that it was not signed and he had not kept a copy.

19 The contract previously provided to Molinaro had been prepared by a solicitor and appears to have been intended to serve as a standard agreement between the plaintiff and producers. It did not specifically refer to ownership of a producer's book of business but contained a non-solicitation clause. The same, or a similar, draft agreement was given to Lenaartowicz by Jane Maxwell, in or about, 1996 when he had become concerned that the terms of his association with the plaintiff were not in writing. Lenaartowicz did not sign the contract but did not object that it was inconsistent with the terms of his alleged oral agreement with the plaintiff. There was no other evidence of the existence of any draft agreement that recognized a producer's rights to contact clients or compete with the plaintiff after ceasing to be associated with it. Lenaartowicz was quite inexperienced at the time of his initial meeting with Matthews and he was bringing few, if any, clients with him. I was not persuaded that he was telling the truth and I believe it is more probable than not that there was no discussion of the question and that no draft agreement was produced on that occasion.

20 Apart from the matters I have mentioned, there was little evidence of specific details of the agreement reached at the meeting between Lenaartowicz and Matthews but I believe it is

reasonable to assume that the structure of the relationship that was actually adopted indicates, and is in accordance with, the understanding, and agreement between the parties. On this basis, it is clear that Lenaartowicz was intended, and did, operate with a substantial degree of independence and autonomy. It was not suggested that in this respect his position differed materially from that of the other producers as distinct from the customer service representatives. He worked from an office in his home and from which he contacted prospective clients and acquired their custom. A substantial proportion of these were members of the Polish community for whom English was not their first language. While back-up facilities were available at the office of the plaintiff, he was their primary, and to a large extent, their exclusive contact. Although, in dealing with clients he held himself out as a representative of the plaintiff Lenaartowicz acted independently of any control or supervision over the manner in which he generated business. He was responsible for paying his advertising, automobile, telephone and office expenses. He had a file for each of his clients in which, among other things, he kept copies of their applications for insurance.

21 As well as having the benefit of record-keeping by employees of the plaintiff, he had, like other producers, unrestricted access to the computerized service provided by it that gave details of the policies available, those that had been issued, premiums and expiration dates.

(b) Evans

22 Anne Evans became a registered insurance broker in 1983 after several years working in the insurance industry. She joined Jonathan Matthews Insurance Brokers Inc. in July 1993 as a producer working from her home. She brought no book of business with her. In January 1994, she was asked to assist in the plaintiff's office with clerical work and from then until September 1998 she received a salary of $35,000 a year. During that period she continued to find and service clients and would earn commissions on the same 50/50 basis as other producers. She also looked after house clients as part of responsibilities as an employee. Prospective clients who contacted Jonathan Matthews directly would generally be referred to her. She received no commissions on house accounts either initially or upon renewal.

23 In September 1998, after questions had been raised about a possible miscoding of house accounts in the computerized records of the plaintiff so that they appeared as accounts on which she earned commissions, it was agreed that her salary would cease and she would in

the future receive only commissions from business she generated and from a number of house accounts that would be transferred to her. The terms of the new arrangement was set out in a letter to her from Phillips dated September 21, 1998, of which parts were as follows:

> Dear Anne:
>
> Further to our conversation recently, we accept your resignation as an employee with our firm and welcome you as a full-time sales representative. The following will confirm the points discussed.
>
> Effective October 1, 1998, all employee benefits will cease and you will discontinue servicing JMIB house accounts. Should you wish to remain on the group insurance plan, arrangements will be made to invoice you directly…
>
> House Account clients currently showing you as C S R will either have the producer code changed to AE or the C S R code as Sandy Peralta. A list of same clients are attached for your perusal. You advised that you would contact the remaining house accounts advising their account will be handled by Sandy. Also, you will transfer any miscoded AE accounts to house accounts.
>
> All accounts presently showing PR (Pride) and MP (Miles Posner) will be transferred to you…
>
> Any new business referrals will be your accounts and no longer coded as house accounts.
>
> You will have office space available on premises and back up of calls by the sales team during illness or vacation. Any time you expect to be out of the office for an entire day or more must be arranged with Jane Maxwell.
>
> We agree to pay you for any unused sick and vacation pay…
>
> The aforementioned is conditional on your signing a Producers Contract, which is presently being prepared.
>
> We trust you find the above in order and look forward to a continuously prosperous relationship.

24 Shortly after the new arrangement was made, the plaintiff circulated, or posted, an internal memorandum, or notice, congratulating Evans on assuming the position of “independent sales broker”.

25 No written contract was ever provided to, or signed by, Evans. It was, however, understood that she would receive commissions on the accounts transferred to her, and any new accounts she would generate, on the same 50/50 basis as on the accounts previously allocated properly to her and coded in the plaintiff’s computerized records with her initials “AE”. She worked from the plaintiff’s office, where she shared space with two or three other individuals, as well as from her home. She visited clients in the evening and was not reimbursed for expenses she incurred in so doing. Prior to her departure there was no

discussion with respect to her rights, if any, to deal with these accounts if she terminated her association with the plaintiff. She, too, maintained personal files relating to her clients and kept copies of their applications for insurance.

(a) Departure of Lenaartowicz and Evans

26 The takeover of the plaintiff in December, 1998, led to a number of changes in the manner in which the plaintiff conducted its business. New financial targets were set and it was decided that, effective May, 1999, producers' share of commissions on renewals of the business they had generated in the past, and on that generated in the future, would be reduced from 50 per cent to 40 per cent of the gross commissions payable by insurers. Jonathan Matthews continued to be in control of the plaintiff's day-to-day operations and he communicated this decision to the producers at a meeting with them in March 1999. At a second meeting on May 20, the producers were notified of other changes that, among other things, would also affect the commissions they would earn.

27 Following the meeting, a number of the producers met a Evans' home and voiced their dissatisfaction. Some of them, including Lenaartowicz and Evans, decided to approach Smith & Fraser with which Winston Pynn was then associated. Evans had already spoken to Roger Wingfield, an executive of Smith & Fraser, in March 1999 after the first meeting. In May, she and Lenaartowicz, independently, contacted Wingfield and discussed the possibility of becoming associated with Smith & Fraser. In each case, agreements were reached to this effect by the end of May. They provided for a 50/50 split of commissions and the producer's ownership of his, or her, book of business. The defendants provided Smith & Fraser with information relating to their clients and details of their policies, including expiry dates. For this purpose they made use of material in their files and, in the case of Evans, printouts of client lists from the plaintiff's computerized records. In the case of Lenaartowicz, letters of authorization were sent to some clients on his list before June 10, 1999 when he notified the plaintiff that he was no longer associated with it. Earlier in the month he had concealed the existence of his agreement with Smith & Fraser when Matthews asked him whether he intended to continue his association with the plaintiff. Lenaartowicz responded that he had made no decision.

28 Evans denied that any of her clients had been contacted before her resignation on June 7 and, on the basis of the evidence, I am not prepared to make a finding to the contrary.

Analysis

(a) Employees or independent contractors?

29 Although, in Mr. McNair's submission, the existence of the duties that the plaintiff seeks to enforce is not dependent on a finding that the defendants were employees, he submitted that such a finding should be made. Almost all of the authorities on which he relied for the existence of such duties involved employees and, in Mr. Hanrahan's submission, they were distinguishable on that basis as the defendants should be found to be independent contractors.

30 In support of his submission, Mr. Hanrahan relied on the following statement of Aitken J. in *Harding v. Myotech Therapeutics Inc.,* [1999] O.J. No. 158 (Ont. Gen. Div.), at paragraph 50:

> The parties' common intention when the agreement was signed is not determinative of the issue, it is just one factor to take into account. Different tests have evolved in the case law to determine whether a person is an employee or independent contractor. Criteria often considered are: (1) whether the person concerned is limited to working for one party; (2) whether control is exercised over the person in question not only regarding the product sold but also regarding when, where and how it is sold; (3) whether the person owns the tools or has invested in the tools with which to conduct business; (4) whether the person has the opportunity to generate a profit; (5) whether the person risks a loss; and (6) whether the activity undertaken by the person is part of someone else's business.

31 On the facts before her the learned judge found that the plaintiff, a physiotherapist who provided services at the defendant's clinic, was an independent contractor and not an employee. In reaching this conclusion, she noted that there were aspects of the relationship which pointed either way. One of those on which she relied was that the plaintiff's services

> …were not integrated into Myotech's business, which entailed the management of various physiotherapy clinics. Ms Harding's work was one means by which Myotech generated revenues, but her work could have been carved out of Myotech's operations without the organization of the company being affected. She was not a link in any chain of command, the absence of which would have prevented the continuation of the plaintiff's business. (at para. 57 (Q.L.).)

32 Other factors that, in her judgment, helped to tip the scales in favour of the finding she made were that the plaintiff received an agreed percentage of the fees charged by the clinic to the patients she attended with no deduction for income taxes, Canada pension plan contributions or unemployment insurance premiums and she received no employee benefits.

33 Mr. McNair did not take issue with the law as stated by Aitken J. He submitted, however, that, when the facts of the relationship between the plaintiff and the defendants are considered in the light of the criteria to which the learned judge referred, I should find that the activities of the defendants were such an integral part of the plaintiff's business that the correct characterization of the relationship was that of employer and employee.

34 The approach of Aitken J. is, I believe, consistent with the more recent authoritative consideration of the question by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (2001), 204 D.L.R. (4th) 542 (S.C.C.), where additional guidance was provided with respect to the status of, and the correct approach to, the question whether an alleged servant was an integral part of the other party's business organization. In delivering the judgment of the court, Major J. stated:

> However, as MacGuigan J.A. noted in [*Wiebe Door Services Ltd., v. Minister of National Revenue,* [1986] 3 F.C. 553 (Fed. C.A.)], the organization test has had less vogue in other common-law jurisdictions…, including England and Australia. For one, it can be a difficult test to apply. If the question is whether the activity or worker is integral to the employer's business, this question can usually be answered affirmatively. For example, the person responsible for cleaning the premises is technically integral to sustaining the business, but such services may be properly contracted out to people in business on their own account… As MacGuigan J.A. further noted in Wiebe Door, if the main test is to demonstrate that, without the work of the alleged employee the employer would be out of business, a factual relationship of mutual dependency would always meet the organization test of an employee even though this criterion may not accurately reflect the parties intrinsic relationship…

Despite these criticisms, MacGuigan J.A. acknowledges,… that the organization test can be of assistance:

> Of course, the organization test of Lord Denning and others produces entirely acceptable results when properly applied, that is, when the question or organization or integration is approached from the persona of the "employee" and not from that of the "employer", because it is always too easy from a superior perspective of the larger enterprise to assume that every contributing cause is so arranged purely for the convenience of the larger entity. We must keep in mind that it was with respect to the business of the employee that Lord Wright… addressed the question, Whose business is it?. (at pages 556-557).

35 In *Wiebe Door* McGuigan J.A. had approved, and applied, a statement in an earlier case that the fundamental test is whether:

> the person who has engaged himself to perform the services is performing them as a person in business on his own account? If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no" then the contract is a contract of

> service. (*Market Investigations Ltd. v. Ministry of Social Security,* [1968] 3 All E.R. 732 (Q.B.D.), at pages 737-8)

Major J. endorsed this approach:

> The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks. (at page 558).

36 As well as the considerable emphasis he placed on the importance of the services and facilities provided by the plaintiff, Mr. McNair found some support in the legislation and the regulations governing RIBO for his submission that the defendants were employees of the plaintiff. Although he did not suggest that the regulatory structure was decisive, he submitted that one factor that militates in favour of the decision that Lenaartowicz was an employee is that the legislative scheme does not appear to contemplate that a holder of restricted licence will carry on business as sole proprietor of an insurance brokerage business or in any capacity other than as an employee, or a partner of a partnership, supervised by an individual designated as the principal broker.

37 I accept Mr. McNair's submissions with respect to the interpretation of the statute and the regulation but I am satisfied that the legislative intention does not dictate the nature of the relationship between Lenaartowicz and the plaintiff for the purpose of this case. I believe Mr. Hanrahan was correct in his submission that the relationship between the parties must be determined on the basis of the facts whether or not they were in accordance with the regulatory scheme.

38 On the basis of the principles stated and applied in the authorities I have referred to, I am satisfied that the correct characterization of the relationship between the plaintiff and Lenaartowicz was that he was an independent contractor and a sub-agent and not an employee. While, obviously, the label attached to the relationship by the parties cannot be decisive, it is quite clear that it was understood that the federal and provincial fiscal, and provincial employee-benefit, obligations imposed upon employers were not be applicable to the plaintiff: that, for these purposes, it was their understanding, that Lenaartowicz, like the

other producers, was to have the status of an independent contractor and was not to be an employee of the plaintiff.

39 There was an arrangement for a sharing of gross profits between them but the financial risk and the quantum of gross profit generated—and the net profit available to him—depended almost entirely on his efforts and the share of the plaintiff was obtained in return for the provisions of the particular services it provided to him. Apart from the use and benefit he received from these, he did not work with employees of the plaintiff and his activities were not integrated into its organization and management. On the contrary, each party should, in my judgment, be considered to have been carrying on his, or its, own separate business with that of the plaintiff being more extensive than, although connected and overlapping with, that of each of the defendants.

40 I reach the same conclusion with respect to Evans. The general thrust of the letter September 1998, was that she was to cease to be an employee and was to have the same independent status as the other producers. The principal difference between the arrangements relating to her and those governing the plaintiff's relationship with Lenaartowicz was that office space was to be made available to her and that she was to inform Ms Phillips if she was to be out of the office for an entire day or more.

41 There was no evidence of the reason for these terms of the arrangement and I am not prepared to infer that they reflected an intention of the plaintiff to exercise significant control over the manner in which she performed her activities as a producer. They are equally consistent with a desire to assist her in her new capacity and to ensure that there would be someone prepared to take calls from her clients when she would be absent for any significant period. Matthews testified that he made the decision to transfer particular house accounts to her because he had a degree of sympathy for her and this is consistent with what I have described as his generally benevolent attitude towards Evans. She was an older person who had left the industry for a number of years while her children were young. Having been dismissed by her previous employer, she was unemployed when she became associated with the plaintiff. She brought no clients with her. He was clearly upset when she handed him her resignation on June 7, 1999 and he berated her for her ingratitude. He testified that she was very good at dealing with clients.

(b) Rights of the Defendants of Termination of their Association with the Plaintiff

42 A considerable amount of the evidence of the witnesses—as well as of Mr. Hanrahan's submissions—was expressed in terms of the ownership of each defendant's "book of business". For the present purposes, the relevant rights encompassed by this metaphorical expression are the right to solicit renewals and other business from clients whose business was originally obtained by the producer; the right to use for this purpose copies of lists of customers and other information in the producer's possession, or obtained from records of the plaintiff; and the right to provide such lists and other information to another principal broker who would share the commissions earned from such renewals and other new business with the producer to the exclusion of the plaintiff.

43 It was not suggested that the question whether, in the absence of a specific agreement, such rights were "owned" by a producer associated with the plaintiff, by the plaintiff, or by each of them as co-owners, can be determined, or assisted in its resolution, by reference to any general practices or understandings in the industry. As I have indicated, no evidence of any such common practices or understandings was given. There was also no evidence that any one of the alternatives is most commonly to be found in written agreements that address such questions of "ownership" specifically. The evidence suggested nothing more than that, while a producer's ownership of the book of business was sometimes recognized, it was quite common—and, perhaps, most common—for the agreements to be silent on the question. Mr. Wingfield testified that, until January, 1999, Smith & Fraser had no written agreements with its producers.

44 In these circumstances, Mr. McNair's submissions in support of the plaintiff's claim were based principally on (a) the defendants' alleged breaches of a fiduciary duty that arose out of their relationship with the plaintiff; and (b) breaches of alleged duties to preserve the confidentiality of the plaintiffs customer lists and records and not to use them to solicit business for their own account and that of any other broker before, or after, the termination of the association between the plaintiff and the defendants. In response, Mr. Hanrahan asked me to accept Lenaartowicz's evidence of the alleged oral agreement giving him ownership of the book of business; the absence of any fiduciary relationship between the parties and any breach of a fiduciary duty by the defendants; the absence of a relationship of employer and employee that would exclude a right to use the customer lists and other information; and that the effect of the plaintiff's alleged breach of its agreement to split commissions on a 50:50

basis was to relieve the defendants from any further obligation to perform their contractual obligations to the plaintiff.

(i) Breach of Fiduciary Duty

45 For the claims of breach of fiduciary duty and breach of a duty of confidence to be true alternatives, the former must contemplate something more than breaches of duties of confidence by the defendants as fiduciaries. While persons in a fiduciary position will often have duties of confidence, it is now well-established that such duties are not dependent on the existence of a fiduciary relationship. I do not think that the test for determining whether such a duty exists with respect to particular information is any different in each case. In the absence of any express, or implied agreement to the contrary, the principles that determine whether a duty to keep information confidential exists, and whether it has been breached, should not vary whether there is a fiduciary relationship, a relationship of employee and employer or, as here, a contract for services.

> The existence of a fiduciary relationship, however, does not operate to extend obligations of confidentiality to what would not otherwise be confidential. *Halsbury's Laws of England* (4th edition, Reissue), Volume 8(1), para. 457.

46 Although it is now almost a standard practice for plaintiffs to add claims for breach of fiduciary duties when claims of alleged breaches of duties of care in tort, or contract, are pleaded, it has been recognized that, in most cases at any rate, the addition creates a false dichotomy if it is intended to suggest that the requirements to be satisfied if the claims are to succeed are materially different. The same, I believe, is true where a breach of a fiduciary duty of confidentiality is pleaded in the alternative to a breach of the same duty independently of the existence of a fiduciary relationship: see *International Corona Resources Ltd. v. Lac Minerals Ltd.,* [1989] 2 S.C.R. 574 (S.C.C.), at page 600-1 *per* Sopinka J; *Bristol & West Building Society v. Mothew* (1996), [1998] Ch. 1 (Eng. C.A.), at p. 16.

47 Moreover, it is, I believe, a mistake to assume that, because a description of a person as a "fiduciary" is intended to indicate that the person occupies a trustee-like position, it must follow that every obligation of a trustee is attached to that position and will be enforced with the same rigour.

> "To say that a man is a fiduciary only begins the analysis; it gives direction to further enquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the

> consequences of his deviation from duty?":. *SEC v. Chenery Corporation,* 318 US 80, at pages 85 - 86 (1943) *per* Frankfurter J. (quoted by Peter Birks in *The content of fiduciary obligation,* (2002), 16 Trust Law International, 34, at page 44).

48 In *Coomber, Re,* [1911] 1 Ch. 723 (Eng. C.A.), (at pages 728-9) Fletcher Moulton L.J. described as absurd the idea that "every kind of fiduciary relationship justifies every kind of interference… The nature of the fiduciary relationship must be such that it justifies the interference". Professor Birks (above at page 45) comments:

> *Re Coomber*… tells us three things: (i) the word 'fiduciary' slips easily from the trustee to any and every relationship tinged with trust and confidence; (ii) we must not assume that wherever 'fiduciary' will go it will carry with it every incident of the express trust; and (iii) if and when we seek to transplant incidents of the express trust, it therefore remains, within the loose analogy set up by the word 'fiduciary', to justify the export of the incident in question by reference to the real facts of the relationship in question.

49 It follows that the fact that persons are considered to be fiduciaries for some purposes does not entail that they are subject to precisely the same duties as other fiduciaries. There is no doubt that, as sub-agents, the defendants here should be considered for some purposes to have been fiduciaries *vis a vis* the plaintiff but I do not think that is necessarily sufficient to attract an automatic application of the principles applicable to trustees who resign for the purpose of competing with the interests of their beneficiaries, or of the extension of such principles to directors and senior employees in cases such as *Canadian Aero Service Ltd. v. O'Malley* (1973), [1974] S.C.R. 592 (S.C.C.), and *Edgar T. Alberts Ltd. v. Mountjoy* (1977), 16 O.R. (2d) 682 (Ont. H.C.).

50 If the plaintiff's claim for breach of fiduciary duty adds anything to the claim for breach of confidence, it must, in my judgment, depend upon whether a similar extension should be made on the facts of this case, but the question must be answered by a consideration of the facts of the relationship that existed between the parties and not merely by an acceptance that there were fiduciary aspects to their relationship while the contract for services continued.

51 In *Alberts v. Mountjoy,* Estey C.J.H.C. held that the general manager, or chief executive, of the plaintiff who managed its day-to-day operations was in breach of a fiduciary duty to the plaintiff when, after his resignation, he successfully solicited business from its former clients. The Chief Justice applied the reasons of Laskin J. in *Canaero* in which a director and senior officer of the plaintiff were held to be in breach of a fiduciary duty when they resigned and successfully competed with the plaintiff for a project sponsored by the government of Canada.

The Chief Justice relied, in particular, on the following passages in the reasons delivered by Laskin J.:

> [The defendants] were “top management” and not mere employees whose duty to their employer, unless enlarged by contract, consisted only of respect for trade secrets and for confidentiality of customer lists. Theirs was a larger, more exacting duty which, unless modified by statute or by contract (and there is nothing of this sort here), was similar to that owed to a corporate employer by its directors… It follows that [the defendants] stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of conflict of duty and self-interest. Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer like [the defendants] is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company…
>
> What these decisions indicate is an updating of the equitable principle whose roots lie in the general standards that I have already mentioned, namely, loyalty, good faith and avoidance of a conflict of duty and self-interest. Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day-to-day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings. (at pages 606-7)

52 Estey C.J.H.C. concluded that, in principle, the facts before him were indistinguishable from those in *Canaero.* It was recognized that, but for his association with the senior executive, a co-defendant who had held a comparatively junior position might not have been liable.

53 In *Alberts v. Mountjoy* there was no finding that the defendants had breached duties of confidence as such. The breach of duty consisted of soliciting clients of the plaintiff by using information gained while in its employment. There was no finding that the information was confidential and there is nothing in the reasons of the court that suggest that a claim for breach of confidence was made.

54 Insofar as the decisions in *Alberts* and *Canaero* were based on the control that employees who are senior executives and managers exercise over the operations of a business, they are obviously distinguishable from this case. The issue here must be whether, on other grounds, the relationship between the plaintiff and the defendants should be considered to attract a similar application of the general standards of loyalty, good faith and avoidance of conflicts to which Las-kin J. referred in *Canaero.*

55 Mr. McNair cited *Tri-Associates Insurance Agency Ltd. v. Douglas,* [1985] O.J. No. 1284 (Ont. H.C.) for the proposition that the fact that a person may not be an employee does not necessarily exclude a finding that he was a fiduciary with the duty not to solicit clients after the termination of his association with an insurance broker. I accept that proposition but note that, on the facts of *Tri-Associates,* the defendant was fully integrated into the business organization and management of the plaintiff and that R.E. Holland J. based his finding that *Alberts v. Mountjoy* should be followed and the defendant found to be a fiduciary on the fact that he was in charge of the commercial insurance department of the plaintiff. In other cases of employees, the distinction between those who were part of the management of the plaintiff and those who were "mere employees" has been treated as crucial to the existence of a fiduciary duty not to solicit after the termination of the employment: see, for example, *Gertz v. Meda Ltd.,* [2002] O.J. No. 24 (Ont. S.C.J.); *Quantum Management Services Ltd. v. Hann* (1989), 69 O.R. (2d) 26 (Ont. H.C.); and *Sanford Evans List Brokerage v. Trauzzi* [2000] O.J. No. 1394 (Ont. S.C.J.).

56 Mr. McNair also relied heavily on the recognition given by Estey C.J.H.C. in *Alberts v. Mountjoy* to the degree to which an insurance broker is vulnerable to a solicitation of its clients by former employees:

> Thus, the substantial business asset of the plaintiff, namely, its trade attachment with its clients, is a vulnerable asset exposed to the depredations of competition in all forms and particularly competition from ex- employees. Accordingly, it is not surprising to find a fiduciary duty arising in former employees for the protection of the undertaking of the former employer. (at page 690)

57 Vulnerability is, of course, one of the three characteristics of a fiduciary relationship recognized by Watson J. In *Frame v Smith,* and it is the one described by Sopinka J. in *LAC Minerals* as "indispensable to the relationship" (above, at page 62). It was, however, emphasized by Wilson J. in *Frame v. Smith,* [1987] 2 S.C.R. 99 (S.C.C.), at page 136, that the three elements she identified are no more than a "rough and ready guide" or, as LaForest J. put it in *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.), at page 176, "… indicia that help recognize a fiduciary relationship rather than ingredients that define it." In *LAC Minerals,* Sopinka J. stated that the presence of the three elements will not invariably indicate the existence of fiduciary relationship.

58 Neither in *Alberts v. Mountjoy,* nor in any of the other cases that were cited, is it suggested that the kind of vulnerability to which Estey C.J.H.C. referred was, by itself, sufficient to

impose a duty of non-solicitation on employees, or other, who were not part of senior management. If that were the case, the discussion of the principle in *Canaero* would not have been necessary. Although it would, no doubt, be a mistake to suggest that the decisions I have mentioned exclude the possibility that fiduciary duties of non-solicitation may attach to persons who do not occupy positions of senior management, a decision to do this to us must depend upon the facts of the particular relationship with which the court is concerned. It is, I think, clear that the starting point in addressing this issue must be the terms of the contract for services.

59 In *Kelly v. Cooper* (1992), [1993] A.C. 205 (Bermuda P.C.), Lord Browne-Wilkinson emphasized that the existence and the scope of the fiduciary duties of agents must depend upon the terms on which they are acting because these define the nature of the relationship. His Lordship quoted (at page 215), with approval, the following passage from the judgment of Mason J. in *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 156 C.L.R. 41 (Australia H.C.), at page 97:

> That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

60 I believe the concluding sentence of the passage quoted by Lord Browne-Wilkinson is very much in point here. The plaintiff chose to treat the defendants as independent contractors carrying on business for their own benefit as well as for the benefit of the plaintiff. They were expected to pursue their own interests as well as those of the plaintiff and were, therefore, not disinterested in the sense required of trustees. What they earned depended almost entirely on their own efforts. The clients were their clients as much as clients of the plaintiff. Clearly, on the termination of their association with the plaintiff, the defendants were entitled to compete with it to the extent that they would be seeking clients in the same market place. On the basis of my findings with respect to the terms of their contracts with the plaintiff and the absence of any evidence of relevant practices and understandings in the industry, or tacit understandings between the parties. I see no justification for a finding that, after their departure—and

independently of any duties of confidentiality—they were obligated not to solicit business from the clients they had recruited and with whom they had maintained contact. I do not believe that this is a situation in which such an obligation should be considered to be innate to the relationship between the plaintiff and the defendants as sub-agents. In these circumstances,

> …the question to be asked is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interest with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.: *Hodgkinson v. Simms,* at page 176, per LaForest J.

61 My findings in this case exclude the existence of any such understanding or agreement with respect to the rights of the defendants after the termination of their association with the plaintiff and, accordingly, the plaintiff's claim based on a breach of a fiduciary duty must be dismissed.

(ii) Duty of confidentiality

62 The conclusion I have reached on the question of a breach of fiduciary duty does not exclude the possibility that the defendants were subject to an obligation of confidence with respect to the information relating to the clients they had recruited. For the reasons given earlier, the enquiry was limited to fiduciary duties other than duties of confidence. The duty to preserve confidence is not dependent on the existence of a fiduciary relationship or duty. It may arise from an express or implied contractual term or even in the absence of a contract.

63 I have found that there was no express, or tacit, agreement or understanding between the parties with respect to their rights to use the information on the termination of their association. Nor is there sufficient evidence of relevant practices within the insurance industry. In the circumstances of this case, I see no other basis for implying a term—or imposing a duty—on the defendants to refrain from using the information.

64 It is established that, to succeed with a claim based on breach of confidence, the claimant must demonstrate that the information had the necessary quality of confidence and that it was imparted in circumstances importing an obligation of confidentiality: *LAC Minerals,* at pages 608 - 10 and 635 - 6. Each of the requirements involves a premise, or an assumption, that the

plaintiff has imparted—confided—information of which it was the owner in a strict proprietary sense or, preferably, of which it should be treated as in a position analogous to an owner for some purposes of the analysis. In cases between an employer and employee, this preliminary issue does not usually arise. It does, however, give rise to an issue here where: (a) the defendants were not employees of the plaintiff; (b) the information was obtained by the defendants; (c) it was acquired very largely at their expense; (d) it related only to clients recruited by them; and (e) it was acquired for the mutual benefit of the defendants and the plaintiff through an equal sharing of commissions earned as policies were issued and renewed.

65 While none of these factors is necessarily decisive, I believe they are sufficient, in combination, to make it inappropriate in the circumstances of this case to infer that information of the plaintiff was imparted to the defendants, whether it was obtained from the computer printouts provided by Evans to Smith & Fraser, or from applications copied by Lenaartowicz from the files he maintained at home. Despite the balancing exercise that, in cases such as *Alberts v. Mountjoy* and *Quantum Management Services,* has given rise to difficult questions relating to a distinction between the use of information that has been memorized by employees and that on a list maintained by the employer that was copied by the employees, the employer's ownership of the information is crucial if the property analysis is adopted. There was no common intention here that the information should belong to the plaintiff and, in my opinion, there is no rational basis for imputing such an intention. Co-ownership, rather than exclusive ownership by either the plaintiff or the defendants, is the more appropriate analogy.

66 If, rather than an approach in terms of proprietary concepts, the basis of the relevant jurisdiction in this case should be considered to lie in the notion of an obligation of conscience arising from the circumstances in, or through, which the information was obtained or communicated—as to which see Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* (3rd edition, 1992) paras 4116 - 7, I do not find anything in the circumstances here that would justify the imposition of the duty which the plaintiff seeks to enforce. Its principals did not wish to create a relationship that would involve the degree of subservience of the defendants and of their integration into its business that would exist if they were employees. Generally, the incidents of their relationship depended on the terms of their agreements with the plaintiff. In these circumstances, and in the absence of express agreement, prevailing

practices or understandings in the industry, tacit understandings of the parties or, in my judgment, legitimate expectations, the court should, I believe, be slow to imply, or impose, the obligations of confidence for which the plaintiff contends. I find nothing in the agreements between the parties, the structure of their relationship, or in their conduct that, in conscience, should preclude the defendants from using the information after their association with the plaintiff had ended. In short, whether or not the information they provided to Smith & Fraser can properly be considered to have been imparted to them by the plaintiff—and I would have some difficulty in making such a finding—I am not prepared to hold that the circumstances imported an obligation of confidence that would survive their relationship.

67 I do not think it matters that, while the association between the plaintiff and the defendants continued, there were very likely implied terms imposing duties of confidence on the latter with respect to the disclosure of information about clients, and their policies, to principal brokers not connected with the plaintiff. The plaintiff would, I believe, have had similar obligations of confidence relating to the disclosure of such information. Neither would have been entitled to use such information in an attempt to divert such clients to other principal brokers, or producers with such brokers, as the case may be.

68 Information that must be treated as confidential while a contractual relationship exists between the parties may lose that character after the relationship has ended: *Faccenda Chicken Ltd. v. Fowler* (1985), [1987] Ch. 117 (Eng. C.A.), at pages 135-8. Labeling can be just as misleading with respect to the duration of duties as it is as a guide to whether particular duties have ever existed. The point has some relevance here in view of Mr. McNair's submission that even if, after they had resigned, the defendants were entitled to use the information relating to the clients they had recruited, Lenaartowicz was in breach of his duty of confidentiality when he did this prior to resigning. Mr. Hanrahan's response to this submission was that the plaintiffs unilateral decision to alter the proportions in which the parties would share commissions was such a fundamental breach of the contracts between them that it entitled the defendants to treat the contracts as at an end and to behave accordingly. For this purpose, he relied on the decision of the House of Lords in *General Billposting Co. v. Atkinson* (1908), [1909] A.C. 118 (U.K. H.L.) in which it was held that an employee who had been wrongfully dismissed was entitled to treat the dismissal as a repudiation of the contract of employment including a covenant in restraint of trade. The governing principle was stated by Lord Collins as follows:

> …in dismissing the respondent in deliberate disregard of the terms of the contract,… the latter was thereupon justified in rescinding the contract and treating himself as absolved from the further performance of it on his part. (at page 122).

69 In *Rock Refrigeration Ltd. v. Jones* (1996), [1997] 1 All E.R. 1 (Eng. C.A.) there was some discussion of the extent to which the decision in *General Billposting Co.* reflects a principle that is consistent with more recent developments in the law relating to repudiatatory breach. Although finding it unnecessary to decide the question, Phillips LJ expressed doubts about the continued authority of the decision:

> If the employer exercises his right of summary dismissal, is it to be suggested that he thereby discharges the employee from his obligation to observe negative restrictions imposed either expressly or impliedly under his contract of employment, such as the duty not to disclose confidential information? This would seem to follow if one applies the principles underlying General Bill Posting to such obligations, yet such a result borders on the absurd. (at page 20).

Morritt L.J. did not share these doubts:

> It has been suggested that the application of the principle of *General Bill Posting Co. v. Atkinson…* may enable an employee to retain for himself that which he should not when his employment has been terminated even by his acceptance of the employer's repudiation. For my part I doubt it. The employer's rights of property will remain unimpaired even if the employment terminated as a result of the employee's acceptance of his wrongful repudiation. As the employment will be at an end the employee's licence to use the company car, for example, will have come to an end too. Similar situations will arise with regard to the employer's trade secrets and papers and access to his property. (at page 14).

70 The differing views of the learned judges are considered in *Chitty on Contracts,* Volume I, General Principles, (28th edition, 1999), at paragraph 17-103 where the views of Morritt L.J. are preferred.

71 On the view I have taken of the obligations of the defendants before, and after, the termination of their association with the plaintiff, the reservations expressed by Phillips L.J. are beside the point. It was not submitted that the plaintiff was entitled to alter unilaterally the proportions in which commissions would be shared with the producers—a decision that would affect renewals of existing policies as well as new business. This was a repudiation by the plaintiff of a fundamental term of the contracts between it and the defendants and Lenaartowicz was, in my opinion, entitled to treat the association as terminated when he was notified of the decision. Having elected to do this, he was no longer bound by any duties of confidentiality that had attached to his books of business while his contract with the plaintiff

remained in force as I have found that there was no such duty after it terminated. I should add that it was not suggested that a party's election to treat a contract as at an end when it has been repudiated by another party will have no effect unless, and until, such election is communicated to the latter. In the absence of evidence of reliance of, or detriment suffered by, the plaintiff, I do not see why this should be required.

72 For the above reasons, the plaintiff's claims are dismissed.

Counterclaims

73 The defendants counterclaimed for damages in respect of the plaintiff's intentional interference with their contractual relations with their clients. As pleaded, the counterclaims presuppose the existence of contracts between the defendants and the clients they dealt with. However, in obtaining applications for insurance, the defendants acted as sub-agents of the plaintiff. While it may be possible to find a contractual relationship between the defendants and the clients for some purposes, it is clear, and it was not disputed, that they had no continuing contractual relationship that would entitle the defendants to require the clients' custom in the future. The latter were not bound to renew their policies or, if they chose to do so, to use the services of the defendants. There was no evidence of the existence of any contractual terms that the plaintiff's activities in writing to the clients could be said to have interfered with.

74 The material facts pleaded in respect of the counterclaims appear to be premised on the proposition that the clients recruited by the defendants were their clients and not clients of the plaintiff and, in his closing submissions, Mr. Hanrahan relied on the defendants' alleged ownership of their books of business. I believe Mr. McNair was correct in his response that, even on this basis, the alleged interference by the plaintiff would not give rise to the cause of action pleaded as it would not relate to any contract that existed between the defendants and the clients. It might potentially give rise to an action against the plaintiff for breach of contract or, perhaps, breach of fiduciary duty but neither of these causes of action was pleaded and, in any event, on the view I have taken of the evidence, neither could be sustained on the facts. There was no agreement between the parties with respect to the solicitation of clients after the termination of the association and no more reason to impose a fiduciary duty on the plaintiff than on the defendants. As I believe I have indicated throughout these reasons, there is a limit to the extent to which parties who enter a commercial relationship without express or

implied agreement upon its terms, and without reducing it to writing, can rely on the courts to create rights for them.

75 For these reasons, the counterclaims, also are dismissed. In the circumstances it is unnecessary to consider whether, if the other elements of the cause of action pleaded were satisfied, the somewhat innocuous terms of the letters written to clients by, and on behalf of, the plaintiff would have crossed the line between a permissible announcement of the termination of its association with the defendants and a wrongful interference and breach of duty. I express no opinion on this question.

Damages

76 I will deal with the computation of damages in case either party successfully challenges the correctness of my findings on the issue of liability. It was not disputed that, irrespective of the basis on which liability is found, the measure of damages is the value of the commissions that would have been earned by the claimant from the business that was diverted from the plaintiff, or each defendant, as a consequence of the breach of duty by the defendant, or the plaintiff, as the case may be.

77 This is a matter of some difficulty as it requires a consideration of factors such as the normal rate of attrition, or loss of business, as clients failed to renew and the possibility that some clients would have followed the defendants, or remained with the plaintiff, irrespective of the breaches of duty that are alleged to have occurred. For this purpose, I assume that any of the parties could—quite properly—have advertised the fact of the defendants' departure.

78 The lack of precision involved in assessing damages in a case like this was referred to by Estey C.J.H.C. in *Alberts v. Mountjoy*:

> In assessing damages in commercial transaction of this nature, the vagaries and risks of commerce must be taken into account. As stated in the Stenhouse judgment, [1974] 1 All E.R. 117, the trade attachment through an insurance agent and his client is a considerably milder bond than that between solicitor-and-client and no doubt has a valency more in the nature of a subscriber to services generally, rather than those of a professional nature. Furthermore, ownership or management of the agency's clients changes over the years so that new alliances are formed and the business of the client goes elsewhere. The dynamics of this kind of business no doubt make it most unfair and demonstrably wrong to use a precise mathematical technique in establishing damages in the circumstances. (at page 693)

79 For the purpose of computing the plaintiffs loss of profit incurred as a result of the defendants' disclosure of information to Smith & Fraser and the subsequent communications with clients, Mr. McNair tendered the evidence of Mr. Harold Frye, a chartered accountant whose professional activities are concentrated in the insurance industry and who has been associated with numerous transactions involving the purchase and sale of insurance brokerages. His qualifications to give expert evidence of the loss of profits suffered by the plaintiff were not disputed.

80 Although, in cross-examination, Mr. Hanrahan questioned a number of details of the calculations made by Mr. Frye, he did not dispute his methodology in general. In computing the plaintiffs loss of commission income in excess of normal attrition, Mr. Frye calculated the present value of the plaintiff's profits on commissions that would have been earned if the policies of the clients that were formerly coded to each of the defendants, and who subsequently accepted Smith & Fraser as their broker of record, had been renewed over a period of five, and seven, years. The amount so determined was then adjusted to take into account the annual rate of attrition—or lost business—that could normally be expected by insurance brokerages such as the plaintiff. For this purpose, Mr. Frye considered a rate of 10 per cent to be reasonable. He also took into consideration the higher attrition rate that accompanied the reorganization of the plaintiff's business in the year 2000. As a result of his calculations he estimated the plaintiff's loss of profits—over five years—from clients formerly coded to Lenaartowicz to be $ 66,000 and $ 119,000 from those coded to Evans. Given the uncertainties and contingincies that affect the assessment of damages, I believe the more conservative choice of five years as the period in which losses would be sustained is justified.

81 Mr. Frye did not take into account the likelihood that, because of close personal contacts with the defendants, some clients would have left the plaintiff when advised of a defendant's departure whether or not there had been any solicitation by the latter. This, I believe, is especially relevant in the case of Lenaartowicz. A large proportion of his clients were members of the Polish community and, for many of them, English was not their first language. These clients had very little, if any, contact with the plaintiff's employees. Mr. Frye conceded that the plaintiff's actual attrition rate might be greater in the case of Lenaartowicz and, in view of the evidence of his special relationship with the clients in his book of business, I believe it is reasonable to reduce the loss of profits and the damages from the departure of such clients by 50 per cent.

82 There was also some—although less—evidence that Evans had a close relationship with the clients she dealt with. In her case, I believe a reduction of 10 per cent would be reasonable.

83 In consequence, if liability was established against each of the defendants, I would assess the damages payable by Lenaartowicz as $ 33,000 and as $ 107,100 in the case of Evans.

84 If Lenaartowicz is to be considered to be liable only in respect of the loss of profits from commissions payable in respect of clients contacted before he notified Matthews of his resignation on June 10, 1999, uncontradicted evidence indicates that the annual premiums payable by such clients represented approximately eight per cent of those payable by clients coded to him. On that basis, I would calculate the damages payable by him as $ 2,640.00.

85 The evidence on which damages could be assessed in favour of the defendants if their counterclaims had been successful is far less satisfactory. There was no expert evidence and neither provided the court with detailed calculations that would permit a reasonable estimation to be made of the loss incurred for more than the initial 12 months after their departure.

86 Lenaartowicz testified that, on the basis of the evidence of the plaintiff's witnesses, he believed he had lost clients whose annual premiums would amount, in the aggregate, to approximately $ 200,000.00. On this basis, he calculated that he had lost commissions of $14,500 annually. He agreed with Evans that a normal attrition rate of 10 per cent in each year would need to be applied but, as far as I am able to determine, he did not factor in any further loss of business that might have been expected in the first year as a consequence of the termination of his association with the plaintiff even if there had been no solicitation of clients by the latter. The evidence was insufficient, in my opinion, to justify a conclusion, on a balance of probabilities, that the letters written on behalf of the plaintiff to clients had the effect of diverting any significant number of them from Lenaartowicz.

87 The above applies equally to the counterclaim by Evans. In addition, serious inaccuracies in the numbers on which her calculations were based were exposed in cross-examination by Mr. McNair. I am satisfied that she deliberately, or carelessly, overstated the amount of business she lost when she moved to Smith & Fraser to an extent that little, if any, credence can be given to her estimate of an income loss of $ 34,346.66 in the initial year.

88 The onus of proving damages, including the necessary causal link between a loss and a breach of duty by the plaintiff, is on the defendants as far as the counterclaims are concerned. In view of the deficiencies in, and the inadequacy of, the evidence they adduced at trial, I would not be prepared to award either of them more than nominal damages of $1000.00 if, contrary to my finding, they have succeeded in establishing the plaintiff's liability.

89 If counsel wish to make submissions on costs, they should make an appointment for the purpose within 21 days of the release of these reasons and provide me with bills of costs, and any written submissions they care to make, at least two days in advance of the appointment.

Action dismissed; counterclaim dismissed.