



WHAT DOES “SOLICITATION” MEAN IN A POST TERMINATION NON SOLICITATION CLAUSE?

In the case of *Towry EJ Limited v Barry Bennett and others*, the judge held that “solicitation” should be generally defined as meaning if an employee “directly or indirectly request[s], persuade[s] or encourage[s] clients of their former employer to transfer their business to their new employer”.

The question is how can an employer actually show that a former employee has solicited former clients in breach of a non solicitation clause? The judge held that solicitation cannot be inferred only from the fact that a “tidal wave” of clients have moved across to the business where the old employees now work where there is no primary evidence of requesting, persuasion or encouragement by those employees?

In the case, the Claimant was not able to show that those clients had not moved across out of a sense of loyalty towards their former employer rather than due to request/persuasion/encouragement.

The judge did not hold that a wholly inferential case would have been impossible; however the burden of proof rests firmly on the employer who was therefore placed in the unenviable position of cross examining a catalogue of its former clients.

This case demonstrates the key difference in strength between a “non dealing” post termination restriction and a significantly less strong “non solicitation clause”. Had the employees had non dealing clauses in their contracts their conduct would have been straightforwardly unlawful.

As usual if advice is needed on employment law related matters please contact [Ian Tottman](#) on 01442 508623

Regards

Pickworths Employment Team