

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 218
5388414

BETWEEN TAYLORS FLOORCOVERINGS
& FURNISHINGS LIMITED
Applicant

A N D NEVILLE BROWN
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Christie Hall and Vonda Hodgson, counsel for Applicant
Andrew Marsh, counsel for Respondent

Investigation meeting: 25 September 2012

Date of Determination: 11 October 2012

DETERMINATION OF THE AUTHORITY

- A. Taylors Floorcoverings & Furnishings Ltd is granted an injunction against Neville Brown, until 11 May 2013.**
- B. Mr Brown is ordered to comply immediately with a term of the employment agreement he had with Taylors Floorcoverings & Furnishings Ltd.**
- C. Costs are reserved.**

Employment relationship problem

[1] The applicant, Taylors Floorcoverings & Furnishings Ltd (TFF), has applied to have the Authority enforce, by permanent injunction, compliance and other orders, a restraint of trade provision which was an express term of an employment agreement between the company and the respondent, Mr Neville Brown, they executed in October 2006.

[2] Mr Brown was offered employment by TFF (then called LCP No 113 Ltd) pursuant to a term of a sale and purchase agreement for a business. He was an interested party in that transaction as a shareholder of the vendor company that sold the business.

Sale and purchase of the TFF business

[3] Mr Brown and a partner formed the vendor company in 1977 and established and developed its business which in 2006 they sold to TFF for over \$2M, a substantial portion of which was paid to Mr Brown.

[4] The sale and purchase agreement included the following restraint provision binding on Mr Brown as one of the “Shareholders” of the vendor;

11.1 Non-Compete

...

(b) *The Vendor and the Shareholders severally agree for the benefit of the Purchaser, and for the protection of the Goodwill, that for a period of at least 36 months from the Effective Date [1 October 2006] and 12 months from the Termination Date, [the date of termination or cessation of an Employment Agreement required to be offered to Mr Brown and another Key Employee] they will not either directly or indirectly, and whether on their own account or as agent, adviser, employee, contractor, consultant or consultant for another person or organisation:*

(i) *be engaged, interested or concerned in, or assist financially in any way, any Specified Business in New Zealand;*

[5] “Specified Business” was defined as meaning any business or activity which was the same as, or substantially similar to, or in competition with, the business or any part of the business as conducted at settlement of the sale and purchase.

[6] As well as receiving part of the purchase price and shares in the parent company of the purchaser TFF, under the sale and purchase agreement Mr Brown and his business partner were designated “Key Employees” and as such were required to be offered employment on terms and conditions set out in employment agreements. These were attached to the sale and purchase agreement. Mr Brown accepted the offer of employment and signed the 2006 employment agreement. Included among its terms and conditions was the following restraint provision which TFF now seeks to enforce;

16. **Restraint of trade**

16.1 *The Executive agrees that, for a period of 36 months from 1 October 2006 and in any event for a period of 12 months from the date of termination of this Agreement, he will not, directly or indirectly, and whether on his own account or as agent, adviser, employee, contractor or consultant for another person or organisation:*

(a) *be engaged, interested or concerned in, or assist financially in any way, any Specified Business (where a "Specified Business" means any business or activity which is the same as or substantially similar to or in competition with the business or any part of the business of the Company as conducted at settlement of the sale and purchase agreement between the Company and Taylors Floorcoverings & Furnishings Limited dated on or about the same date as this agreement);*

(b) [non-solicitation by Mr Brown of TFF employees and contractors]

(c) [non-solicitation by Mr Brown of TFF clients or customers]

16.2 *The Executive acknowledges that the value of the remuneration and benefits referred to in this Agreement has been assessed and are dependent upon the Executive giving the undertakings contained in this clause for the proper preservation of the goodwill in respect of the business of the Company, and the Executive acknowledges that in all the circumstances such undertakings are fair and reasonable.*

16.3 [Mr Brown permitted to hold shares - up to 5% of company's share capital - in any public company]

[7] Mr Brown worked under the October 2006 employment agreement until 23 September 2010, when he advised TFF that he wished to offer his resignation. The notice he was required to give was three months and he indicated a departure date before the end of December 2010. However he did not leave then but remained employed by TFF until 11 April 2012, when he gave notice of resignation and finished the following month.

[8] While during an earlier Authority investigation to determine TFF's application for an interim injunction it was contended for Mr Brown that his employment had

terminated on about 23 December 2010 and that he was then immediately re-employed by the company, it seems he is no longer pursuing that argument. The evidence the Authority has heard indicates that as a fact there was no termination and re-employment but that Mr Brown continued working for TFF from September 2010 until May 2012.

Next Dore Ltd

[9] Mr Brown left TFF to go to work for Next Dore Ltd (NDL). It operates a store of similar size to 'The Floor Store' that TFF trades from in Christchurch and it is in direct competition with TFF. Mr Brown began working for NDL as a floor covering measurer and estimator, a change from the salesman and management positions he had had with TFF.

Interim injunction

[10] At the beginning of July 2012, TFF sought from the Authority an interim injunction against Mr Brown to stop him working for NDL in breach of the clause 16 restraint of trade provision. Following an investigation meeting, on 14 August 2012 the Authority (member Helen Doyle) granted the application and ordered that pending the final determination of the matter, Mr Brown was not to breach the restraint provision and was to cease working for NDL. Mr Brown complied with the Authority's order and is not currently working at all.

[11] Before it proceeded to investigate and determine this substantive application, the Authority was satisfied that the parties had undertaken mediation and made all reasonable efforts to resolve this matter on their own terms.

Operation of the restraint provision

[12] In support of its application for a permanent injunction and compliance, TFF contends that the clause 16 restraint provision in the 2006 employment agreement was triggered in May 2012 by Mr Brown terminating his employment with TFF. The company contends that the provision prevents Mr Brown, for a period of 12 months until May 2013, from being engaged, interested or concerned in any business or activity which is the same as, or substantially similar to, or in competition with, the business of TFF.

[13] In opposing the application Mr Brown claims firstly that the restraint began to operate in December 2010 and that consequently its 12 month term has now expired. He claims that in about December 2010, TFF had agreed to let the restraint start to run before his employment terminated. Secondly he claims that if the provision had still been operable when his employment terminated in May 2012, it was unenforceable because it was an unreasonable interference or limitation on his liberty of action in earning a living. Thirdly, he claims that if the restraint provision is reasonable it is too wide in scope and should be narrowed in its duration to a period of less than 12 months.

[14] In relation to his first ground of opposition Mr Brown claims that TFF, through Mr Christopher Ogden, the Regional Manager of TFF's parent company, Flooring Brands Group, had in return for his consent to continue working for TFF instead of resigning, agreed that the restraint of trade provision would begin to run from the date he had originally intended to resign from at the end of December 2010. Mr Brown claims the agreement with Mr Ogden was made orally during a discussion at work.

[15] In evidence Mr Ogden has agreed that a discussion took place during which Mr Brown raised his concern about the restraint provision, but denies that he made any agreement binding on TFF to vary the provision and in particular the point at which the 12 month period would run from.

Oral variation to restraint of trade provisions

[16] Restraint provisions to the same effect were contained in two distinct agreements made at about the same time; the sale and purchase agreement for a business to which Mr Brown was directly or indirectly a party as a shareholder of the vendor company, and under which Mr Brown received a portion of the purchase price paid for the business, and an employment agreement between the purchaser of the business and Mr Brown. The provisions of the sale and purchase agreement, including the restraint, are enforceable against Mr Brown in the civil courts, while the provisions of the employment agreement are enforceable against him in the Authority. To avoid any enforcement action being successfully taken against him either in the court or the Authority, Mr Brown would need to have reached agreement with TFF to vary the restraint in both agreements.

[17] In his affidavit in opposition to the application for interim injunction, Mr Brown deposed that, after advising on 23 September 2010 he would be resigning by the end of the year, he gave an exit date to Mr Ogden of 23 December 2010. He said Mr Ogden had visited The Floor Store in mid-December and asked him to consider extending his exit date to the end of January 2011, so as to allow more time to find his replacement. He said he agreed to this request unconditionally although he did not withdraw his resignation.

[18] Mr Brown's further evidence was that, in mid-January 2011 on a date he can no longer recall, Mr Ogden visited him and asked if he could extend his exit date, to which Mr Brown agreed, although only until the end of March 2011. He said:

I also agreed to this on the provision that my restraint of trade started to count back as from the 23rd December 2010. The Regional Manager agreed to this. There was never any suggestion that I needed to go to any other person. At no time was written confirmation mentioned and I assumed that the verbal agreement from the Regional Manager was the only authority required otherwise I would have pursued the matter given that I had raised it and was determined to go through with it.

[19] Mr Ogden's affidavit in reply contained the following evidence by contrast:

10. Mr Brown states that in January 2011, he agreed to remain in employment for a further period on the provision that his restraint of trade would start to run from 23 December 2010. While a discussion took place at this time, it did not include the subject of the restraint of trade and I did not agree to a variation of Mr Brown's employment agreement.
11. I did have a conversation with Mr Brown regarding his restraints of trade however, my recollection is that the discussion took place in mid to late 2010. I specifically recall the conversation, but not the date on which it took place. It was not linked specifically to a decision on Mr Brown's part to resign at that time. Rather, it was an informal five to 10 minute conversation, which took place on the showroom floor at The Floor Store, the Company's store in Christchurch, and was one of a number of general conversations that I had with Mr Brown regarding his desire to eventually leave the Company.
12. During this conversation, Mr Brown told me that a problem he would have, if his employment ended, was that he was bound by restraint of trade, which prevented him from working in the industry. He said that he had completed his three year earn out period under the sale and purchase agreement, but he was concerned about his restraint of trade.

13. *I did not want Mr Brown to leave his role, so I suggested that if Mr Brown were minded to leave, the Company might be able to make some accommodation in respect of his restraint provisions if he agreed to remain employed by the Company. I indicated to Mr Brown that I would be supportive of such an accommodation.*
14. *No agreement was reached during this discussion. It was simply an informal conversation where I told Mr Brown that there might be a way of dealing with his restraint. I did not enter into any verbal agreement with Mr Brown altering his employment agreement or altering his shareholder obligations under the sale and purchase agreement. Furthermore, there was no written variation in any event; this is something that I would have done as a matter of course had I reached an agreement with Mr Brown and had I believed that I was dealing with an employment matter in which I had authority to act.*

[20] Mr Ogden's more recent oral evidence was that he did not mention the discussion to TFF's sole director Mr Rodney Martin or to Christine Ogden, his wife, who took over from him as Regional Manager in February 2011. He said this was because the discussions with Mr Brown had not proceeded beyond an informal chat, such as he had been used to having at various times about Mr Brown's stated wish to finish his employment with TFF.

[21] Several months after agreeing to stay working for TFF, on 16 April 2010 Mr Brown sent Mr Ogden an email which included the following:

I would like to thank you for being patient with me and agreeing to my restraint counting down from December, unfortunately Christine [Ogden] is not in favour of that arrangement, however I have agreed to stay on for now given the situation and the fact that a JV partner/manager is still yet to be appointed.

[22] Mr Ogden in a reply sent the following day, made no reference at all to the assertion or statement from Mr Brown that he had agreed to the restraint counting down from December. Mr Ogden told the Authority that this was because he regarded Mr Brown's email as a general informal catch up. He said he had therefore simply responded to it in a like chatty tone and style.

[23] In his oral evidence at the investigation meeting, Mr Ogden confirmed largely his affidavit evidence that he and Mr Brown had had a short discussion while standing together in the showroom about the restraint provision. Mr Ogden said to Mr Brown he could not see an issue about the restraint and he thought the company would be able to reach some accommodation with him over it. Mr Ogden said he had indicated

his support for having the restraint altered in some way, because at that time he did not think there was a risk that Mr Brown would go and work for a competitor if he left TFF.

[24] In his oral evidence Mr Brown said that he and Mr Ogden had a clear verbal agreement to vary the restraint and that he had not regarded it as necessary to record the variation in writing, although a provision of the employment agreement stipulated that. Mr Brown said that Mr Martin had not been involved in approving or agreeing to a variation or requiring that it was put in writing. Nor was there any discussion about creating a file note to record the agreement.

[25] Later, in about March 2011, as Mr Brown mentioned in his April email to Mr Ogden, he had been advised by Mrs Ogden, who had become Regional Manager, that she would not agree to a variation of the restraint. He had not taken issue or raised with her that statement.

[26] It is clear to the Authority that following the single discussion which took place in December 2010 or January 2011 about the restraint and when its term would commence to run, Mr Brown genuinely believed that 23 December 2010 was the commencement date for the restraint period and Mr Ogden had agreed to that.

[27] Mr Brown's email to Mr Ogden of 16 April 2011 thanking him for "agreeing to my restraint counting down from December" is evidence of his belief, supported by his testimony to the Authority.

[28] It is also clear to the Authority that Mr Ogden did not believe that on behalf of TFF he had reached any agreement with Mr Brown to that effect, although he had discussed the likelihood that TFF would be able to do something to meet Mr Brown's concerns about the restraint not beginning to operate until his employment terminated. In Mr Ogden's email reply to Mr Brown of 17 April, he made no mention at all of the matter but has since explained that he did not see the email exchange and the tone and purpose of it as an occasion for making an issue. Aside from his silence in his email, there was no conduct of Mr Ogden indicating a belief on his part that an agreement with TFF had been reached. There is no evidence of any file note being made or any discussion had by him with Mr Martin, or with his wife Christine, confirming the existence of such an agreement.

[29] Viewing the matter objectively, the Authority does not consider that any oral or verbal agreement was reached through Mr Ogden between TFF and Mr Brown, to vary the starting point for the 12 month restraint period.

[30] I find that Mr Ogden wanted Mr Brown to stay working for TFF and initiated or took part in a discussion with him on that basis. I consider that Mr Ogden encouraged Mr Brown to hope that consent or approval would readily be given to relax or vary the restraint provision, but I do not find Mr Ogden went as far as to commit TFF to making that change.

[31] I do not consider that he went out on a limb to that extent so that the continued employment of Mr Brown could be secured. I accept that Mr Ogden in his position as Regional Manager was fully aware of the restraint provision and its importance as a term and condition of TFF's purchase of the business in 2006 and of its importance to the employment agreement reached with Mr Brown as a key employee in relation to the transfer of the business. I consider it unlikely that Mr Ogden risked action or censure by reaching agreement with Mr Brown to relax or vary the restraint, certainly not in an informal undocumented way and without involving Mr Martin.

[32] The contents of a transcript of the telephone conversation that took place between Mr Brown and Mr Martin on 21 August 2012 are informative when consideration is being given to what is likely to have happened, or not to have happened. A week after the Authority had issued the interim injunction against Mr Brown he rang Mr Martin and recorded their conversation, a fact Mr Martin was not aware of while speaking to Mr Brown.

[33] In that telephone conversation Mr Martin expressed his view that he would have expected any agreement Mr Ogden had made would have been followed up in writing, and he would have expected Mr Brown to have sought some written confirmation of the agreement because of the importance of it to him. Mr Martin pointed out to Mr Brown, "at the end of the day, you're talking about a restraint of trade which is part of a sale and purchase agreement for a business that was sold for a couple of million dollars, it's a pretty significant thing ... its quite a big deal". At this point in the discussion Mr Brown said he totally agreed with everything Mr Martin had said. Mr Martin went on:

And to assume that this conversation you've had with Chris, where Chris generally supports the idea, means that it's a done deal, to me, doesn't wash, its not – it just doesn't figure, to me.

[34] To this Mr Brown responded that in his experience Mr Ogden had never followed up in writing and he did not think it was necessary as Mr Ogden was a man of his word who had the authority to make those decisions. He said, "I would have followed it up if I thought it was necessary, but I thought that Chris was a man of his word, no need to worry, everything will be fine". Mr Martin replied:

But I suppose the thing that doesn't wash with me in that, Neville, is that the restraint of trade was part of a sale and purchase agreement, which at the end of the day, you know, you had signed with me, and, you know, if there was ever anything to do with the sale and purchase agreement, like if there was anything to do with wash-ups or, you know, earn-out payments or RPS payments, anything of that sort of nature, everybody in Flooring Brands knows that they have to come and talk to Rodney [Martin] about that stuff. You know, I am the one that did the deal with you, I'm the one that did the deal with you and John, and at the end of the day that was an integral part of the deal, was the restraint of trade, it's a very important part of the deal. So, I'm really surprised if you thought that Chris generally supporting the idea in the conversation could mean it was a done deal and there wouldn't need to be any further discussion about it.

[35] Mr Brown then replied:

Well, the only reason I thought it was a done deal was because neither he or I thought it would be going on for as long as it did. We didn't expect the disaster we had here, it was only going to be until the end of March, which was probably no skin off his nose, Flooring Brands' nose. It was of little benefit to me because it would only be for three months, that would be all, but it turned out to be very, very different, and I never gave it another thought after that.

[36] The passage of the discussion immediately above suggests that Mr Brown, in the light of what actually happened when he remained with TFF for much longer than he had anticipated after he had first agreed to stay on, has elevated words of reassurance he heard from Mr Ogden into a contractual promise. I accept that Mr Ogden and Mr Brown respected and trusted each other. They were, nevertheless, very experienced businessmen and I do not consider that they threw caution to the wind to the extent that, in a relatively brief, unplanned conversation on the showroom floor, an arrangement was reached which significantly changed a business deal that Mr Brown had been part of in selling his business for gain, including being retained in employment for several years as a key employee.

[37] It is also relevant to an objective consideration of the circumstances that Mr Brown did not take up with Mrs Ogden the advice she conveyed to him of being “not in favour” of the restraint counting down from December 2010. Instead, from April 2011 for a further 12 months, Mr Brown said nothing to her about any agreement he and Mr Ogden on behalf of TFF had made. That conduct is some indication that Mr Brown had no reason to think TFF had agreed to vary the restraint. I agree with the submission for TFF and find that a variation of the restraint was not discussed between Mr Ogden and Mr Brown with sufficient certainty to create a binding legal agreement.

Written variation, and estoppel

[38] It was submitted that even if there had been an oral or verbal variation it was ineffective as the employment agreement required any variation of it to be in writing. In my view, that contractual requirement, if not followed, might have provided a basis for a claim that the employment agreement had been breached but does not in itself make an oral agreement ineffective. I find however that I do not need to consider the variation provision any further, for the same reason I do not need to consider the estoppel argument raised in submissions by Mr Marsh, counsel for Mr Brown. I do not consider that an estoppel has been made out because I have found that no clear and firm contractual agreement to vary the restraint was reached between Mr Ogden on behalf of TFF and Mr Brown, for the term of it beginning to run from December 2010. I accept that Mr Brown genuinely believed an agreement had been reached but find that was not so as a fact.

Is the employment agreement restraint provision reasonable and enforceable?

[39] Having determined that Clause 16 *Restraint of Trade* had not been altered or varied in any way by the time Mr Brown terminated his employment with TFF in May 2012, the Authority must now decide whether the provision was reasonable and enforceable.

[40] The legal principles are well settled and there are many cases from the Court of Appeal, High Court and Employment Court applying them. A concise statement of those principles is to be found in *The Broadcasting Corporation of New Zealand v. Nielsen* (1988) 2 NZELC 96,040 a decision of the High Court. Hardie Boys J in his

judgment made the following general observations about the law governing restraint of trade provisions or covenants:

I turn now to the question of the enforceability of the covenant in restraint of trade. Such a covenant is prima facie unlawful, but will be upheld to the extent that the employer is able to establish that it is reasonably necessary for the protection of the proprietary interest which the law recognises that he has in what maybe called his trade secrets and his trade connections: and provided further that the covenant is not unreasonable from the point of view of the employee and that it is not in conflict with appropriate considerations of public interest.

[41] The Court noted that while the restraint of trade clause in the case before it had been inserted to protect the employer after the employee's departure, obvious considerations required some protection of the employee's future interests as well.

[42] The question of enforceability is fundamentally a question of law but is to be answered following a consideration of the actual context.

[43] The Authority must be satisfied that the provisions of clause 16 of the employment agreement were reasonably necessary for the protection of TFF's business, in which Mr Brown was employed from 2006. Clause 16.2 expressly provided that the restraint was for "the proper preservation of the goodwill in respect of the business of the Company."

[44] I accept that protection of goodwill depending on the circumstances may be considered a reasonable purpose of a restraint provision. Five Judges of the High Court of Australia, including Latham CJ the Chief Justice, had no difficulty with that as a general proposition of law in the 1950 case of *Lindner v Murdock's Garage* (1950) 83 CLR 628. By a three - two majority of the Court the restraint in that case was struck down as being unreasonably wide and therefore unlawful, but there was no disagreement about the basic principles. They are discussed in each judgment as follows. The trade connection or goodwill of a business is an interest that may be reasonably protected from the activities of a former employee. Acquisition of an influence over customers or clients and personal knowledge of them through close relations had with them during employment, may allow an employee, unless restrained, to take advantage of the employer's trade connections. It may be reasonable to prevent an employee from creating or assisting in a competing business in the same area through the use of such "intimacies and knowledge" acquired in the course of employment.

[45] A more recent case from the New Zealand Court of Appeal confirms that goodwill can legitimately be protected with a restrictive covenant as part of an employment agreement. In *Fletcher Aluminium Ltd v O'Sullivan* [2001] ERNZ 46 the covenant in the employment agreement was a concomitant of one in the sale and purchase agreement and under which the vendor of the intellectual property in a product became the employee of the purchaser. In relation to that product the employee was also engaged by the purchaser to be involved in the completion of design work, commercial production, conversion of existing franchisees and promotion to potential new franchisees of the product and any new product developed. The purchaser employer had planned for substantial investment and a long-term commitment to a business strategy, and to support those initiatives it wanted the vendor employee, who had created the product and who would have responsibility for critical relations with customers, to be restrained from working for a competitor for a period of two years after termination of employment.

[46] In relation to those matters the Court held, at para.[37];

We see no reason why a company should not be entitled to take a covenant to protect these interests. They are analogous to goodwill.

[47] In *Debtor Management (NZ) Ltd v Quail* [1993] 2ERNZ 499, at 506, the Employment Court held;

Reasonableness is to be considered in the context of the whole of the agreement between the parties and against the background of the circumstances in which the contract was entered into.

[48] The Court of Appeal in the *Fletcher Aluminium* case took into account the “composite arrangement” the parties had made in negotiating a sale and purchase agreement and collateral employment agreement, each containing a restraint clause applying to the vendor employee, of which the Court observed, at para.[45];

The covenant was a term in an overall commercial arrangement having a large element of sale and purchase of property intended to become the key element in the company's business.

[49] In assessing the reasonableness of a restraint provision, relevant factors include its duration and territorial extent. The reasonableness or otherwise of the provision is to be assessed at the time it became part of the employment agreement, and the law also requires consideration to be given by the employer in return for the employee's restraint.

[50] It is a significant fact in this case that the restraint in clause 16 of the employment agreement had devolved from the Sale and Purchase Agreement which expressly provided at clause 11 that the restraint was for the protection of “the Goodwill”.

[51] As the Court of Appeal however pointed out in *Gallagher Group Limited v. Walley* [1999] 1 ERNZ 490, restraints upon a vendor of goodwill and upon a former employee focus on the protection of different rights although there may be circumstances where the same or similar restraint is reasonable in both cases.

[52] The Court in the *Fletcher Aluminium* case (above) had before it a situation where entry into an employment agreement flowed from entry into and the provisions of a sale and purchase agreement in relation to the business in which the employee was engaged. The two are closely linked and the restraint in the employment agreement may be considered in the context of a commercial transaction involving the sale of assets for use in the business.

[53] The Court of Appeal noted that the Courts have approached restraint covenants entered into at the time of the sale of the goodwill of a business differently from such covenants in an employment contract alone. The difference derives from the proposition that a restraint of trade should be no wider than is required to protect the party in whose favour it is given. “The purchaser of goodwill requires protection against the erosion of that goodwill. The employer requires protection against an employee taking advantage of the employer’s trade and commercial information acquired by the employee in the course of employment”. The Court held however that it is not correct that restrictive covenants are to be confined to one or other of two categories, but notwithstanding that distinction between the sale and purchase and goodwill situations the totality of the transaction between the parties must be taken into account. The Court considered that the purpose of the restraint in the employment agreement was to be discerned from the sale and purchase agreement.

[54] As submitted by counsel Ms Hall for TFF with reference to *Radio Horowhenua Limited v. Bradley* [1993] 2 ERNZ 1085, in considering whether the restraint is reasonable in all the circumstances the Authority should have regard to the history of the employment, the nature of the interest to be protected, the likely effect of the former employee taking up a position with a competitor, the likely effect on the

employee of the restraint being enforced, and any relevant public interest considerations;

[55] I accept that a significant part of the purchase of the TFF business in 2006 was the goodwill associated with it. The businesses client and customer contacts and relationships, including those of Mr Brown, formed an essential part of that goodwill.

[56] From its major investment made in those client relationships TFF acquired a legitimate interest in protecting them. Mr Martin stated in his evidence, and I accept, that without the restrictive covenant obligations entered into by the shareholders including Mr Brown, TFF would not have bought Mr Brown's business.

[57] He was considered to be a "key employee" under the sale and purchase agreement. The shareholding he was given in TFF's parent company Flooring Brands Ltd is also an indication of his seniority within and importance to TFF.

[58] Mr Brown received valuable consideration for the restrictive covenants. He was employed by TFF from October 2006 on a salary of \$90,000 including benefits and, at the termination of his employment, was receiving \$82,500 plus a company car. An extra or specific payment or premium is not required; *Fuel Expresso Ltd v Victor Hsieh* [2007] NZCA 58.

[59] Mr Brown expressly acknowledged in clause 16.2 that the value of his remuneration and benefits had been assessed upon his "giving the undertakings contained in this clause." In looking to see whether consideration is present the restraint in the employment agreement should not be viewed in isolation from the sale and purchase agreement which gave rise to the employment relationship, or from the bargain of the parties and the shareholders under that agreement.

[60] I accept that over many years before the TFF business was sold in 2006, Mr Brown had obtained personal knowledge and had developed and maintained deep and strong working and personal relationships with clients and customers over whom he acquired an influence. Mr Brown had a relationship with one particular commercial client of The Floor Store from 1987, a period of some 25 years. That base of repeat business customers and clients became a key part of the purchase by TFF, which it intended to be protected by the restraint provisions in both the Sale and Purchase Agreement and Mr Brown's employment agreement. The value of those relationships

to the business is reflected in the revenue generated by Mr Brown; 30% of the total for the store in the financial year ending 31 March 2012.

[61] I consider it was reasonable for a period to prevent him after termination of employment from creating or assisting in a competing business in the same area using *the intimacies and knowledge* acquired in the course of his involvement in the business and from subsequent employment by TFF after the transfer.

[62] Further I accept the evidence that the flooring retail industry and in particular the business of The Floor Store in Christchurch is extremely competitive and relies heavily on relationships built up with clients and customers.

[63] I do not consider that the restraint period of 12 months in the circumstances is unreasonable and neither do I regard the area or extent of the restraint, being Christchurch, as too wide. At the time the restraint was agreed to in 2006, I consider both the duration and extent of the covenant were reasonable.

[64] As to public interest, there is no evidence that Mr Brown will suffer severe financial hardship if clause 16 is enforced until May 2013. Because of personal commitments and circumstances, including an earthquake damaged house, he is confined to Christchurch in taking employment, but he is not prevented from earning a living. It is clear that Mr Brown is readily employable because of his sales and business talents and the business reputation he enjoys. He has been offered positions and, significantly, Mr Martin has recently raised with him the possibility of being reemployed by TFF and of entering negotiations over the future operation of the restraint provisions. Mr Brown declined the invitations.

[65] The public interest lies in seeing that someone in Mr Brown's situation is not reduced to a life of poverty and inability to enjoy the satisfaction of performing work and being rewarded, but that is not a state he is threatened with. An assessment of the public interest must also take into account the commercial arrangement that led to the restraint provisions. As the Court of Appeal said in the *Fuel Espresso* case in emphasising the sanctity of contract, "agreements are made to be kept." In this regard the Court also quoted from Trietel on Contract Law; "a person who makes a commercial promise expects to have to perform it." The sale and purchase agreement is likely to be more strictly enforced by the courts, so that TFF can retain the value of what it bought without Mr Brown by his conduct afterwards reducing that or

derogating from the vendor's promise, given by Mr Brown's company. As Mr Martin confirmed, the sale and purchase transaction is quite unlikely to have occurred without the restraint. The public interest lies in seeing that the parties observe their undertakings given at arms length in commercial dealings.

[66] The evidence of confidential information required to be protected in 2006 by a restraint was insufficient I find. However the restraint is justified on the basis that it was necessary and reasonable for the protection of goodwill.

[67] The Authority has considered the extensive undertakings given by Mr Brown and the response of Mr Martin to those. Mr Martin's view is that the undertakings are insufficient without Mr Brown undertaking to cease being engaged, interested or concerned in NDL. The undertakings stopped short of making commitment, leaving orders as sought the only way that end can now be achieved.

[68] Accordingly, the Authority considers it is appropriate to grant the injunction to restrain Mr Brown from working for Next Dore Limited until the expiry of the 12 month period, which will be on 11 May 2013. Five months of that period has already elapsed, although Mr Brown arguably could have been compelled by TFF to work a further period of 2 months until July 2012 before terminating, as the notice period was three months under the employment agreement. Mr Brown appears to have breached the agreement in that regard by giving only one months notice.

[69] I am satisfied that Mr Brown breached clause 16.1(a) in going to work for NDL and a compliance order is appropriate to prevent any further breach, but to a limited extent only as Mr Brown has not breached the non-solicitation clauses. The order made under s 137 of the Act will have immediate effect and will remain in force until 11 May 2013.

[70] It must be said in Mr Brown's favour in this case that while his actions which have been met with the injunction are those of being, as an employee, engaged, interested or concerned in a business in competition with TFF, there is no evidence of any solicitation whether of employees or customers or clients by Mr Brown, and indeed the evidence is quite to the contrary that he dissuaded clients and customers of TFF from following him to NDL. The fact that they did so however is confirmation of the influence he has had over those clients, which TFF has sought, reasonably in my view, to protect.

[71] Mr Brown was entitled to maintain personal friendships formed with customers and clients and he has reasonably explained why he passed on his personal cell phone number when he was about to leave TFF. There has been no proof of harm or loss that could have founded a claim for damages against Mr Brown.

Determination

[72] For the above reasons, by way of injunction given under s 162 of the Employment Relations Act 2000, the Authority orders that until 11 May 2013 Mr Neville Brown is not, directly or indirectly, to be engaged, interested or concerned, or assist financially in any way, whether on his own account or as agent, adviser, employee, contractor or consultant, in the business of Next Dore Limited in Christchurch.

[73] Further, by way of compliance under s 137 of the Employment Relations Act, the Authority orders that Mr Brown is to immediately comply with clause 16.1(a) of the employment agreement with LCP No 113 Ltd (now TFF) having the commencement date of 1 October 2006. This order made shall remain in force until 11 May 2013.

Costs

[74] Costs are reserved. If the parties through their representatives are unable to settle the question themselves an application for costs may be made in writing by TFF within 14 days of the date of this determination and Mr Brown may reply within a further period of 14 days.

A Dumbleton
Member of the Employment Relations Authority