IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 219 of 2019

BETWEEN : **3SA CARPET LIMITED** a limited liability company incorporated under the laws of Fiji with its registered office at Lot 7, Jai Ambamma Road, Bindi Sub – Division, Vatuwaqa, Suva in the Republic of Fiji Islands.

PLAINTIFF

AND : **LAISA COIRI** of Makoi, Tuirara Settlement.

DEFENDANT

Counsel	:	**Plaintiff: Mr. Kunal Singh**
		Defendant: Ms Kirti V and Mr. Liverpool
Date of Hearing	:	**23.7.2019**
Date of Judgment	:	**10.9.2019**

JUDGMENT

INTRODUCTION

1. The Plaintiff who was the employer, of the Defendant, seeks to restrain her from employment with a competitor in the business. Employment contract contained a restraint clause that restrained Defendant for a period of 3 years with a competitor. Defendant had obtained a staff loan for Plaintiff and this loan agreement again restricted employment with a competitor for five years from the last day of work and also bonded for five years from the date of obtaining loan. In terms of employment contract there was a requirement for both parties to give notice of three months but Defendant had resigned with immediate effect and this was notified through a letter dated 10.6.2019, but the letter states that it will be affective from 16.6.2019. Plaintiff seeks to implement restraint clauses contained in employment contract and, or loan agreement and restrain her employment with a competitor. Employment contract contained a restraint clause which is too wide in its application. It is applicable to Fiji and also any competitive business where a director or owner has an interest which involves in flooring and carpeting business is excluded. Restraint clause in the loan agreement is also too wide as it intend

to apply for five years from last date of employment, and it is unfair and one sided. All restraint clauses are dealt separately and found unreasonable and court could not amend them and grant reasonable restraint, as the restraint clauses in respective contracts are inseparable. (see :Court of Appeal *Singh v Grants Waterhouse Agency* [2000] 1 FLR 292 at 302).

FACTS

2. Defendant was employed by Plaintiff for over a decade and she had advanced her position through time and lastly she was a Sales and Administrative Executive and her total annual package including bonus/commission was substantial. Employment contract was for three year duration, renewable at the end of term.

3. Defendant denied that she sought greener pasture. According to her she left employment with Plaintiff as there was an incident which had resulted she being subjected to disciplinary action in this year.

4. Employment contract contained a restraint clause.

5. Defendant had obtained a loan in 2016 for $10,000 and there were two restraint clauses in the said loan agreement. This loan agreement also bonded Defendant for five years from 2016.

6. Apart from said bond Defendant is also restrained employment with competitor for period of five years from the last date of employment with the Plaintiff.

7. Defendant by letter dated 10.6.2019 which became effective from 16.6.2019 had resigned from her post and joined a competitor.

8. Plaintiff is seeking to restrain the present employment of Plaintiff, through *inter partes* injunction.

LAW AND ANALYSIS

9. The employment with Plaintiff prior to the present employment is admitted. The position held was sales executive in terms of the employment contract and prior to this Defendant was employed with the Plaintiff and her tenure was over 10 years. There are three documents that refer to restraint of employment with a competitor, and they are employment contract, which was renewed after it expired in 2016, loan agreement entered in 2016, and a document of 11.3.2019, signed by Defendant pursuant to disciplinary inquiry which reiterate restraint clauses contained in earlier document.

10. Plaintiff is seeking to enforce restraint clauses, thus preventing, by way of interim injunction, employment of Defendant with a competitor. At this stage Plaintiff on the affidavit in support, affidavit in reply and also in the supplementary affidavit had established that Defendant is currently employed with an entity that is involved in similar type of business, hence a competitor.

11. So the pertinent issue to grant interim injunction lies with the validity of restraint clauses that are found in employment contract and loan agreement.

12. Court of Appeal in ***Singh v Grants Waterhouse Agency*** **[2000] 1 FLR 292 (17 November 2000)** it was held,

> *"However it is essential, in a case such as this, for the former employer to establish a prima facie case that the contractual restraint on the former employee is valid. A former* ***employer who fails to make out such a case is not entitled to an interlocutory injunction to enforce the restraint.***"(emphasis is mine)

13. The restraint clauses are found in three documents but document of 11.3.2019 only refers to bond period in the loan agreement hence it is not considered separately. Restraint clauses contained in the two documents are as follows:

Employment Contract

> *"The employer wilfully agrees and undertakes not to join any Flooring or Blinds Company or companies where the owner/director has interest in the flooring or Blinds business, directly or indirectly for a period, which Shall be not less than that of the period of contract..i.e. 3 years. This 3 year special clause is irrespective of term this contract was in effect as this is a renewal of the contract and the staff has already worked for 3SA Carpets for more than 3 years."*

Loan Agreement

> *"..... irrevocably agrees and hereby gives undertaking that she will not join any business which may be in competition with 3SA Carpets Limited, whither Directly or Indirectly for a period of not less than 5 years. This period starts from ....'s last day of job at ....."*
>
> *"In consideration of this unsecured and interest free advance, Ms. .... Agrees to be bonded by 3SA Carpets Limited for a period of 5 years"(emphasis removed)*

14. The burden of proof that such restraint is valid is with the Plaintiff. (see: *Singh v Grants Waterhouse Agency* [2000] 1 FLR 292). Plaintiff should before enforcement of restraint through injunctive relief, should show they are prima facie valid and enforceable in law.

Restraint clauses in Loan Agreement

15. The relevant clauses were quoted earlier. Defendant had obtained an interest free loan form Plaintiff while in employment. The amount of loan was $ 10,000 and the time period for repayment was less than a year. Defendant was bonded in two distinct clauses. Plaintiff was restrained from leaving the Plaintiff for five years from the time of obtaining the loan and further restrained for similar number of years from the last working day.

16. First, there is no justification to bond an employee who was granted a loan that contained a repayment time less than one year for five years from the date of obtaining such loan from any employment other than with Defendant. This is unfair and one-sided, and unconscionable. The amount of the loan and repayment time do not warrant such a time period and also such a restriction on a person only because that employee needed money and sought it from employer. Such a loan facility is more of a trap or to restrain the employee from leaving organization, rather than protecting its interest, and not done in good faith.

17. There was a penal interest if loan amount is not paid in terms of the agreement. The restraint imposed on the employee is not to be employed with a competitor of the Plaintiff for five years from the last date of the employment. In my judgment this is not a reasonable restraint considering the restraint is five years irrespective of time of the settlement of loan which was less than one year.

18. The loan amount was less than the annual salary of Defendant at that time, and there was additional restraint for five years from the last day of the employee with Plaintiff. This is grossly unfair term especially considering the loan amount, purpose of utilization of it, and the time period of settlement. If it was not settled timely, there was a penal interest. There are disputed facts on this as Defendant claims variation of written contract verbally. This relates to mode of settlement and not material, for present application.

19. In terms of that, loan was to be settled in ten months. So granting a staff loan such as this and imposing a restraint for such a long period from the last date of employment is unreasonable hence both restraint clauses in loan agreement are unreasonable, hence not enforceable through an injunctive relief.

20. The reasonableness of a restraint is when it only relate to extent that is needed for the contracting parties. It is not reasonable to grant a loan and restrain a person from seeking employment with another entity irrespective of the business of that entity in one clause for five years from the date of obtaining loan, and in another clause restraint employment with a competitor from last date of employment with Plaintiff. These restraint clauses are

wider than any restraint needed. The restraint clause contained in the loan agreement is unfair, and completely one sided.

Employment Contract

21. The contract of employment also contains a restraint clause as quoted earlier. This is for a period of three years and that is the time period of the contract. The geographic applicability is entire country and this is not reasonable. The restrain " ... *not to join any Flooring or Blinds Company or companies where the owner/director has interest in the flooring or Blinds business, directly or indirectly for a period,..* " is wide and also uncertain and ambiguous. What if the main business of a new employer that Defendant joins is not doing flooring and or carpeting as main business, but owner or one director owns a share in a holding company which included a company that engaged in flooring or blinds business? Can an employee understand this clause?

22. This is obviously not a thing an employer such as sales executive would know when it seeks employment in an entity. So, this type of restraint in practicality will be a restraint even on non-competing entities and wider than required. Directors' shareholding in other entities will not normally divulged unless publicly quoted companies and even then that it divulged to the shareholders of that company and it may be difficult or impossible for a new recruit to know all the interests of directors. Irrespective of availability of such information, the restriction is unreasonable. The time period of three years is also not reasonable considering the position Defendant held, and the remuneration package.

23. It is clear that restraint in the employment contract was aimed to restrict labour turnover and or the loss of trained staff to competitors, but the restraint clause was too wide in the circumstances. So, there is an issue whether the court can vary or change excessive restraint clauses, in an application for interim injunction.

24. ***Herbert Morris Ltd v. Saxelby*** [1916] 1 AC 688 at 707(per Lord Parker):

> *"...the only reason for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is - having regard to the duties of the employee - reasonably necessary. Such a restraint has, so far as I know, never been upheld, if directed only to the prevention of competition or against the use of the personal skill and knowledge acquired by the employee in his employers business*

25. Next issue is whether it is possible for the court to use discretionary power in an injunction to restrain a period that is reasonable.

26. The principles which govern the validity of a contractual restraint given by an employee to his employer are well established. They are to be found in the decisions of the House

of Lords in ***Mason v The Provident Clothing & Supply Co Ltd*** [1913] AC 724, and ***Herbert Morris Ltd v. Saxelby*** [1916] 1 AC 688[1].

27. It is trite law court cannot alter terms of contract unless there statutory provision allowing such action by courts.

28. In *Singh v Grants Waterhouse Agency* [2000] 1 FLR 292 held,

> *"**There is legislation in New Zealand and New South Wales which enables a Court to do this in a proper case**, but we were informed that there is **no similar legislation in Fiji**. We are therefore bound to apply the common law, which does not **give the court any power to alter the contract made by the parties.** As Viscount Haldane said in **Mason** [1913] AC 724 at 732:*
>
> *"...the question is not whether they could have made a valid agreement, but whether the agreement actually made was valid."*

On the same point Lord Shaw said at 742:

> *"Courts of law should not be astute to disentangle such contracts and to grant injunctions ... which are not justified by their terms. There is no occasion for the framing, in the present instance, of a limited injunction, the contract not being in separate and clearly - defined divisions. It stands as a whole, and in my opinion it is not enforceable by law."*

Lord Moulton was even more emphatic at 745-6:

> *"I do not doubt that the **court may enforce a part of a covenant in restraint of trade**, even though taken as a whole the covenant exceeds what is reasonable. But in my opinion, **that ought only to be done in cases where the parts so enforceable are clearly severable,** and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport or substance of the clause. It would in my opinion be [wrong] if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the courts were to come to his assistance and carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master..... the hardship imposed by the exaction of unreasonable covenants by employers would be greatly increased if they could continue the practice with the expectation that, having exposed the servant to the anxiety and expense of litigation, the court would in the end enable them to obtain everything*

[1] See Court of Appeal in *Singh v Grants Waterhouse Agency* [2000] 1 FLR 292 at p 303

which they could have obtained by acting reasonably. It is evident that those who drafted this covenant aimed at making it a penal rather than a protective covenant, and that they hoped by means of it to paralyse the earning capabilities of the man if and when he left their service, and were not thinking of what would be a reasonable protection to their business, and having so acted they must take the consequences."(emphasis added)

29. In this case restraint clauses contained in the **loan agreement** are severable but **not in contract of employment**. Though clauses in loan contract are severable they were both found unreasonable, hence no utility in severability of the two clauses relating bond and restraint. The restraint clause contained in contract of employment is not severable and it needs to stand or fall in its entirety in the application of ratio in ***Singh v Grants Waterhouse Agency*** [2000] 1 FLR 292 at P 303.

30. If the restraint clause contains several clauses and each can be severable it can be severed without altering words (See Younger LJ in ***Attwood v Lamont*** [1923] 3 KB 571 at 593)[2] but this is not possible considering the restraint clause contained in the employment contract. The clause contained in the employment contract cannot be severed to alter its time period and or applicability.

CONCLUSION

31. So the restrain clause contained in the employment contract is unreasonable when considering the applicability of it. Its applicable to entire country and also to any company which a director has an '*interest*' in the business of flooring or blinds is vague and also unfair. This is wider than what is required for the protection of Plaintiff's business. The geographic area is wide and scope is also wider than required considering the nature of the business and the position held by Defendant in the business. Since all restraint clauses are found unreasonable, application for interim injunction is refused. Considering the circumstances of the case each party to bear their own costs.

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[2] Full Court of the Supreme Court of South Australia in ***Rentokil Pty Ltd v Lee*** of 2 November 1995, which he had discovered by diligent search, where severance was permitted in a case involving contractual restraints given by an employee. However, in that case the contractual restriction was very different, and was clearly divisible in form. Doyle CJ quoted with approval the statement of principle by Younger LJ in ***Attwood v Lamont*** [1923] 3 KB 571 at 593:"The doctrine of severance has not, I think, gone further than to make it permissible in a case where the covenant is not really a single covenant but is in fact a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word, it is permissible. But in that case only. Now here, I think, there is in truth but one covenant for the protection of the respondent's entire business and not several covenants for the protection of his several businesses...In my opinion this covenant must stand or fall in its unaltered form."(see *Singh v Grants Waterhouse Agency* [2000] 1 FLR 292)

FINAL ORDER

a. *Inter partes* Summons for injunction filed on 3.7.2019 is stuck off.
b. No costs.

Dated at Suva this 10th day of September, 2019.

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Justice Deepthi Amaratunga
High Court, Suva