RESTRAINT OF TRADE AND PUBLIC INTEREST

Thomas Cowan & Co. Ltd. v. *Orme*

The recent Singapore case of *Thomas Cowan & Co. Ltd.* v. *Orme* [1] is interesting not only because it concerns a much litigated field in the law of contracts but also because of the fresh and novel approach of the learned judge in deciding the issue before him.

The defendant was engaged by the plaintiffs, who were carrying on business as White Ant and General Pest Exterminators and Fumigators. He made a covenant as follows: "On leaving the services of the employer for any reason whatsoever either pursuant to this Agreement or on any breach of this Agreement [he] shall not carry on the business of White Ant Exterminator or Fumigator anywhere in the Island of Singapore either by himself or in partnership with others nor shall he take employment with any person, firm or corporation carrying on the business of White Ant Exterminators or Fumigators or any such similar business until the period of three years has expired from the date of the employee leaving the services of the employer." After leaving the plaintiffs' employment, the defendant became a director in another company carrying on similar business, and the plaintiffs thereupon sought to have the covenant enforced against him.

The points arising from the case may be considered under the following heads: —

(1) *Reasonableness of restraint as regards the interests of the parties.*

Dealing with the question whether the covenant is designed to protect the proprietary interest of the employer or merely to prevent competition, Chua J. found that the defendant "by reason of his employment by the plaintiffs, acquired special knowledge and became acquainted with the trade secrets and information relating to the business of the plaintiffs and [was] in a position to entice away the customers of the plaintiffs." [2] As to the area of restraint imposed by the covenant the learned judge held that it was not unreasonable in view of the fact that the plaintiffs carry on business not only in Singapore but in the Federation of Malaya, Borneo and Sarawak. The learned judge also held that the duration of the covenant *(viz., 3*

1. (1961) 27 M.L.J. 41.
2. *Ibid.* at p. 42.

years) was not too excessive. On the whole the covenant was, therefore, reasonable as regards the interests of the parties themselves.

(2) *Reasonableness of restraint as regards the interests of the public*

It is well recognised that to be valid a covenant in restraint of trade must not only be reasonable as between the contracting parties but it must also be reasonable in the interests of the public. If the covenant does not fulfil the latter condition, even though it may be reasonable as between the parties, it is void. However, as Cheshire and Fifoot points out, this is a line of attack which can seldom succeed because "it is difficult to imagine circumstances which can render a covenant injurious to the public if it is reasonable between the parties. In a few cases, indeed, injury to the public has been a contributory, though apparently never the sole, cause for the invalidity of a restraint."[3] Moreover, one may expect the Courts to be rather cautious in their approach to the question of public interest. [4] Thus there has so far been only one English case of substantial importance on the point: *Wyatt* v. *Kreglinger and Fernau.*[5] In that case the employers wrote to the employee stating that on the employee's retirement they would pay him an annual pension of £200 provided that he did not enter the wool trade. There was some doubt as to whether there was a proper contract, but the majority of the Court of Appeal were of the opinion that there was. The Court was, however, unanimous in holding that the contract was void as being contrary to the public interest, since its effect would be to deprive the community of the services of someone who might be of benefit to it in his own trade. Even in *Wyatt's case,* however, injury to the public interest appeared to be only an additional ground for invalidating the contract.

What makes the present case so interesting is the fact that the learned judge held the covenant void on the sole ground that it is contrary to the public interest. Although the covenant was not unreasonable as between the parties (having regard to the nature of the defendant's employment, the area of restraint imposed by the covenant and its duration) yet it was detrimental to the community at large since (as was found by the learned judge) it created a virtual monopoly of fumigation work in Singapore on the part of the plaintiffs. It is contrary to the public interest that the plaintiffs should, by the covenant, be able to monopolise fumigation work in Singapore.

This realistic approach of the learned judge has much to commend itself, and gives an added importance to the doctrine of public policy in the field of contracts in restraint of trade. Whilst public policy is undoubtedly an "unruly horse," it has been aptly invoked in the instant case. There is, moreover, some authority that an agreement which creates a monopoly of employment in a particular trade is void as being contrary to public policy.[6] Whether an agreement which falls short of creating

3. Cheshire and Fifoot, *Law of Contract* (5th ed.) at p. 318. See *Underwood (E.) and Son Ltd.* v. *Barker* [1899] 1 Ch. 300.

4. A good illustration of this cautious approach of the courts to the question of public interest is provided by the recent English case, *Kores Manufacturing Co. Ltd.* v. *Kolok Manufacturing Co. Ltd.* [1959] 1 Ch. 108. At first instance, Lloyd-Jacob J. held that the contract in that case was void on the additional ground that it was contrary to public interest. While affirming Lloyd-Jacob J.'s judgment, the Court of Appeal preferred to base their decision on the sole ground that the agreement was unreasonable in the interests of the parties and to leave open the question of public interest.

5. [1933] 1 K.B. 793; [1933] All E.R. Rep. 349.

6. See *Attorney-General for Australia* v. *Adelaide Steamship Co. Ltd.* [1913] A.C. 781 at p. 796, where Lord Parker of Waddington, delivering the opinion of the Privy Council, observed: "Although, therefore, the whole subject may some day have to be reconsidered, there is at present grounds for assuming that a contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce ... a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent." A similar suggestion was made by Lindley L.J. in *Underwood (E.) & Son Ltd.* v. *Parker* [1899] 1 Ch. 300 at p. 305.

a monopoly may be invalidated on the sole ground of public policy is still an open point.

(3) *Onus of Proof*

The onus of establishing that the covenant is reasonable in the interests of the parties lies on the person upholding the covenant.[7] But once it is shown that the covenant is reasonable in the interests of the parties, the onus is on the party attacking the covenant to establish that it is unreasonable in reference to the interest of the public; and this onus will be no light one.[8]

(4) *Severability of Covenant*

Dealing with the question of the severability of the covenant the learned judge held that it was a single covenant for the protection of the plaintiffs' entire business, and not two distinct covenants, one relating to the business of White Ant Exterminator and the other to the business of Fumigator. Hence, on the authority of *Attwood* v. *Lamont*[9] the covenant could not be severed so as to allow its enforcement in part. In adopting the test laid down by the Court of Appeal in *Attwood* v. *Lamont,* viz., that a composite covenant may only be severed if on its true construction the covenant consists of two or more separate covenants, the learned judge in effect underlines the insufficiency of the "blue pencil" rule. The requirement that the covenant must be a combination of several distinct covenants, and not a single covenant, is however, not entirely satisfactory as it is based on neither logical nor grammatical distinction, and may indeed be elusive in practice.

Conclusion

In conclusion it may be observed that the courts have hitherto shown a tendency to identify the interests of the parties with the public interest. No doubt there have been important and authoritative dicta to suggest that these two interests are really distinct.[10] The present case emphasises the importance of this distinction, and, it is hoped, is representative of a new tendency in deciding legal issues in the light of the social and economic conditions of the day.

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7. *Morris* v. *Saxelby* [1916] 1 A.C. 688 at pp. 700, 706; *Attwood* v. *Lamont* [1920] 3 K.B. 571, at pp. 587-588.

8. *Attorney-General for Australia* v. *Adelaide Steamship Co. Ltd.* [1913] A.C. 781 at p. 797.

9. [1920] 3 K.B. 571.

10. In *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society* [1919] A.C. 548 at pp. 563-4, Lord Birkenhead L.C. emphasised that "a contract which is in restraint of trade cannot be enforced unless (a) it *is* reasonable as between the parties; (b) it is consistent with the interests of the public . . . Every contract therefore which is impeached as being in restraint of trade must submit itself to the two standards indicated." See also *Vancouver Malt and Sake Brewing Co.* v. *Vancouver Breweries Ltd.* [1934] A.C. 181 at p. 189.