IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 168
5388414

	BETWEEN	TAYLORS FLOORCOVERINGS & FURNISHINGS LIMITED Applicant
	A N D	NEVILLE BROWN Respondent

Member of Authority:	Helen Doyle
Representatives:	Jennifer Mills and Emily Cameron, Counsel for Applicant Phil James, Counsel for Respondent
Investigation meeting:	7 August 2012 at Christchurch
Date of Determination:	14 August 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Taylors Floorcoverings & Furnishings Limited (Taylors) seeks an interim injunction –

(a) restraining its previous employee Neville Brown until further order of the Authority from breaching the restraint of trade provision in clause 16 of his individual employment agreement; or

(b) alternatively, if any of the restrictions set out in clause 16 of the employment agreement are found to be unreasonable or unenforceable, it seeks an order modifying, pursuant to s.8 of the Illegal Contracts Act 1970, the restraints of trade applying to Mr Brown such that, at the time the agreement was entered into, the provisions as modified would have been

reasonable; and an interim injunction until further order of the Authority on such modified or varied terms; and

(c) costs.

[2] The Flooring Brands Limited group of companies of which Taylors is a part, carries on business as a flooring retailer in both the residential and commercial flooring sector and operates under three brands: Master Kelwin Floors, Carpet Court and The Floor Store. Taylors carries on business as The Floor Store in Christchurch.

[3] Mr Brown worked at The Floor Store in Christchurch. The Floor Store was acquired by the Flooring Brands group of companies with effect from 1 October 2006. A group company, then named LCP No 113 Limited, but now, Taylors Floorcoverings, purchased the business and assets of the company in which Mr Brown was a shareholder. That company subsequently changed its name to Brown & Taylor Holdings Limited.

[4] The terms of sale were set out in an agreement for sale and purchase of the business and assets of Taylors Floorcoverings dated 20 December 2006.

[5] The sale and purchase agreement provided the following material clauses:

- Clause 9.4 provided the Key Employees will be offered employment with the Purchaser, and on the terms and conditions set out in the attached Employment Agreements (clause 9.4). The key employees were defined earlier in the sale and purchase agreement as Neville Brown and another shareholder, John Taylor.

- Clause 11 of the agreement for sale and purchase was a no-competition clause. Clause 11.1 provided:

> *(a)* *For the purposes of this* clause 11*:*
>
> 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 as conducted at Settlement; and.*
>
> Termination Date *means the date of termination or cessation of the Employment Agreement;*

(b) The Vendor and 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 and 12 months from the Termination Date, 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;

(ii) canvass, solicit, employ, procure or attempt to procure the services of, or offer employment to, any person who is or was an employee or contractor of the Purchaser during the six months immediately preceding the Termination Date; and/or

(iii) canvass, solicit, procure or attempt to procure from the Purchaser any person or organisation, firm or corporation which has been a client and/or customer of the Purchaser during the period of 12 months immediately preceding the Termination Date (and with which the Shareholders had dealings during their employment with the Purchaser).

[6] The written employment agreement between LCP No 113 Limited and Neville Brown was entered into at or about the same time and contained the following restraint of trade provisions in clause 16:

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) canvass, solicit, employ, procure or attempt to procure the services of, or offer employment to, any person who is or was an employee or contractor of the Company during the six months immediately preceding the termination of the Executive's employment; and

> *(c) canvass, solicit, procure or attempt to procure from the Company, or in any way interfere with, any person or organisation who is or was a client and/or customer of the Company during the 12 months immediately preceding the termination of the Executive's employment.*

[7] Clause 16.2 provided:

> *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 to the business of the Company, and the Executive acknowledges that in all the circumstances such undertakings are fair and reasonable.*

[8] The period of 36 months from 1 October 2006 expired on 1 October 2009. Taylors say that Mr Brown was bound by the restraint of trade period of 12 months from the date of termination of employment which was 11 May 2012. Taylors say that Mr Brown breached the restraint of trade clause 16 after his employment ended with Taylors when he commenced employment with a competitor Next Dore.

[9] It is not accepted by Mr Brown that he is bound by the restraint of trade covenant. He says that he tendered his resignation on 23 September 2010, with an agreed exit date of about 23 December 2010 and he was then asked by his then regional manager, Christopher Ogden, to consider extending his exit date to the end of January 2011 to allow additional time for Taylors to engage a new candidate/joint venture partner to take over his position. He says then in or about mid January 2011 he was again asked by Mr Ogden to extend his exit date because no suitable candidate had been found. Mr Brown said that he agreed to do so but only until the end of March 2011. He said that he agreed to the extension on the basis that his restraint of trade started to count back as from 23 December 2010 and an oral agreement to this effect was entered into with Mr Ogden.

[10] Mr Ogden ceased to be the Regional Manager of The Floor Store in or about late February or March 2011 and Christine Ogden, Head of Southern Operations became Mr Brown's Regional Manager. Mr Brown says that the agreement about his restraint of trade continued after Ms Ogden asked him to stay on although he did come to understand at least from April 2011 that Ms Ogden was not in favour of the arrangement. A new manager Jeremy Benzie was employed on 11 November 2011

and Mr Brown says he discussed and agreed with Mr Benzie that his final exit date would be 11 May 2012.

[11] Mr Brown says that even if the restraint provision in his employment agreement was breached (which he denies) then the restraint of trade provision is unlawful and unreasonable and also that his present employment does not involve any breach of the restraint as he is employed as a measurer and quantifier only and not engaged, interested or concerned with assisting financially in any way his present employer's business.

[12] The parties agreed to attend mediation following a telephone conference with the Authority, but the employment relationship problem was not resolved. The interim application was dealt with on the basis of the affidavit evidence provided and helpful detailed submissions from Ms Mills and Mr James. Any reference to evidence in this determination is to the untested affidavit evidence.

[13] An undertaking as to damages signed by Ms Ogden, on behalf of Taylors was provided. The affidavit evidence provided by Ms Ogden supported that any award of damages against Taylors could be met by revenue generated by the company group.

[14] An interim injunction involves the exercise of a discretion. It is recognised that the answer to an interim injunction is not in the rigid application of a formula, but there are two broad questions of whether there is a serious issue to be tried; and where the balance of convenience lies.

[15] The final question requires the Authority to stand back and ascertain where the overall justice lies – *Klisser Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA).

[16] The Authority needs to consider the following issues in this case:

- Is there a serious issue to be tried;
- Where does the balance of convenience lie;
- Would damages be an adequate remedy;
- What does the overall justice of the case require?

Is there is serious question to be tried?

[17] Both counsel referred to the general principle that covenants of restraint of trade are *prima facie* unlawful and are unenforceable unless they can be justified as reasonably necessary to protect the proprietary interests of the employer and in the public interest. The reasonableness of the restraint is to be assessed at the time the contract was entered into – *Gallagher Group Ltd v. Walley* [1999] 1 ERNZ 490 (CA).

[18] A restraint provision should be enforced only to the extent required to protect a proprietary interest for the employer, and relevant to this is the nature of the employee's position within the business, the business of the employer, the geographical scope of the restraint and its nature and duration.

Proprietary Interest

[19] Taylors purchased the business in which Mr Brown was a shareholder for a substantial sum of money. Ms Ogden in her evidence says that one very important aspect of including the restraint of trade/non competition provisions in Mr Brown's individual employment agreement and the sale and purchase agreement was to protect the goodwill in the business of the company. Mr Brown at the time he became an employee of Taylors was Operations Manager, which is in practice a Commercial Sales Consultant role. There were some changes to his role but as from December 2010 he was undertaking the Sales Consultant role.

[20] It is arguable on the untested evidence that the flooring retail industry and specifically the business of The Floor Store in Christchurch is competitive and relies heavily on relationships built up with clients and customers.

[21] It is arguable on the untested evidence that Mr Brown developed and maintained strong relationships with clients and customers for many years and that his client and customer base was a key part of the goodwill purchased. It is strongly arguable that Mr Brown operated with a level of autonomy and that he was the primary point of contact for the clients and customers he serviced and was therefore in a position of some influence. For the 2011 financial year ending 31 March 2012 Mr Brown generated 30% of the Company's revenue.

[22] It is arguable that Mr Brown had access to a substantial amount of confidential information, client contact details, client revenues, client activity and pricing information.

[23] After Mr Brown went to work for NextDore, albeit not in a retail role as such, several major clients of Taylors approached him to undertake their work. Affidavits from managers of these clients have been provided. Mr Brown referred these clients back to Taylors but the fact that he was approached in the first place supports the strong relationships he had with significant clients of Taylors and the high regard in which he is held.

[24] I find that it is strongly arguable that Taylors has a proprietary interest in confidential information and customer relationships that the restraint of trade covenant in Mr Brown's employment agreement is designed to protect.

Consideration

[25] It is arguable that there was adequate consideration for the restraint of trade covenant by way of the value of the remuneration and benefits as referred to in clause 16.2 of the employment agreement.

Variation of restraint of trade

[26] There is no dispute on the face of the affidavit evidence that Mr Brown tendered his resignation on 23 September 2010 although continued on his employment with Taylors until 11 May 2012. Mr James submits that Mr Brown's resignation remained in effect but from time to time Mr Brown reached an agreement with Taylors to extend his departure date to assist the company in finding a replacement.

[27] There is a dispute about whether there was agreement to a variation to the restraint of trade covenant and/or a re-employment of Mr Brown by Taylors. Mr James submits that as a result of Mr Brown entering into an agreement with Mr Ogden that the restraint period would run from 23 December 2010 the restraint ceased to have any effect from 23 December 2011. Mr Ogden in his evidence does not accept that he entered into an agreement of that nature with Mr Brown and says that any discussions about the restraint were of an informal nature never reaching the point of a legally binding agreement.

[28] Ms Mills submits that clause 20 of Mr Brown's employment agreement provided any variation to it must be recorded in writing and clause 19 provides that that the employment agreement represents the entire agreement between the parties with the restraint of trade forming part of this.

[29] The only documentation in support of any variation being agreed to is an email sent to Mr Ogden by Mr Brown dated 11 April 2011 which Mr Brown attaches as exhibit "B" to his affidavit. At this time Mr Ogden was no longer working for the Flooring Brands Group. In the email he writes, amongst other matters,

> *I would like to thank you for being patient with me and agreeing to my restraint counting down from December, unfortunately Christine 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.*

[30] Mr James submits that when Mr Ogden responded by email dated 17 April 2011 he did not disagree with what had been set out although he was no longer working at that time for Taylors.

[31] The Authority is not required to resolve any disputes in the evidence, rather recognise their existence. On the untested evidence and having heard the submissions I find that there is an arguable case that the restraint of trade covenant was not varied by agreement, Mr Brown was not re-employed and the restraint of trade clause remained in force.

Reasonableness of the restraint

Duration

[32] The restraint of trade clause 16.1 in Mr Brown's employment agreement has to be read as a whole as it will only be reasonable if it goes no further than is necessary to protect Taylors' legitimate proprietary interests. Mr Brown has already been subject to a three year restraint, no competing period, from 1 October 2006 to 1 October 2009 in his employment with Taylors. The 12 months from termination is separate from and not absorbed into the three year initial restraint period and so when the clause is read in its entirety there is a four year restraint period from competing which would be at the high end of such periods even those involving the sale of a business. This could be unreasonable in some circumstances although arguably less so in the circumstances of this case.

[33] I find that it is arguable if the duration of the restraint period of 12 months after termination is not reasonably necessary to protect the proprietary interest of Taylors then it is capable of modification under s.8 of the Illegal Contracts Act 1970. The Authority had identified at an earlier stage with counsel under s.164 of the Employment Relations Act that modification of the restraint period in the employment agreement could be an issue and agreement was unable to be reached on this in mediation. There is authority in *United Pukekohe Limited v Grantley* [1996] 3 NZLR 762 that an order under s.8 is available on an interim application. I am minded on reflection to leave any modification for a substantive hearing.

Geographical Scope

[34] There is no geographical limit to the restrictive covenant. I accept Ms Mill's submission as arguable that the reference to a specified business in clause 16.1 (a) limits the scope of the covenant to businesses in Christchurch which are in competition with the business of The Floor Store.

[35] It is arguable therefore that the scope of the clause is reasonable or capable of modification to reflect it is limited to Christchurch. The effect of the restrictive covenant not to compete does not prevent Mr Brown working at all, it prevents him from competing at least in Christchurch.

Public Interest

[36] In looking at the issue of public interest I accept Ms Mill's submission that the imbalance of power in an employment relationship between employee and employer at the point an employment agreement is entered into is a factor to take into account with restrictive covenants. I find it arguable that there was not at the time the employment agreement was entered into with Mr Brown the imbalance of power that there can be in some cases. The employment agreement was entered into at or about the same time as the agreement for sale and purchase of the business in which Mr Brown was a shareholder and for which legal advice was obtained.

***Was there a breach by Mr Brown of the restraint obligations*?**

[37] I find that it is arguable that Mr Brown is in breach of clause 16.1(a) of the employment agreement in accepting employment and working for NextDore which is a competitor of Taylors. It is arguable that he is as an employee engaged and

interested in the business of NextDore within the meaning of clause 16.1(a). I am not satisfied it is arguable that there was a breach of the non solicitation covenant in 16.1(c).

Arguable case

[38] In conclusion I find for the above reasons that there is an arguable case. There are serious and arguable issues to be tried between Taylors and Mr Brown.

Balance of Convenience

[39] The Authority is required in considering the balance of convenience to assess the relevant detriment or injury the parties will incur as a result of the interim injunction being granted or not.

[40] Mr Brown has not deposed in his affidavit as to any particular financial hardship he would suffer if an interim injunction was granted, although I accept, as a matter of commonsense, that there would be in all likelihood some disadvantage/inconvenience to him if he was prevented from continuing to work for NextDore. I have weighed in Mr Brown's favour his conduct in referring any clients that have contacted him back to Taylors. There is affidavit evidence from these clients that Mr Brown has not solicited them either before or after 11 May 2012. Mr Brown did accept that he had given his new mobile phone number to four of Taylors' clients before he left but says in his evidence that that was because Taylors insisted that he return his mobile phone. Those clients from the affidavit evidence have remained with Taylors.

[41] Against that I have weighed the potential damage and loss that may be suffered by Taylors if Mr Brown continues to remain employed in a competing business and the difficulty of quantifying any loss that may arise. I accept that Taylors is vulnerable if Mr Brown has a change of heart about Taylors' clients and also vulnerable to damage to existing client relationships. Key clients obviously know that Mr Brown is employed in the flooring industry and there is a risk for Taylors given that knowledge.

[42] In terms of adequacy of damages Taylors could meet the cost of any damage suffered by Mr Brown if it was subsequently held that an interim injunction should not have been granted. Such damage would be relatively simple to quantify. If an

interim injunction was not granted at this stage but there was a permanent injunction granted at a later stage then it would be more difficult to quantify any damage to Taylors and I do not find damages would be an adequate remedy.

[43] The Authority will be in a position to give the parties a date for a substantive hearing within three to four weeks.

[44] Although reasonably balanced I find that the balance of convenience favours Taylors by a small margin.

Overall Justice

[45] I now stand back and consider where the overall justice lies. I have found that there is an arguable case and that the balance of convenience favours Taylors. The untested evidence supports Mr Brown, over many years both in the business in which he was a shareholder that was sold to Taylors and in his employment at Taylors, built strong relationships with his clients and had access to confidential information. From the untested evidence there was no imbalance of bargaining power at the time the employment agreement was entered into with the restrictive covenants. It may be that the duration of the restrictive covenant will be reduced however there is the availability of a substantive hearing within a few weeks. I find that the overall justice of the case requires that an interim injunction be granted.

Orders

[46] I therefore make the following orders with respect to interim relief:

> **Pending the determination of this proceeding or earlier order of the Authority Mr Brown is not to breach the restraint of trade provision in clause 16.1(a) of his Employment Agreement with Taylors and is restrained from continuing work for NextDore.**

Further steps

[47] A telephone conference will be arranged as soon as possible with counsel to organise a date for a substantive investigation.

Costs

[48] I reserve the issue of costs and these will be dealt with after the substantive investigation meeting.

Helen Doyle
Member of the Employment Relations Authority