IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Case No.: HBC 147 of 2018

BETWEEN : **AQUAHEAT SOUTH PACIFIC** a foreign company registered in Fiji under Section 367 of the Companies Act (Cap. 247). The registered name and address of its local agent are Digby Bossley, 8 McOwen Street, Tamavua, Suva.

PLAINTIFF

AND : **MELVIN SINGH** of Lot 2, Makoi Street, 8 Miles, Nasinu.

FIRST DEFENDANT

AND : **MECHANICAL SERVICES LIMITED** a limited liability company having its registered office at Matua Street, Walu Bay, Suva.

SECOND DEFENDANT

Counsel : **Mr. J. Apted for Plaintiff**
Mr. R. A. Singh for 1st and 2nd Defendants
Date of Hearing : **28th June, 2018**
Date of Judgment : **6th July, 2018**

JUDGMENT

INTRODUCTION

1. The Plaintiff employed the 1st Defendant as its Senior Estimator and the letter of appointment contained a restraint clause, subsequently he was promoted to the Estimating Manager. The 1st Defendant had tendered a letter of resignation to the Plaintiff on some personal grounds and it was not accepted and he was offered leave of absence and also offered increased salary and a new vehicle, upon his return. The Plaintiff had offered the 1st Defendant leave of absence from 13.4.2018. In the company news letter published on 8th April, 2018, it was published that 1st Defendant who was their Group Estimation Mange will be taking leave of absence and an acting person will oversee the work till his return. Since it was a publication was while 1st Defendant was still working with the Plaintiff, the 1st Defendant could have denied or ask for a correction if not correct. After

few days, the Plaintiff had realized that 1st Defendant was employed by the 2nd Defendant who is also engaged in the same type of business. Neither the 1st Defendant nor the 2nd Defendant admitted employment initially but in the affidavit in opposition admitted that 1st Defendant had started 'work generally' after he left employment with the Plaintiff and he was confirmed as Business Development Manager of the 2nd Defendant on 8th May, 2018. The Plaintiff seeks to enforce the clause that restrains the 1st Defendant from employment with a business competitor for 6 months from 13th April, 2018. The Plaintiff had also in the affidavit in support submitted evidence of breach of confidential information or intellectual property rights that cost them a substantial amount.

FACTS

2. Plaintiff is a limited liability company that engaged in the same type of business as the 2nd Defendant. They are competitors in the field electrical, mechanical, refrigeration and air conditioning fields.

3. The Plaintiff employed the 1st Defendant as its Senior Estimator on 4th May, 2017 and a contract of employment was entered between the Plaintiff and 1st Defendant. He was subsequently promoted to Estimating Manager.

4. The said employment agreement inter alia contained a Post-Employment Obligation or Restraint of Trade and it states as follow

> *'38. **POST EMPLOYMENT OBLIGATIONS/RESTRAINT OF TRADE***
> *38.1 You agree that at any time during your employment or for the relevant period following the termination of your employment with the Company or any related holding company, you will not for any reason (directly or indirectly), **without prior written consent from us**:*
> *a.*
> *b.*
> *c.*
> *d. Carry on or be connected engaged or interested either directly or indirectly or alone or with any other person or persons whether as principal, partner, agent, director, shareholder, employee or otherwise in **any business which competes may compete with the business of the Company in relation to electrical , mechanical and refrigeration contracting, servicing, consultancy and advisory services.** This*

restraint applies for period of 6 months following the termination of your employment and with a 50 kilometer radius directly in relation to the Company's business premises in Fiji.' (emphasis added)

5. The 1st Defendant had submitted a letter of resignation to the Plaintiff but Plaintiff after discussing with the 1st Defendant's reason for the resignation had offered an indefinite leave of absence as the request for resignation was unrelated to the work with Plaintiff.

6. The Plaintiff had later realized that 1st Defendant was working with the 2nd Defendant and inquired about it but both did not admit employment, though in this application had admitted that 1st Defendant had 'generally worked' with the 2nd Defendant since he left the employment with the Plaintiff.

7. Later 1st Defendant had taken the position that the restraint clause in the employment contract that prevents him being employed with a competitor is invalid and unenforceable.

8. The Plaintiff seeks injunction in following terms and they are,

'An interlocutory injunction to restrain the First Defendant, during the period of 6 months from 13 April 2018, and within a 50 kilometre radius directly in relation to the Plaintiff's business premises in Fiji, from carrying on or being connected, engaged or interest either directly or indirectly or along or with any other person or persons whether is principal, partner, agent, director, shareholder, employee or otherwise in any business which competes or may compete with the business of the Plaintiff in relation to electrical mechanical and refrigeration contracting, servicing consultancy and advisory services.'

ANALYSIS

9. There is no dispute as to the type of business of the Plaintiff and 2nd Defendant as both are primarily involved in the business of electrical, mechanical, refrigeration and air conditioning, servicing etc. They are competitors in the field of business they are engaged in and both companies seek business in the same manner. (See affidavit of 1st Defendant paragraphs 35 and also 23)

10. The Restraint of Trade clause prevents the 1st Defendant being employed by the 2nd Defendant irrespective of the position he is holding. The requirement is that it '*competes*' with the Plaintiff's business, and upon the admissions in the paragraphs 25 and 35 of the 1st Defendant there is no dispute as to the fulfilment of the said requirement that the 2nd Defendant is a competitor that is covered in the restraint clause.

11. The party who is seeking to enforce the restraint of trade clause needs to justify its applicability to the circumstances of the case.

12. There is a serious question of law to be decided in this case as to the applicability of Restraint of Trade clause and the behaviour of the 1st Defendant, and or 2nd Defendant.

13. Restraint of Trade causes may be required in the senior positions of businesses depending on information and type of information and also type of business involved, and also the manner in which an employee's leave businesses.

14. The issue is the whether clause 38.1 d of the employment contract of the 1st Defendant, can legally recognized in law to be basis of this interim relief, considering circumstances of this case.

15. The Plaintiff was initially employed as Senior Estimator and in few months he was promoted Estimating Manager. By virtue of his position and job description contained in the contract of employment there is no denial that he obtained information relating to estimation of the projects where the Plaintiff was seeking businesses including information relating to tenders during the time he was employed with the Plaintiff. There is no dispute that the 1st Defendant worked with the Plaintiff till 13.4.2018.

16. In the 'information age' with vast developments in the field of Information Technology the importance of information relating to a field of business is key to success and also for survival in a competitive market driven *knowledge economy*.

17. Since the global trend is for knowledge based economy, the information is a valuable asset and should be closely guarded not only for privacy but also to prevent undue advantage and to encourage healthy competition among the players in a field of business. So information can be protected in certain circumstances when they are commercially sensitive information.

18. In ***Lansing Linda Ltd v Kerr*** [1991] 1 All ER 419 at 436 held,

> *'.... But we have moved into the age of multinational business and worldwide business interests. Information may be held by very senior executives which, in the hands of competitors, might cause significant harm to the companies employing them. 'Trade secrets' has , in my view, to be interpreted in the wider context of highly confidential information of non-technical nature, which may come within the ambit of information the employer is entitled to have protected, albeit for a limited period....'(emphasis added)*

19. It should also be noted that Section 24 (1) of the Constitution of the Republic of Fiji recognizes the confidentiality of communication and personal information and this is applicable to legal person to the extent that is required by the nature of the right and nature of legal person (i.e nature of business of the Plaintiff), in terms of Section 6(4) of the Bill of Rights contained the Chapter 2 of the Constitution of Republic of Fiji.

20. Considering the importance in business information that is confidential, and also to promote healthy competition among the players in a level playing field the restraint on confidential information are enforced through restraint of trade clauses in employment contracts, but these clauses needed to be justified to give legal enforceability.

21. In ***Cactus Imaging Pty Ltd v Peters*** [2006] NSWSC 717 Supreme Court of New South Wales held,

> *'An employer has an interest in its confidential information which it may legitimately protected by a restraint of trade, even if the information is not in the nature of trade secret such as to attract equitable protection in the absence of any contractual agreement.'*

22. Lord Denning ***The Littlewoods Organisation Ltd v Harris*** [1978] 1 All ER 1026 at 1033 held,

> *'It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade.* ***But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to prove a breach*** *when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period. That appears from the judgment of Cross J in* ***Printers and Finishers Ltd v Holloway*** *([1964] 3 All ER 731 at 736, [1965] 1 WLR 1 at 6:(emphasis added)*

23. That was nearly 40 years ago and in my judgment a restraint as to business information needs more recognition in law through appropriate restraint on disclosing them. If such restraint is not recognized in law an employee who obtains confidential information can in a short time period leave such an organization and disclose it to a business rival, thus making undue advantage to them and detriment to the previous employer.

24. This applies 1st Defendant's position such as estimator as regard to pricing information of tenders that are yet to be finalized, considering the evidence contained in the affidavits filed by the parties.

25. The reason for such a restraint is clear. The 1st Defendant is precluded from joining a competitor with knowledge about already live bidding or tenders so that he could use the said knowledge or the pricing offered for the tenders that are live.

26. Considering the type of the business that the Plaintiff was involved it takes some time for a tender to be awarded and terms and conditions and other technical support and service agreements can take even more than 6 months.

27. The importance of keeping the 1st Defendant with the Plaintiff is evidenced by the admitted fact that when he tendered his letter of resignation it was not readily accepted, but the reasons for resignation were discussed and since they were not work related or anything to do with the Plaintiff he was offered leave of absence from 13th April, 2018

and Plaintiff would hold the position until he attended to his personal issues and on his return he was offered a higher salary, retention bonus plan and new mid-sized SUV as his company car. This did not prevent the 1st Defendant from 'working generally' for 2nd Defendant while he was fully aware of the position of the Plaintiff that had kept the position open for him to return at any time, with added benefits. According to 1st Defendant he had already resigned from Plaintiff by handing over his office lap top etc. and other formalities, such as submitting an online form. These are issues to be tried at hearing, as there are disputes in the manner of execution.

28. The 1st Defendant in his affidavit state that said new packages were not accepted by him. These are facts that cannot be decided on the affidavits, but it remains that the Plaintiff desired to keep the 1st Defendant and he was an important person for the Plaintiff though his tenure with them was only one year, and before 13th April, 2018 the company newsletter also informed that the 1st Defendant was taking leave of absence and would return to them, and this was not denied by 1st Defendant or sought a correction of it at any time before or after 13.4.2018.

29. About 10 days from the said 'leave of absence' the 1st Defendant had seen working for the 2nd Defendant and this was also confirmed by the General Manger of the 2nd Defendant who said since leaving with the Plaintiff the 1st Defendant was working with them.

30. According to the affidavit in support Plaintiff obtains its business though highly competitive tendering process and it was detailed in the affidavit in support. It is again an admitted fact as paragraph 20 of the affidavit in support is admitted by the 1st Defendant.

31. The 1st Defendant had also admitted that decisions of the tenders were reviewed and this process takes a considerable time, but states that it will take only about 3 months as opposed to the Plaintiff's position that such review would take 2-12 months.

32. From the admitted facts the alleged disclosure of commercial sensitive information had happened at least 7months after the submission of the first tenders and 2nd Defendant had not denied submission of a fresh tender after 13th April, 2018 in the affidavit in reply, but stated that price was not the only determinant factor. If that is correct, 1st Defendant would reasonably have known other factors that favoured the Plaintiff as opposed to the 2nd Defendant and there is likelihood of those factors being divulged or used in favour of the present employer.

33. How long a review would take depends on numerous factors and it is safe to state that it takes time for such review and funding is another factor that may delay such awards.

34. According the affidavit in support he was involved in 35 outstanding projects where tenders are yet to be awarded. This again is denied by the 1st Defendant, and a matter for the hearing.

35. At paragraph 36 the Plaintiff's General Manager had sworn some facts about a tender which they were informed that they were selected and after 1st Defendant's departure they were informed that 2nd Defendant had submitted a lower price than the Plaintiff, and in order to keep the tender Plaintiff had resubmitted a lower price.

36. The said tender documents marked AC 11 and AC 12 indicates that the first tender was submitted on 31st August, 2017 and the lower priced tender on 2nd May, 2018 which indicate that it had taken more than 7 months but there was no final offer of tender. This prima facie justifies the time period of restraint, at interlocutory stage.

37. So a time period of 6 months being imposed is to restrain any unfair advantage to a rival with the bidding knowledge of the particular projects and prima facie the restraint of 6 month or restraint in the employment with a competitor cannot be considered as against public policy to consider it invalid for this application. Even the present contract of the 2nd Defendant contained a period of 3 years restraint from employment with a

competitor. (See annexed SSNG2 Clause 10C of the affidavit in response filed by 2nd Defendant's General Manager on 7.6.2018).

38. Lord Denning ***The Littlewoods Organisation Ltd v Harrisabou*** [1978] 1 All ER 1026 at 1033 held,

> *'Littlewoods claim that this is such a case. They say that Mr. Harris has acquired a great deal of confidential information about their forthcoming catalogue. It is not practicable to separate it from that which is not confidential. And he can carry it away in his head. The only practicable protection is a covenant restraining him from going to their rivals, the Great Universal Stores group, for a period of 12 months. The critical question is therefore: are Littlewoods in possession of confidential information which they are entitled to protect'.*

39. In the affidavit in support had indicated the information relating to tenders that were open at the time of 13.4.2018, as such 'confidential information' and had also indicated one such breach which I discussed earlier. In my judgment in the circumstances of this case the 1st Defendant is in possession of confidential information relating to Plaintiff and they are as admitted by the 2nd Defendant not only information relating to the pricing of the said tenders but many other factors that are reviewed in the awards of such open tenders, that favoured Plaintiff, at interlocutory stage.

40. These are facts that needs to be proved at the hearing but considering facts contained in affidavits of parties there is a good and arguable case as stated in ***Lawrence David Ltd v Ashton*** [1991] 1 All ER 385 on the available evidence at this time . The said case also held that test formulated in ***American Cyanamid Co v Ethicon Ltd*** [1975] AC 396 applies in the grant of injunction for restraint of trade.

41. In ***Faccenda Chiken v Fowler*** [1987] 1 Ch 117 it was held that price put forward in a tender document is an obvious example of such confidential information that can be restrained by a clause by the employer.

42. In ***Smith vs Nomad Moudlar Building Pty Ltd*** [2007] WASCA 169 it was stated at paragraph 31,

'There was evidence that the appellant received monthly management reports and attended monthly management meetings. From these and from other information available to him, the appellant knew what the respondent charged many of its customers, was aware of work the respondent was seeking to obtain in the course of his employment , was aware of major tenders lost by the respondent and he gained information about the respondent's profits and margins of revenue over costs....'

Further at paragraph 36 held,

'An employer is not entitled to be protected against mere competition but a restraint clause to protect confidential information which is reasonable as to the time and geographical extent will not be contrary to public policy.'

43. Interlocutory injunctions are granted to prevent a party from doing a certain act that will cause damage to the other party. The Plaintiff is alleging that the 2nd Defendant had already divulged information relating to its tenders that are still open thus preventing them from obtaining tenders that are yet to be finalized with an award of the tender. At the same time the Plaintiff is alleging that unfair and undue advantage is made to the 2nd Defendant through the employment of the 1st Defendant with them which they had restricted for 6 months after leaving them.

44. The 1st Defendant states that restraint clause in the Plaintiff is broader than necessary. He had stated that 50 km radius will cover a larger area from Suva. In my judgment appropriate geographic restriction is not an illegal restraint (see ***Smith vs Nomad Moudlar Building Pty Ltd*** [2007] WASCA 169). Considering Fiji is made out of several islands it is not unreasonable to restrict to 50 km in the circumstances and the position he was involved and the time period on the available evidence at this juncture.

45. Since I have held that there are serious questions to be determined, next issue is the adequacy of damages as mode of compensation to the 1st Defendant through the restraint.

46. The alleged damage to the Plaintiff is massive compared with loss of employment of the 1st Defendant for remaining period for the restraint which is about 3 months. The Plaintiff had given an undertaking and it is in a position to adequately compensate the 1st

Defendant whereas the calculation of the loss of the Plaintiff of alleged disclosure of confidential information is relatively large and 1st Defendant is not in a position to compensate such damage. It would be difficult to assess such damage to the Plaintiff, too. So the ground of injunctive remedy is justified in terms of restraint clause contained in clause 38.1(d) of Employment Contract.

47. Since damages are an adequate remedy to 1st Defendant, I need not consider overall balance of convenience. Without prejudice to that, I consider the overall balance of convenience of the parties and that heavily favour granting this injunction which will operate only for 6 months from 13.4.2018. So the effective period will be for about 3 months (from today till 13.10.2018). The alleged damage through disclosures during this period is immense and also creates an undue advantage to 2nd Defendant. There is no issue of 1st Defendant finding a suitable employment after this period. Even within the period he can work with non-competing entity with Plaintiff, or place outside 50km from Plaintiff's business that is confined to Nadi and Suva.

CONCLUSION

48. When one considers the evidence presented at this stage of hearing, the conduct of the Defendants cannot be considered as frank and forthright. 1st Defendant had denied that he was on leave of absence and had not admitted working for the 2nd Defendant when asked in the first instance where as 2nd Defendant had in the affidavit in opposition had admitted that he 'worked generally' since 13.4.2018. On the available evidence for the purpose of interlocutory proceedings the restraint imposed in clause 38.1(d) cannot be considered as against the public policy and 1st Defendant is in possession of confidential information that are commercially sensitive. An interlocutory injunction is granted in terms of restraint clause 38.1 (d) restraining 1st Defendant from engaging and or employing with the manner stated in the said clause in any business that competes with the business of the Plaintiff for a period remaining in terms of the said clause till 13.10.2018. This applies rival businesses situated within 50 km radius of the Plaintiff's business places in Nadi and Suva. Each party to bear their own costs.

FINAL ORDERS

a. The 1st Defendant is restrained from carrying on or be connected engaged or interested either directly or indirectly or alone or with any other person or persons whether as principal, partner, agent, director, shareholder, employee or otherwise in any business which competes may compete with the business of the Plaintiff in relation to electrical, mechanical and refrigeration contracting, servicing, consultancy and advisory services. This restraint applies for period of 6 months from 13.4.2018 (for remaining period till 13.10.2018) and with a 50 kilometer radius directly in relation to the Plaintiff's business premises in Fiji.

b. No costs.

Dated at Suva this 6th day of July, 2018

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Justice Deepthi Amaratunga
High Court, Suva