IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

PLAINT NO. 10/2013

BETWEEN	**TINE FA-ASILI PONIA** of Nikao, Rarotonga, Cook Islands, Solicitor **Plaintiff**
AND	**SOUTHPAC TRUST LIMITED** a duly incorporated company having its registered office at ANZ House, Main Road, Rarotonga, Cook Islands **Defendant**

Date of Hearing:	4 July 2013 (New Zealand time)
Place of Hearing:	Auckland, New Zealand
Counsel:	Ms Maria Dew for Plaintiff to oppose Mr Samuel Hood for Defendant in support
Judgment:	16 July 2013

JUDGMENT OF HUGH WILLIAMS J

A. The Defendant's applications for Interim Injunctions against the Plaintiff relating to "confidential information" and non-solicitation are adjourned to be brought on in the event of an allegation of breach of the modified undertakings currently set out in paragraphs [58] and [65] of this judgment.

B. The Defendant's application for an Interim Injunction against the Plaintiff in relation to the restraint of employment clause in the Confidentiality Agreement between them of 31 May 2010 is granted to the extent that, other than the duties described in the first four bulletpoints of Asiaciti Trust Pacific Limited's job specification for Legal Counsel – ensuring that company is FATCA compliant by 31 October 2013 – the Plaintiff is restrained from taking up or continuing employment or becoming otherwise affiliated with any licensed trustee company carrying on business in the Cook Islands excluding the Defendant and Asiaciti Trust Pacific Limited for the period of just over 9 months from 25 January 2013 until 31 October 2013.

C. Costs are to be dealt with in accordance with paragraph [75] of this judgment.

INTRODUCTION

[1] The offshore banking industry – an industry in which the Defendant, Southpac Trust Limited ("Southpac"), and another company involved in this case, Asiaciti Trust Pacific Limited ("Asiaciti") are participants – is a major contributor to the Cook Islands economy. Southpac, Asiaciti, the four other trustee companies and the seventy odd people they employ are significant players in that economy.

[2] The Plaintiff, Mrs Ponia, is a qualified lawyer who was, from 2 June 2004 to 19 June 2005 and again from 1 June 2010 to 25 January 2013, employed by Southpac as its legal or general counsel.

[3] Southpac and Mrs Ponia – to put it neutrally – parted company on 25 January 2013 and, on and from 30 April 2013[1] Mrs Ponia took up employment with Asiaciti, one of Southpac's competitors, as its Legal Counsel-Compliance.

[4] On 3 May 2013 Mrs Ponia sued Southpac for damages as a result, first, of what she alleges were breaches by Southpac of the Contract of Employment between them and, secondly, what she pleads was her wrongful dismissal. She also sought damages for what she alleges was her sexual harassment at the hands of Mr Steens, Southpac's General Manager, and discrimination against her on the basis of her family status. Those proceedings are defended by Southpac and for present purposes it is necessary to do no more than note the issues between the parties. They will be ventilated at trial.

[5] However, it is common ground that Mrs Ponia's employment by Southpac was covered by Employment and Confidentiality Agreements dated 31 May 2010 and Southpac has both counterclaimed in Mrs Ponia's proceedings for breaches of those agreements and, on 30 May 2013 (NZ time), issued an on notice application for Interim Injunctions against the Plaintiff. It is with that application that this Judgment is concerned and, as far as the researches of counsel were able to go, this case may be the first occasion to be heard in this Court of injunction proceedings arising out of an employer/employee relationship.

[1] after accepting the role on 22 April 2013

FACTS INCLUDING AGREEMENTS OF 31 MAY 2010

[6] The parties agreed that, fundamental to the success of the offshore banking industry are both confidentiality between trustee companies and their clients and the personal relationship which grows up between those companies and their clients as a result of the latter's investment in the industry through the former. The identity of parties connected with individual trusts is confidential as are their Deeds of Trust.

[7] In large measure, the confidentiality of information relating to the offshore banking industry results from a suite of statutory provisions[2] obliging trustee companies and their employees to observe privacy and secrecy. Many of those who invest through Cook Islands' trustee companies are affluent individuals based in the USA. Recently, a growing proportion of clients have been wealthy Asian individuals.

[8] In order to maintain and reinforce employees' obligations of trust, secrecy, privacy and confidentiality, all Southpac employees are required to sign agreements obligating them in that regard. Southpac clients are advised of the company's requirements of its employees.

[9] Mrs Ponia graduated in New Zealand as a lawyer in 2001 and was admitted to the Cook Islands bar the following year. After giving birth to her first child she worked as Legal Counsel for Southpac between 2 June 2004 – 19 June 2005. Following her resignation she worked as a lawyer in New Zealand until 2009, then returned to Rarotonga with her husband and family and took up a position as General Counsel for Southpac from 31 May 2010.

[10] She now has two young children with a third due on about 1 August 2013 following which she expects to be on maternity leave for six weeks.

[11] The two agreements signed between the parties on 31 May 2010[3] are pivotal to this case and it is necessary to consider them in detail. The Employment Agreement carefully described Mrs Ponia's duties and responsibilities as involving:

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[2] eg. s 23 of the International Trusts Act 1994, s 45 of the Trustee Companies Act 1981-82, s 227 of the International Companies Act 1981-82, s 72(4) of the Limited Liability Companies Act 2008 and s 74 of the International Partnerships Act 1984

[3] the agreements are identical with those signed on 1 June 2004 relating to Mrs Ponia's earlier employment by Southpac with the exception of variations in the rate of pay and other matters of no relevance to this case

2.4 Your specific duties shall include:

(a) the provision of legal, corporate and trustee services to international trusts and companies registered in the Cook Islands with the Company. You will be required to gain a degree of experience and knowledge of Cook Islands International Trust and Corporate Law, including the common law, with particular reference to trusts registered under the International Trusts Act 1984;

(b) general management of the administration and affairs of individual international trusts, including, but not limited to, legal advice. This will involve direct liaison and communication with our trust and corporate clientele. You will be expected at all times to maintain high standards of professionalism and decorum in dealing with clients and colleagues;

(c) assisting the Company on matters of trust and corporate law as they affect the establishment and administration of international trust banks and companies, the accounting of trust assets, acquisitions, transfers, establishment and maintenance of trust records and reporting procedures;

(d) such other duties as are allocated to you from time to time by the management of the Company.

[12] Then, after dealing with matters of remuneration, leave entitlement and the like, it dealt with termination and expressly provided that Southpac may end Mrs Ponia's employment for "any serious misdemeanour" which included:

> "... breach of confidentiality as to the affairs of a client or the Company, a breach (actual or anticipated) of the Confidentiality Agreement, or any similar or other behaviour incompatible with the person being an employee of the Company".

[13] The Agreement also included, in clause 9, a condition that Mrs Ponia enter into a "formal deed relating to confidential information and restraint of future employment" with it being a "further condition of this contract that you comply with terms of that deed at all times".

[14] The Confidentiality Agreement of 31 May 2010 first comprehensively defined "confidential information" in the following terms[4]:

[4] Clause 1.5

(a) any information relating to the business activities, operation, organisation, financial affairs, methods, technology, contractual arrangements or other dealings, transactions or affairs of and concerning the Group;

(b) any trade secrets, intellectual property, specialist know-how or practice in any field in which the Group, or any member thereof may from time to time engage in business;

(c) client or client related lists, documents, files or correspondence or other information relating to any client of the Group;

(d) any promotional or marketing reports or materials;

(e) performance reports, or profitability figures or Company or Group accounts or other financial information in relation to the Group's business, or in relation to any customer or client of the Group;

which has come to the knowledge of the Employee or which has been disclosed or might reasonably be understood to have been disclosed to the Employee in confidence, other than information which is already in the public domain or which is obvious or trivial.

[15] It then, in clause 2.1, contained an acknowledgement by Mrs Ponia that all confidential information belonged to Southpac Group and if it were disclosed or "used to compete with the Group or solicit its customers, serious damage would be caused". Clause 2.2 then continued:

2.2 The Employee shall, during the continuance of the employment and after its termination, howsoever occasioned:

(a) use the Employee's best endeavours to prevent the use of disclosure of any confidential information;

(b) other than in a proper discharge of the Employee's duties to the Company, or as may be required by law, not disclose or attempt to disclose any confidential information to any person or entity other than a director or another employee of the Group authorised to use it;

(c) not use or attempt to use any confidential information, or any personal knowledge acquired of any clients of the Group, for the benefit of the Employee or for the benefit of any person or entity other than the Group, or in any manner which may injure or cause loss, whether directly or indirectly, to the Group;

(d) not at any time without the consent of the Managing Director remove from the Company premises any files, correspondence, reports, documents (including computer software and records) materials or any other information of or relating to the Company or its clients (including all copies and extracts thereof).

[16] Then, after recounting[5] that any intellectual property resulting from the Employee's work for Southpac was owned by the company, the Agreement continued:

> 4.0 **Non-Solicitation**
>
> 4.1 The Employee acknowledges that the identity of clients of the Group is confidential information, obtained as a result of substantial expense over several years.
>
> 4.2 The Employee therefore agrees that she shall not during her term of employment nor for a period of 24 months subsequent thereto, solicit directly or indirectly on her own behalf or on behalf of any other person or persons, any client of the Company including those with whom she has had dealings of any kind during her employment by the Group.
>
> 5.0 **Restraint of Employment**
>
> 5.1 The Employee agrees that on termination of her employment with the Company howsoever occurring, she shall not, for a period of 12 months commencing from the date of such termination:-
>
> (a) directly, or indirectly through any controlled entity or person, take up employment or become otherwise affiliated, associated, connected, engaged or interested in any capacity, including as a consultant or advisor, either in or outside the Cook Islands;
>
> (i) with any other licensed trustee company or offshore bank carrying on business in the Cook Islands; or
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> (ii) with any company, firm, partnership or entity in or outside of the Cook Islands if that entity is a parent, subsidiary or branch of, or otherwise affiliated, associated, connected or related to, a licensed trustee company or offshore bank carrying on business in the Cook Islands; or
>
> (iii) with any company, partnership or entity in the Cook islands which, in the reasonable opinion of the Company, exclusively, or pre-dominantly exclusively, provides services, advice or assistance to a particular licensed trustee company or offshore bank carrying on business in the Cook Islands.
>
> (b) directly, or indirectly through any controlled entity or person, carry on or be engaged, financially interested, assist, or concerned in any way, including as principal, agent, partner, director, shareholder or otherwise, in the business of, or in any business similar to, a licensed trustee company or offshore bank in the Cook Islands, including

[5] Clause 3

> seeking to establish a new business which will be in actual or potential competition with the Company.

[17] The Confidentiality Agreement concluded with an acknowledgement by Mrs Ponia that remedies for non-compliance might include but were "not limited to the right to obtain injunctive relief and/or damages".

[18] It seems the terms of the agreements just canvassed were common to employees of Southpac. They have been used for a number of years, there is little opportunity to negotiate on their terms[6] and some in similar terms were signed by two persons Mrs Ponia employed.

[19] Going back a little in time, Mr Steens became General Manager of Southpac in January 2012 and undertook a review of the company's organisational structure to seek ways of improving efficiency and profitability. By the end of the year his analysis suggested the company lacked strength in the marketing and business development side of the company's operation. He concluded that the position of General Counsel was superfluous and should be replaced by a Director – Client Services.

[20] Mr Steens said he discussed this rearrangement with Mrs Ponia on 24 January 2013 and told her he would be prepared to consider any application from her for the position of Director – Client Services. The disestablishment of Mrs Ponia's then position required the termination of her contract immediately and, rather than have her serve out the contract's required 3 months notice, Southpac paid her 3 months' salary in lieu of notice. This discussion was recorded in a letter Mr Steens gave Mrs Ponia on 25 January in which he reminded her of her obligations under the Confidentiality Agreement. Because it was a matter of some emphasis during argument, it should be noted the letter said:

> "I do not consider you as an appropriate candidate for the role of Manager – Client Services but I would be happy to consider your application for the position of Director – Client Services when I commence the recruitment process.

[6] apart, of course, from personal matters such as remuneration and other terms and conditions of appointment

> In accordance with the restructure I give you written notice that your employment with Southpac is terminated effective immediately in accordance with clause 7.1 of your Employment Agreement.
>
> I will arrange for payment of three months remuneration in lieu of notice.
>
> I would like to remind you of your obligations under the Confidentiality Agreement you entered into with the Company in respect to non-solicitation and restraint of employment. I intend that these be enforced as they have been executed however would consider reducing the restraint of employment clause to three months in return for your agreement that the above payment of three months remuneration is in full and final settlement of any obligations between the Company and yourself in respect to the employment agreement. If this is something that you wish to explore, please discuss with me.
>
> As your employment is now terminated I will assist you in collecting your personal effects now or if you prefer we can do this at 10am tomorrow morning.
>
> I would like to thank you for the work that you have done for Southpac in the past and wish you well for the future. It is not a personal practice of mine to give written references however I would be happy to give a certificate of employment and make myself available as a verbal referee if you would like."

[21] It also needs to be recorded that the interview appears to have been conducted in circumstances of some acrimony, even threats on Mrs Ponia's behalf, and that she takes a markedly different view of the circumstances. Those are issues which are not for determination on an application for an Interim Injunction as they will be issues at any substantive hearing.

[22] Mrs Ponia sought employment compatible with her qualifications and experience but opportunities were not available either in the general legal profession in Rarotonga[7] or elsewhere. After about three months without employment she was able to find a position with Asiaciti as "Legal Counsel – Compliance", the job specification for which relevantly reads:

> **Position Summary :** Responsible for:
>
> - All aspects of compliance with regulatory authorities in relation to structures administered by the Cook Islands office;
> - Bank account openings for structures administered by the Cook Islands.

[7] where most lawyers are sole practitioners without qualified employees

Primary functions :

- To develop systems to deal with FACTA[8] reporting and ensure that the Cook Islands office is FACTA compliant by no later than 31 October 2013.
- Responsibility for the implementation, continued operation and reporting required by the FACTA systems.
- To undertake and be responsible for the Know Your Client and Anti-Money Laundering processes applicable to structures administered by the Cook Islands office.
- To assure the roles of Money Laundering Reporting Officer and Compliance Officer in accordance with Cook Islands law.
- Be responsible for the bank account opening processes for Cook Islands administered entities.

Her work for Asiaciti is approximately half time.

PARTIES COMPETING VIEWS

[23] Mr Steens said that, during Mrs Ponia's recent employment by Southpac she was responsible not just for the provision of legal services but had "direct liaison and communication" with Southpac's trust and corporate clients. As part of the Defendant's senior management team Mrs Ponia had access to Southpac's financial client information and that of its associated companies, she knew of the ownership structure and ultimate beneficial owners of the privately owned bank and had access to all of Southpac's intellectual property including its precedents and marketing material. She was director of various Southpac wholly-owned subsidiaries. She was not greatly involved in marketing or business development.

[24] Mrs Ponia does not take issue with that overall description but seeks to diminish it saying, for example, that prospective clients are often sent draft trust and company documents and other information without confidentiality undertakings; that the anonymity of clients and their advisors can be compromised by their often visiting Rarotonga where they are known within the close-knit industry; that clients and trustee

[8] FATCA is Foreign Account Tax Compliance Act, USA legislation dealing with tax evasion by US citizens. Compliance with its requirements by 31 October 2013 is mandatory in the Cook Islands for the trustee companies. Mr Steens said compliance required a significant amount of work on their behalf.

company officers move between trustee companies; and that accordingly Mr Steens concerns are not quite as "black and white" as he avers.

[25] In particular, she says she has "no intention of breaching my confidentiality obligations at Southpac or jeopardising my career by doing so" and holds her "obligation to respect confidentiality as an extremely important obligation particularly as a solicitor and officer of this Court". She also makes the point – and in this she is supported by Mr Taylor, the Managing Director of Asiaciti – that she and it were careful to ensure her role with Asiaciti did not and could not require the use by Mrs Ponia of Southpac's confidential information. She says – and again is supported by Mr Taylor – that her current role differs from her former role because she is:

> "now developing a new compliance system for Asiaciti in the Cook Islands [to ensure the company complies with the FATCA registration timetable]. I am not dealing with clients or attorneys on developing and administering client trusts as I was with Southpac. I'm not required to solicit clients for Asiaciti in this role".

[26] In his affidavit, Mr Taylor gives assurances that:

(a) "Asiaciti has not sought or received any confidential information regarding Southpac... from Mrs Ponia" an assertion he particularises.

(b) "Asiaciti has not requested or required Mrs Ponia to solicit any customer of Southpac and ... will not request or require Mrs Ponia to solicit any customer of Southpac".

[27] As a result of all of the foregoing Southpac seeks an Interim Injunction against Mrs Ponia preventing her from:

(a) Using or attempting to use any confidential information belonging to the Defendant as defined in clause 1.5 of the Deed of Confidentiality dated 31 May 2010 between the Defendant and the Plaintiff;

(b) Using or attempting to use any personal knowledge acquired by the Plaintiff of any clients of the Defendant or its associated companies;

(c) Soliciting directly or indirectly any client of the Defendant including those with whom the Plaintiff has had dealings of any kind during her employment with the Defendant for a period of 24 months from 25 January 2013 or until further order of the Court;

(d) Taking up or continuing employment or becoming otherwise affiliated with any other licensed trustee company carrying on business in the Cook Islands, including Asiaciti Trust Pacific Limited, for a period of 12 months from 25 January 2013 or until further order of the Court.

[28] Mrs Ponia's stance is that an injunction is unnecessary and oppressive particularly in light of undertakings which she is prepared to give the Court in the following terms:

1. That the Plaintiff has and will continue to abide by the **confidentiality** provisions (clause 1.5 and 2.0) of the Deed of Confidentiality dated 31 May 2010 between the Defendant and Plaintiff ("the Deed"); and

2. That the Plaintiff has and will continue to abide by the **non-solicitation** provision (clause 4.0) of the Deed for a period of 12 months from 25 January 2013 or until further order of the Court;

3. That the Plaintiff has abided by the **restraint of employment** provision (clause 5.0) of the Deed for a period of not less than three months from 25 January 2013 to 29 April 2013.

LAW AND SUBMISSIONS

[29] Understandably enough, the parties and counsel took widely different views as to the proper outcome to the injunction application but there was little difference between counsel on the legal principles to be applied.

[30] It is well-settled that the tests to be applied by the Court in exercising its discretion as to whether to grant an Interim Injunction application are whether there is a serious question between the two parties to be tried, the balance of convenience and the overall justice of the case[9] but that those are indicative rather than rigid formulae[10].

[31] With more specific reference to employment disputes, Mr Hood, for Southpac, relied on *Allright v Canon New Zealand Ltd*[11] where the Plaintiff was employed by the Defendant in a very senior position but then took up employment with a competitor despite an agreement between the parties containing a restraint of trade covenant for 3 months and prohibition on the use or disclosure of confidential information. The New

[9] *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1995] 2NZLR129 (NZCA) citing the test enunciated in *American Cyanamid Co v. Ethicon Ltd* [1978] AC396

[10] it was not argued that Cook Islands law requires any departure from the New Zealand and English authority.

[11] (2008) 6 NZELR 367

Zealand Employment Court issued an injunction against him to debar his involvement with the competitor without the consent of the Defendant for 3 months after his departure. Judge Colgan defined the applicable principles as being whether there was an arguable case for substantive relief, whether the restraint of trade provision was enforceable; whether there was an alternative remedy such as damages available and if not where the balance of convenience lay; and the overall justice of the case[12]. In relation to the possibility of "innocent" disclosure – that following the Plaintiff judging incorrectly but innocently that the information disclosed was not confidential – Mr Hood pointed to the decision of the English Court of Appeal in ***The Littlewoods Organisation Ltd v Harris***[13]. There the Defendant, having been a senior operative of the Plaintiff, proposed to move to a competitor but was restrained on appeal from being engaged for a period in a limited sector of the rival's business. The judgment of Lord Denning MR first cited ***Herbert Morris Ltd v Saxelby***[14] where Lord Parker, speaking of stipulations to protect trade secrets or confidential information, said:

> "Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained."[15]

Following which the Master of the Rolls 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."

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[12] at 14.
[13] [1978] 1 ER 1026
[14] [1916] 1 AC 688,709
[15] at 1033

[32] A useful summary of the law on restraints of trade can be found in *Warmington v AFFCO New Zealand Ltd*[16] where the following appears:

> [42] Contractual provisions restricting the activities of employees after termination of their employment are, as a matter of legal policy, regarded as unenforceable unless they can be justified as reasonably necessary to protect proprietary interests of the employer in the public interest: see *Gallagher Group Ltd v Walley*[17].
>
> [43] The onus of establishing that a restrictive provision is reasonable is on the employer. A restraint of trade provision should be no wider than is required to protect the party in whose favour it is given.
>
> [44] A number of factors are to be considered in determining the reasonableness or otherwise of a restraint of trade provision. Restraints by employers are enforced only to the extent required to protect a proprietary interest of the employer. The nature of the employee's role and the employer's business, the geographical scope of the restraint, and its nature and duration are relevant factors in assessing whether a restraint is reasonably necessary.
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> [45] The reasonableness of a restraint of trade provision is to be determined at the time the agreement was entered into, not the time it is sought to be enforced: *Walley* at [23].

[33] And, in relation to confidentiality clauses and the possibility of inadvertent disclosure, in the same decision the following passages appear[18]:

> [68] Counsel submitted that where there is already the protection of a confidentiality clause in an agreement and no realistic evidence of the risk of inadvertent disclosure, a restraint of trade provision will not be justified. Reference was made to *Breweries (DB) Ltd v Marshall*[19]. There, the Court observed that:
>
> > I do not think that the Court should, in circumstances where there is no evidence or even suggestion of a deliberate breach of the restrictions upon confidentiality; give effect to a restraint on employment merely to ensure that there is no possibility of the confidentiality clause being intentionally breached. Not only is there no evidence against Mr Marshall in this regard but such evidence as there is touching upon potential disclosure of confidential information tends to emphasise that Lion in particular as Mr Marshall's prospective employer, will be vigilant to ensure that there is no breach of this covenant by him.

[16] (2012) 9 NZELR 287
[17] [1999] 1 ERNZ 490 (CA)
[18] at [68] to [69]
[19] [1994] 1 ERNZ 98

> [69] The presence of a confidentiality clause in an agreement does not, of itself, render a restraint of trade provision unreasonable. Whether a restraint of trade provision is reasonable in the circumstances will depend on the facts of the individual case. In dealing with an argument that a restraint of trade provision was unreasonable, as being unnecessary in the presence of an implied contractual obligation of confidence and the employee's undertaking that he would not breach that obligation, Judge Colgan in *Television New Zealand Ltd v Bradley*[20] said this:
>
> > Although I accept that it is tendered in good faith I am also satisfied that Mr Kiely is correct that it does not and indeed probably cannot, cover the inadvertent or unintended disclosure of what I am satisfied are arguably elements of confidential information. Although I accept there is no evidence that Mr Bradley has breached the Plaintiff's confidentiality or indeed any allegation that this has occurred, it is seriously arguable that he may be unable to adhere to the mutually exclusive obligations of maintaining the confidences of his former employer and performing the duties and meeting the expectations of his new employer to the best of his ability.

[34] Mr Hood submitted that the non-competition term between these parties was reasonably necessary to protect Southpac's proprietary interests because of the nature of its business, Mrs Ponia's position with the company, the consideration given for the restraint coupled with the risk the Plaintiff would intentionally or innocently use or disclose Southpac's confidential information or solicit its clients. He also submitted the Plaintiff's undertakings were inadequate.

[35] Elaborating, he pointed to the paramountcy of confidentiality in the Cook Islands offshore banking industry and the seniority of Mrs Ponia's position with Southpac. He relied on the significant income she was paid – several orders of magnitude greater than the Cook Islands' average income – and went on to submit there was a high possibility of Mrs Ponia disclosing Southpac's confidential information, whether intentionally or inadvertently, coupled with a likelihood she would solicit Southpac's clients. Her departure, he submitted, was acrimonious, by taking employment with Asiaciti she had disregarded the agreements between the parties and she then sued Southpac raising unheralded allegations of sexual harassment.

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[20] BC 1995 71126 HEC 14/95

[36] Mr Steens and Mr Hood placed significant reliance on the fact that, later on 25 January 2013 but after her employment was terminated, Mrs Ponia returned to Southpac's office and sent three emails to client attorneys in the United States advising them of her departure, her computer receiving, later on, friendly acknowledgements with requests for ongoing contact details. Mrs Ponia's emails – later deleted by her – were strong evidence, Mr Hood submitted, supporting the possibility of solicitation.

[37] Mr Hood argued, as he had in ***Allright***, that Mrs Ponia would use Southpac's confidential information judging incorrectly but innocently that the information was not confidential relying on Mrs Ponia's explanations to rebut Mr Steen's concerns. Because of her experience with Southpac, she would have, Mr Hood submitted, a "myriad of detailed information some of which is confidential and some of which is not but which in many cases will be intertwined" and may divulge that information to Southpac's competitor.

[38] Mr Hood submitted this case was on all fours with the passage from ***Television New Zealand*** cited. Accordingly Mrs Ponia's undertakings were insufficient. Damages would not be adequate relief for Southpac and both the balance of convenience and the overall justice of the case were in the Defendant's favour. Had Mrs Ponia wished to test the legitimacy of her actions she could, he submitted, have applied for relief under s 6 of the Illegal Contracts Act 1987.

[39] For Mrs Ponia, Ms Dew summarised her case as being that an Interim Injunction restraining her from continuing her new legal compliance role with Asiaciti was unwarranted and beyond what was reasonably required to meet the overall justice of the case. That was particularly because there were sufficient safeguards for Southpac in place, especially given Mrs Ponia's undertakings.

[40] She submitted Mrs Ponia had "observed" a 3 month restraint in her employment before taking up her Asiaciti role and that was a period acknowledged by Southpac as sufficient to protect is confidential information in its termination letter of 25 January 2013. She was, however, constrained to acknowledge that the 3 month period in that letter was conditional on Mrs Ponia abandoning any rights of action against Southpac and was a matter for discussion, rather than a concluded position.

[41] Describing the proposed restraint on Mrs Ponia's employment as being at the heart of the dispute between the parties, Ms Dew submitted that a 12 month restraint on an interim basis was well beyond what was necessary or reasonable to protect Southpac.

[42] Ms Dew conceded that Southpac had a serious question to be tried in relation to the restraint on employment given the terms of the Confidentiality Agreement and the Plaintiff's employment by Southpac's rival, but suggested the terms were unreasonable both geographically and timeously. Ms Dew supported that submission by a comprehensive review of New Zealand and United Kingdom employment cases where the average period of restraint appeared to be about 3 months and she emphasised that covenants restricting former employee's activities were, as a matter of legal policy, unenforceable unless they could be justified as reasonably necessary to protect the former employers proprietary interests plus were in the public interest[21]. Against that was strong public policy that employees should be permitted to advance themselves using and developing their skills, experience and general knowledge[22] Ms Dew submitted that the principles relating to the protection of confidential information held by former employees must satisfy the test that it is not trivial or public, is genuinely confidential and is not information so confidential that even if an employee has learnt it by heart, it requires to be protected from use outside the interests of the former employer[23].

[43] Ms Dew submitted that the New Zealand and British authorities on which both she and Mr Hood relied required modification in the context of the Cook Islands given its limited population and employment opportunities and the importance of the offshore banking industry to its economy.

[44] Ms Dew emphasised the lack of evidence that Mrs Ponia had breached her confidentiality obligations. The emails to former clients were, she submitted, innocuous and Southpac and the Court could derive comfort from the undertakings given by Mrs Ponia, and Mr Taylor's affidavit, that Asiaciti would respect her confidential obligations. Ms Dew also emphasised the lack of evidence of Mrs Ponia's breach. It could be assumed Southpac would have searched her computer and

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[21] *Dellar Group Ltd v Walley* [1999] 1 ERNZ 490 at [20] (NZCA)
[22] *Green v Transpacific Industries Group* (NZ) Ltd [2011] NZ EmpC 6 at [27]
[23] *Faccenda Chicken Ltd v Fowler* [1986] 1 All ER 724

other material for evidence of breach yet there was no evidence of Southpac clients deserting the Defendant at her motivation.

[45] Ms Dew said Mrs Ponia accepted that a period of non-solicitation was appropriate in light of her role at Southpac and the nature of its business. She had offered a period of 6 months and later increased it to 12, a period Ms Dew submitted was at the upper limit as what was reasonably necessary in the circumstances.

[46] Ms Dew submitted the restraint on employment clause was unreasonable not only geographically but in its scope which, on its face, could extend to any role with a trustee company, offshore bank or other company, even one which was not directly involved in the industry. Such a restraint maintained little balance between the competing interests of the employer and the employee. Ms Dew also emphasised that the contracts between the parties contained no separate consideration for the restraint.

[47] Moving to the balance of convenience, Ms Dew submitted the merits of the case favoured the Plaintiff. She challenged what might be regarded as the status quo in the present instance, emphasising Mrs Ponia's employment with Asiaciti for "2 months" and the prejudice to her were she now be obliged to leave that employment and risk losing her position.

[48] Ms Dew submitted there was no justifiable risk of innocent or inadvertent disclosure. Her new role did not conflict with her former, her departure was acrimonious, she again debunked the Defendant's reliance on the Plaintiffs emails and said there was no obligation on her to consult Southpac before accepting employment with Asiaciti. Ms Dew acknowledged the Plaintiff did not take action under the Illegal Contracts Act for a declaration as to her legal position, but submitted such was unnecessary and, in the Cook Islands' context, impractical.

[49] Mrs Ponia accepted that damages would not be an adequate remedy for Southpac but submitted, in the factual circumstances, there was no proof that Southpac would suffer any damage from her departure.

DISCUSSION AND DECISION

[50] There are several salient features of the contractual rights and obligations between these parties which the injunction application seeks to enforce.

[51] In the first place, the Confidentiality Agreement of 31 May 2010 not only very comprehensively defines "confidential information" but limits the activities of employees or former employees in three ways: use by them of the "confidential information" as defined; debarring their solicitation of Southpac clients for 24 months; and restraining them taking up employment with competitors or certain others for 12 months from the termination of their employment. Whilst it may be possible for these obligations to be enforced separately, they are obviously intended to be a contractual package with each obligation interdependent with the others. The parties in this case so treated them.

[52] When the various obligations are more closely analysed in terms of the authorities it is to be noted that:

(a) the bar on the use of "confidential information" is unlimited in the time it is intended to operate following termination of the employment agreement, unlimited geographically and unlimited in its reach in the sense that, on its face, it debars use of the "confidential information" for all time and in all ways unless the use is for the "benefit of the Employee or for the benefit of any person or entity other than the Group".

(b) the non-solicitation clause is also comprehensive in scope though it is not disputed that the "identity of clients" of Southpac, the object of the non-solicitation clause, is a matter of considerable importance to Southpac and its rivals. A significant part of the essence of the present dispute is whether the 24 month term non-solicitation term is reasonable.

(c) as to the restraint on employees' employment, what is important is the reasonableness of the restraint along with its reach. Ms Dew's submissions are pertinent that, on its face, the restraint provision debars employment not just with "any other licensed trustee company or offshore bank carrying on business in the Cook Islands" or their associated subsidiaries or parents "either in or outside the Cook Islands" but also extends to business concerns which predominantly provide services to such "licensed trustee company or offshore bank". It goes further and debars involvement directly or indirectly "in any way" in

> any business similar to licensed trustee companies or offshore banks in the Cook Islands. That analysis demonstrates the significant breadth and depth of the provision.

[53] Further, the enforceability of those provisions must be seen against the backdrop of their applying to all the Cook Islands, not just to Rarotonga[24], and the limited job market in the Cook Islands for those with experience and qualifications similar to Mrs Ponia's.

[54] Of the three obligations, those relating to confidentiality and non-solicitation cause no great difficulty in the present case because, as the contrasting provisions sought and offered by the parties and as described in [27] and [28] show, there is little difference between Southpac and Mrs Ponia.

[55] Southpac seeks an Interim Injunction restraining Mrs Ponia from using or attempting to use "confidential information" in terms of clause 1.5 of the deed dated 31 May 2010 and she undertakes to continue to abide by the confidentiality provisions in that agreement. The only significant difference between the parties is whether an Interim Injunction should issue against Mrs Ponia or whether her undertaking is sufficient protection for the Defendant.

[56] As remarked during discussion between Bench and bar during the hearing, at present, though filed in Court, Mrs Ponia's undertakings are not undertakings to the Court. That is a difference of significance in that undertakings inter partes and not to the Court are more difficult to enforce and the consequences less serious than undertakings by parties to the Court. Not only is that true generally but it is of particular importance in this case as undertakings by solicitors to the Court can result, in the event of breach, in the solicitor being struck off.

[57] In the Court's view, the possible sanctions for Mrs Ponia's undertakings, once converted into undertakings to the Court, are such that her undertaking relating to "confidential information" should provide sufficient protection for Southpac and Southpac's application for an injunction relating to "confidential information" should be adjourned and only revived in the event of claimed breach by Mrs Ponia.

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[24] though, in practical terms, that is likely to be the principal locale of their operation

[58] In relation to the use of "confidential information" there will therefore be orders:

(a) that, within three working days of delivery of this judgment, the Plaintiff file signed undertakings to the Court in terms of paragraph 1 of the undertaking previously offered and recited in [28] of this judgment.

(b) that the Defendant's application for an Interim Injunction against the Plaintiff in relation to the use or attempted use by her of "confidential information" is adjourned to be revived only in the event of alleged breach by the Plaintiff of her undertaking to the Court required in [58] (a) above.

[59] Apart from the duration of the non-solicitation of the clause of the Confidentiality Agreement of 31 May 2010, there is, again, no great dispute between the parties.

[60] Southpac's application (b) recited in [27] of this judgment goes beyond clause 4.1 of the Agreement which defines a facet of "confidential information" and the application in paragraph (c) amends the obligation in clause 4.2 of the contract. Mrs Ponia gives a general undertaking to continue to abide by that clause.

[61] In deciding the duration of the order that is justifiable relating to non-solicitation, the following matters are germane:

(a) the parties are at one in acknowledging the primacy of retaining clients of any trustee company or offshore bank in the Cook Islands

(b) the parties contracted for a 24 month non-solicitation period. Contracts are made to be observed.

(c) Mrs Ponia has offered a 12 month undertaking – though it needs to be modified to become an undertaking to the Court – to comply with the non-solicitation provision. The earlier remarks concerning undertakings generally and undertakings by solicitors to the Court apply equally to this aspect of the dispute.

[62] In relation to this phase of the dispute, Southpac relied heavily on Mrs Ponia's three 25 January 2013 emails to client attorneys but, in the context of an Interim Injunction, while those emails may be capable of being construed as solicitation attempts by her, such may not be found to be the case at the substantive hearing. Amongst the reasons for that tentative view are:

(a) the emails are all in identical form which suggests a template more than individualised solicitation.

(b) they might be open to the construction that they were sent in furtherance of Mrs Ponia's obligations in clause 2.4(b) of the Employment Agreement of 31 May 2010. In the emotionally charged circumstances which no doubt obtained between Mr Steens and Mrs Ponia on 25 January 2013, her sending the emails might ultimately be found not to have been in breach of her non-solicitation obligations especially when, at the time of sending them, she had no job or prospects of a job. Solicitation may turn out to be hard to prove in those circumstances.

(c) Mrs Ponia would not have been able to receive the attorneys' replies as they came to her Southpac computer. That is of some importance when it is not uncommonly the case in litigation such as this, that emails and replies are sent by and to personal computers.

(d) While it may be assumed that Southpac has endeavoured to obtain further evidence of the possible breach by Mrs Ponia of the non-solicitation provisions it is correct, as Ms Dew emphasised, that nothing further appears in evidence between 25 January 2013, the date of her departure and 24 June 2013, the date on which Mr Steens swore his affidavit in reply.

[63] Against that is the fact, as Mr Steens emphasised, that Mrs Ponia not only sent the emails but deleted them from her office computer.

[64] In those circumstances, although a period of 24 months may be longer than necessary to protect Southpac, it is the period for which the parties contracted and holding Mrs Ponia to the contractual term would appear to impose no unreasonable

additional burden on her. In those circumstances, her undertaking to the Court should be sufficient and Southpac's application in relation to non-solicitation should again be adjourned and revived only on further allegations of breach.

[65] In those circumstances, there will be Orders:

(a) that, within three working days of delivery of this judgment, Mrs Ponia is to file an undertaking to the Court that until 25 January 2015 she will not solicit directly or indirectly on her own behalf or on behalf of any other person or persons, any client of the Defendant including those with whom she has had dealings of any kind during her employment by it; and

(b) the Defendant's application for an Interim Injunction against the Plaintiff relating to non-solicitation be adjourned to be revived in relation to any allegation of breach of the undertaking in [65] (a) hereof.

[66] The restraint of employment provision is the area where the parties are widest apart. Southpac seeks the injunction recited in [27] of this judgment – the wording of which is a significant reduction from the wording of clause 5 of the Confidentiality Agreement of 31 May 2010 – and Mrs Ponia offers an undertaking that she has abided by the employment restraint provision from 25 January 2013 to 29 April 2013.

[67] The suggestion that Mrs Ponia "observed" the restraint of employment provision for three months after leaving Southpac overstates the position. Although the evidence to date is that she tried to obtain other employment with Cook Islands' lawyers and perhaps other trustee companies after she and Southpac parted company on 25 January 2013, the job market in Rarotonga was such that no comparable employment was available. Thus the fact Mrs Ponia did not take up employment – which she admits was in breach of clause 5 of the Confidentiality Agreement of 31 May 2010 – until accepting employment with Asiaciti on 22 April 2013 and commencing in her role on 30 April was because no other comparable job was available rather than that she was deliberately "observing" a restraint period of three months.

[68] It is a further overstatement to suggest, as Ms Dew did in her submissions, that Mrs Ponia has now served a further "2 months" period of restraint. The fact is that

Mrs Ponia was unable to obtain a position – which is plainly in breach of clause 5 – for three months, five days, after leaving Southpac and, at the date of the hearing, had been in employment which breached that clause for a further 35 days.

[69] What needs, however, to be factored into the discussions on this aspect of the dispute is, first, that Mrs Ponia will be on maternity leave for what the evidence suggests will be six weeks from 1 August 2013 – 12 September 2013 and, secondly, that her current part-time role is principally confined to amending Asiaciti's systems to ensure it is compliant with the FATCA statute by 31 October 2013.

[70] As the authorities clearly demonstrate, covenants in the restraint of employment area are unenforceable except to the extent Courts regard them as reasonably necessary to safeguard former employers' interests and to the extent they are consonant with the public interest.

[71] Here, there is force in Mr Hood's submission that, at least during the restrained period, there is a possibility of innocent disclosure of Southpac's confidential information by Mrs Ponia to her new employer. It would not be possible during that period for her to separate out information acquired from her legal training, from her first stint at Southpac and from her second.

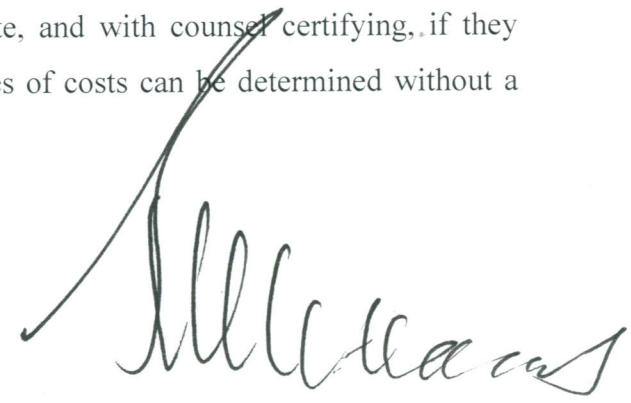
[72] Taking all those factors into account, the Court's view is that Mrs Ponia should be held to her contractual obligations in clause 5 but only for what is regarded as a reasonable period, namely somewhat less than the 12 months contracted for, and in a limited field of occupation.

[73] Because of the Plaintiff's breach of the restraint of employment provision, the Court's view is that this is not an aspect of the dispute between the parties which can be adequately covered by an undertaking from the Plaintiff. There will therefore be an Interim Injunction that, other than in relation to the first four bulletpoints in Asiaciti's job specification for the position now occupied by the Plaintiff set out in [22] of this judgment, the Plaintiff be restrained from taking up or continuing employment or becoming otherwise affiliated with any licensed trustee company carrying on business in the Cook Islands other than Southpac and Asiaciti for a period of just over 9 months namely from 25 January 2013 until 31 October 2013.

[74] For the avoidance of doubt, the Court's intention in that order is to restrict Mrs Ponia's employment with Asiaciti to the work she is currently undertaking for that company in ensuring it is compliant with FATCA until the ultimate date for compliance, 31 October 2013. The work she is permitted to do is to be that described in the first four bulletpoints of the specification for the position she now holds but she is to be excluded from the fifth bulletpoint, it appearing that that provision is wider than is required for Asiaciti to become FATCA compliant by due date.

COSTS

[75] This being an Interim Injunction application where the Plaintiff's undertakings have been held to provide sufficient safeguard for the Defendant on two of the three grounds sought but an injunction has been issued on the third ground, the Court's current inclination is that costs should lie where they fall. However, if, despite that, either party wishes to pursue the issue of the costs and the topic is not capable of agreement between counsel, memoranda may be filed (maximum 5 pages) with that from the Defendant being due within 28 days of delivery of this judgment and that from the Plaintiff within 35 days of that date, and with counsel certifying, if they consider it appropriate so to do, that all issues of costs can be determined without a further hearing.



Hugh Williams, J