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2018/33157

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

NORTH WEST BOOKMAKERS LTD t/a LADBROKES

Plaintiff

and

GALA CASE LTD t/a TOALS BOOKMAKERS

Defendant

McBRIDE J

Introduction

[1] The plaintiff by Notice of Motion dated 28 March 2018 seeks an interlocutory injunction to restrain the defendant from making or continuing to make an application for a bookmaking office licence in respect of premises situate and known as 12-14 Quay Street, Bangor ("the subject premises") on the basis of an agreement dated 8 March 2004.

[2] This application was grounded on a writ issued on 23 March 2018 whereby the plaintiff sought the following relief against the defendant:

(i) An injunction restraining the defendant whether acting by its officers, directors, servants and agents or otherwise howsoever, from making an application for a bookmaking office licence in respect of the subject premises;

(ii) A declaration that the defendant, whether acting by its officers, directors, servants and agents, is prohibited from making an application for a bookmaking office licence in respect of the subject premises;

(iii) A declaration that the defendant, whether acting by its officers, directors, servants and agents, shall not financially assist and/or nominate any person, partnership or company in making an application for a bookmaking office licence in respect of the subject premises;

(iv) A declaration that the defendant, its officers, directors, servants and agents, are obliged to observe and perform and adhere to the agreement dated 8 March 2004 in the future;

(v) Damages;

(vi) Interest; and

(vii) Costs.

[3] The plaintiff was represented by Mr Brian Fee QC with Mr Atchison of counsel. The defendant was represented by Mr Liam McCollum QC with Mr Michael Lavery of counsel. I am grateful to all counsel for their detailed and well-researched skeleton arguments and oral submissions.

Evidence

[4] The plaintiff's application was grounded on the affidavits of: Edward McAllister, Solicitor, sworn on 28 February 2018; a replying affidavit sworn on 10 July 2018 and a supplementary affidavit sworn on 13 March 2019. The defendant's evidence consisted of an affidavit filed by Damien Agnew, Solicitor, sworn on 25 May 2018. I note that the affidavits refer not only to factual matters but also contain a number of legal arguments. Affidavits should only contain evidence. In the event affidavits refer substantially or only to legal arguments the court may disallow the costs of same. This court further reminds practitioners of the importance of abiding by the provisions of Order 41 as a failure to do so may mean that the court will either give little or no weight to the affidavit evidence and/or disallow the costs of same.

Background/Chronology

[5] The following background facts set out in the affidavit evidence filed by Edward McAllister are not in contention, as appears from the affidavit of Damien Agnew:

(a) Toals Bookmakers ("Toals") made an application ("Toals' Application") dated 1 May 2002 under Article 26 of the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 for an order authorising them to carry on a bookmaking office business temporarily at the subject premises, on the basis that they were unable, for reasons falling within Article 26, to carry

on with said business at their existing premises at 2A Bank Lane, Bangor, for which they held a valid bookmaking office licence.

(b) Toals had made a similar application on 8 August 2001. As a result of objections they withdrew that application.

(c) Michael Bernard Eastwood ran a bookmaking business from premises at 38 Queen's Parade, Bangor. He held a valid bookmaking office licence and the leasehold interest in those premises. On 19 October 1988 he entered into a Declaration of Trust whereby he declared that he held the premises at 38 Queen's Parade, Bangor, together with the licence and assets, in trust for his father, Bernard Joseph Eastwood. Subsequently, his father acquired the legal interest in the premises at 38 Queen's Parade, Bangor. By a further Declaration of Trust dated 15 March 2000, Michael Bernard Eastwood declared that the licence and assets attaching to the premises at 38 Queen's Parade, Bangor, were held in trust for his parents, namely Bernard Joseph Eastwood and Frances Bridget Eastwood.

(d) Michael Bernard Eastwood and a number of other bookmakers in Bangor objected to Toals' application. Mr John Fyffe, Resident Magistrate, heard Toals' application at Bangor Magistrates Court. The objecting bookmakers were represented by the same junior and senior counsel. Judgment was reserved and then delivered orally on 24 July 2002. A written judgment was provided subsequently.

(e) In his judgment the Resident Magistrate held that he was satisfied that the application had been brought in an attempt to avoid having to show "inadequacy" when making an application under Article 12(1) for a full licence in respect of the subject premises. In relation to the jurisdictional question whether the objecting bookmakers had locus standi given that the police are the only notice party to an Article 26(1) application, he held that under Article 6 of the ECHR all interested parties have a right to be heard and accordingly he allowed the objecting bookmakers including Michael Bernard Eastwood to be heard.

(f) Toals lodged a Notice of Appeal to the County Court dated 26 July 2002.

(g) The appeal was part heard by Judge Peter Smyth QC. Before it was relisted a written agreement dated 8 March 2004 ("the settlement agreement") was entered into.

The Settlement Agreement

(h) The settlement agreement was entered into between Toals of the one part and Michael Toal, Gerard Fox, Michael Vincent Smith, Patrick Joseph Smith, Michael Sawey and Michael Bernard Eastwood, who were collectively

referred to as "the objecting bookmakers", of the other part. The settlement agreement was signed on behalf of Toals by G Toal, Director/Secretary and Michael Toal. The other signatories to the settlement agreement were Michael Toal, Gary Toal, Gerald Fox, Michael Vincent Smith, Patrick Joseph Smith, Michael Sawey and Michael Bernard Eastwood.

(i) Clauses 1-7 of the settlement agreement set out the relevant chronology. Paragraphs 8-12 provide as follows:

> "8. That Toals will withdraw their appeal against the order of North Down Magistrates Court dated 24 July 2002 dismissing their application under Article 26(1).
>
> 9. That Toals, their shareholders and directors, shall not at any time make an application under the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985, to obtain a bookmaking office licence for the premises at 12-14 Quay Street, Bangor.
>
> 10(a) That Toals shall continue to conduct their bookmaking business in their premises at 2A Bank Lane, Bangor, under their booking making office licence.
>
> (b) That Toals shall not apply to relocate their business and bookmaking office licence from 2A Bank Lane, Bangor, except for a proper and genuine reason.
>
> 11. That Michael Toal, Gary Toal and Toals Bookmakers shall not financially assist and/or nominate any person, partnership or company, to make applications for a bookmaking office licence for the premises at 12-14 Quay Street, Bangor.
>
> 12. In consideration of the presence herein the objecting bookmakers shall not enforce the order for payment of costs made at North Down Magistrates Court on 24 July 2002 against Toals. The said costs have been billed at £34,114.54 but have not been taxed or assessed."

Deed of Assignment and Conveyance

(j) By a Deed of Assignment and Conveyance dated 17 September 2004, Michael Bernard Eastwood transferred all his interest in the licence attaching to 38 Queen's Parade, Bangor, to Bernard Joseph Eastwood and Frances Bridget Eastwood (Mr and Mrs Eastwood) and Edwin McLaughlin and Stephen Thomas Charles Eastwood (referred to as the Eastwood Discretionary Trust).

(k) On 6 February 2008 Mr and Mrs Eastwood, Edwin McLaughlin and Stephen Thomas Charles Eastwood as Trustees of the Eastwood Discretionary Trust entered into an Asset Purchase Agreement with North West Bookmakers Ltd and Ladbrokes Betting and Gaming Ltd whereby they sold their business of operating bookmaking offices.

Asset Purchase Agreement

(l) The Eastwood Discretionary Trust sold all the assets set out at Clause 2.1 paragraphs (a)-(l) to the plaintiff. The assets included:

> "(a) The goodwill.
>
> (b) The leasehold properties in accordance with Schedule 2.
>
> (c) The fixed assets.
>
> (d) The bookmakers office licences used in connection with the business in accordance with Schedule 5.
>
> …
>
> (k) All (if any) of the other assets, property or rights of the seller relating to or connected with, or belonging to or required or intended for use in, the business or in the properties in which are not otherwise described in this Clause 2.1 but not the excluded assets or the excluded business.
>
> (l) All the sellers rights against third parties, including rights under any warranties, conditions, guarantees or indemnities are under the Sale of Goods Act 1979 relating to any of the assets."

The excluded assets were set out at Clause 2.2 and in accordance with Clause 2.2 paragraph (h), specifically excluded,

> "all contracts and arrangements relating to the business entered into outside the ordinary course of business".

Assets were defined as "the property rights and assets of the business".

Business was defined as "the businesses of operating bookmaking offices."

Recent Chronology

(m) In July 2016 Toals Bookmakers transferred all its assets to the defendant, Gala Case Ltd.

(o) On 12 August 2017 the defendant applied for a bookmakers office licence in respect of the subject premises.

(p) The plaintiff served a Notice of Objection on 14 August 2017.

(q) On 7 December 2017 the High Court stayed the application for grant of the bookmaking office licence pending the outcome of these proceedings.

Submissions by the parties

[6] The plaintiff submitted that the defendant was precluded from applying for a bookmaking office licence in respect of the subject premises by reason of the provisions of Clauses 9 and 11 of the settlement agreement.

[7] The defendant submitted that the settlement agreement was void and unenforceable because:

(a) It was not supported by consideration.

(b) The defendant was not a party to it and therefore not bound by it.

(c) The defendant as a successor in title was not bound as it did not bind successors.

(d) The plaintiff could not enforce the covenant as the benefit of the covenant was not assigned to it.

(e) The covenant in the settlement agreement was an unlawful restraint of trade and therefore unenforceable.

Questions for consideration

[8] Before determining whether to grant the relief sought or any relief the court must first determine whether the covenant in the settlement agreement is enforceable between the parties. To determine this question it is therefore necessary to ask and answer the following questions:

(i) Is the settlement agreement supported by consideration?

(ii) Is the defendant bound by the settlement agreement either as a party or in the alternative as a successor in title to a party?

(iii) Was the benefit of the covenant in the settlement agreement assigned to the plaintiff?

(iv) Is the settlement agreement an unlawful restraint of trade?

(v) If the settlement agreement is enforceable should the court grant the equitable relief sought and if so what relief should be granted?

Question 1 - Is the settlement agreement supported by consideration?

[9] Mr McCollum on behalf of the defendant submitted that the settlement agreement was unenforceable as no consideration moved from the objecting bookmakers, one of whom was Michael Bernard Eastwood. Although it was submitted consideration consisted of an agreement not to enforce a costs order against the defendant, he submitted that Michael Bernard Eastwood and the other objecting bookmakers were not entitled to the benefit of the costs order made by the court on 24 July 2002 as they lacked locus standi to object to Toals' application. In the alternative he submitted that the only person entitled to the benefit of the costs order was Mr Gerald Fox who was the only person named on the proceedings as an objector. Accordingly, he submitted that Clause 12 of the settlement agreement which stated the consideration for the agreement consisted of the objecting bookmakers agreeing not to enforce the court costs order was wrong. Consequently, Michael Bernard Eastwood and all the other objecting bookmakers, save perhaps Mr Fox, did not give any consideration for the settlement agreement.

[10] Mr Fee on behalf of the plaintiff submitted that the settlement agreement was supported by consideration as the Resident Magistrate had held that the objecting bookmakers had locus standi on the basis of the provisions of the ECHR as supported by dicta in *Re McLean and others' Application* [1994] NIJB 149. Accordingly, the Resident Magistrate was entitled to make the costs order. He further submitted that whether the costs order was made in favour of Mr Gerald Fox or the objecting bookmakers generally did not matter as Mr Fox, acted on behalf of all the objecting bookmakers and therefore each objecting bookmaker had the benefit of the costs order. Although Toals initially appealed the case, they withdrew their appeal and

entered into the settlement agreement in which they expressly accepted at Clause 12 that the objecting bookmakers would not enforce the costs order made by the Resident Magistrate in consideration of the settlement agreement. As a result he submitted there were mutual promises made by the parties which constituted consideration. In the alternative he submitted that consideration consisted in all the parties compromising and forbearing to sue.

Consideration of Question 1

[11] As a general rule a promise is not binding as a contract unless it is either made in a Deed or supported by some "consideration". The traditional definition of consideration concentrates on the requirement that "something of value" must be given and accordingly states that consideration is either some detriment to the promisee or some benefit to the promisor.

[12] I am satisfied that although Gerald Fox was named on the proceedings he acted on behalf of all the objecting bookmakers and this was understood and agreed by all the parties including Toals. I am also satisfied that the Resident Magistrate made a costs order against Toals and that all the objecting bookmakers and not just Mr Fox had the benefit of this costs order. Toals could have appealed this cost order on the basis the court lacked jurisdiction to make such an order because the objectors lacked locus standi. Although Toals commenced an appeal they did not pursue it. Rather, on the basis of legal advice, they entered into the settlement agreement, in which, at Clause 12 they acknowledged the enforceability of the costs order and further accepted that the agreement by the objecting bookmakers not to enforce their costs order amounted to 'consideration' for the settlement agreement.

[13] In light of the provisions of Clause 12; the fact the parties entered into mutual promises; and, the fact the settlement agreement was an agreement under which all the parties entered into a compromise and agreed to forbear suing each other, I am satisfied that the agreement is supported by consideration.

Question 2 – Is the defendant bound by the settlement agreement?

[14] Mr McCollum submitted that the defendant was not bound by the settlement agreement as he was not a party to it. He further submitted that the defendant, as a successor in title was not bound, as the covenant in the settlement agreement was personal and therefore not capable of assignment.

[15] Mr Fee in contrast submitted that the defendant was either a party to the settlement agreement and/or in the alternative was bound by its terms as a successor in title, because the covenant in the settlement agreement was capable of assignment and was actually assigned to the defendant.

Consideration of Question 2

[16] The settlement agreement was entered into by Toals. The defendants in this action are Gala Case Ltd trading as Toals Bookmakers ("Gala"). From the affidavits of Edward McAllister it appears that:

- Gary Toal is a director and main shareholder of both Toals and Gala;
- He is the registered person of significant control in both companies;
- Both companies conduct the same business, namely gambling and betting activities;
- Both have the same registered office;
- Gary Toal treats Gala as being synonymous with Toals and has referred to it as "his" company in email exchanges;
- Gary Toal signs the financial statements for Gala; and
- Gala employees participate in a defined contribution pension scheme provided by Toals.

[17] Whilst there is a close connection between Toals and the defendant, I am nonetheless satisfied that, in law, they are two distinct legal entities. Indeed, Mr McAllister in his evidence did not go so far as to say they were one and the same legal entity and Mr Fee, at hearing, accepted that they were different legal entities. Accordingly I find that the defendant was not a party to the settlement agreement and therefore not bound by it on that basis.

[18] Mr Fee submitted that, notwithstanding the fact the defendant was in law a distinct entity from Toals, Gary Toal, as a result of his position, was in breach of Clause 11 of the settlement agreement as he was financially assisting and/or nominating the defendant to make the application for the bookmaking office licence for the subject premises.

[19] Given the links that Gary Toal has with the defendant, it may be that he is acting in breach of Clause 11 of the settlement agreement. Gary Toal however is not a party to these proceedings and no injunctive relief is sought against him. He has not had the opportunity to respond to any of the allegations made that he is in breach of Clause 11 and accordingly this court makes no ruling on this point.

[20] The defendant accepted that it is the successor in title to Toals, as in or around July 2016 Toals transferred all its assets in its bookmaking chain to the defendant. Notwithstanding this the defendant submitted that it was not bound by any covenants contained in the settlement agreement as the settlement agreement did

not refer to "heirs and assigns" thus signifying that the covenant was personal to Toals. Indeed, an earlier draft settlement agreement which contained the words "heirs and assigns" was amended so that these words were deleted from the final settlement agreement. Accordingly, the defendant submitted that the settlement agreement could not bind it as a successor in title.

[21] The general rule is that a contract binds only the parties to it. Whilst there are a number of exceptions to the 'privity of contract' rule generally the "burden" of a covenant in an agreement does not bind a third party. One exception to the rule that the burden of a covenant does not bind successors in title, is when the purchaser of land has notice, whether actual or constructive, that it is subject to a covenant – See *Binions v Evans* [1972] Ch 359.

[22] I am satisfied that when the defendant purchased Toals' business, which included the subject premises, it had actual or constructive notice of the terms of the settlement agreement as Gary Toal was a director in both companies and was a signatory to the settlement agreement. Accordingly I find that the covenant in the settlement agreement is binding on the defendant.

Question 3 – Was the benefit of the covenant in the settlement agreement assigned to the plaintiff?

[23] Mr McCollum submitted that the plaintiff did not have the benefit of the covenant in the settlement agreement as the covenant was not capable of assignment as it was personal in nature as appears from the fact the words "heirs and assigns" were not included in the settlement agreement. If, contrary to this submission the court held that it was capable of assignment, he submitted that the covenant was not actually assigned. He submitted that it was Michael Bernard Eastwood who entered into the settlement agreement and as he was not a party to the Asset Purchase Agreement whereby the plaintiff purchased the relevant premises and licence, the covenant was never assigned to the plaintiff. He further submitted that even if Michael Bernard Eastwood was a party to the Asset Purchase Agreement, the covenant was not assigned to the plaintiff because the settlement agreement was an excluded asset in the Asset Purchase Agreement.

[24] Mr Fee submitted that the covenant was capable of being assigned as it related to land and was not therefore personal in nature. Mr Fee relied on the Declaration of Trust dated 19 October 1988 and the Deed of Assignment and Conveyance dated 17 September 2004 to establish that the covenant in the settlement agreement had been assigned by Michael Bernard Eastwood to his father, mother and the Eastwood Discretionary trust, who then assigned it to the plaintiff in accordance with Clause 2.1 (k) of the Asset Purchase Agreement. He submitted that the settlement agreement was not an excluded asset as it was entered into in the course of business.

Consideration of Question 3

Is the covenant capable of being assigned?

[25] All the parties agreed that a covenant in restraint of trade is capable of being assigned unless it is personal to the covenantee. The covenant restricts the trade/activities which can be carried on at a neighbouring land owner's premises and therefore affects the value of the covenantee's premises and the licence attached to it. By its nature it therefore 'touches and concerns' the covenantee's land and accordingly I am satisfied that it is not personal in nature and is therefore capable of assignment.

Was the covenant actually assigned to the plaintiff?

[26] When Michael Bernard Eastwood entered into the settlement agreement his father was the legal owner of the premises at 38 Queen's Parade, Bangor (having acquired them in or around 2000) and by reason of the Declaration of Trust dated 19 October 1988 Michael Bernard Eastwood held the licence for these premises on trust for his father. Michael Bernard Eastwood's legal interest in the licence was then transferred to Mr and Mrs Eastwood and the Eastwood Discretionary Trust by way of the Deed of Assignment and Conveyance dated 17 September 2004

[27] To claim the benefit of the covenant in the settlement agreement the plaintiff must establish an unbroken chain of assignment from Michael Bernard Eastwood to the plaintiff.

[28] I have carefully considered the Deed of Assignment and Conveyance and note that nowhere in this Deed does Michael Bernard Eastwood expressly assign the covenant in the settlement agreement to Mr and Mrs Eastwood and the Eastwood Discretionary Trust. Although there may be an argument that the covenant was assigned by reason of the provisions of section 6(1) of the Conveyancing Act 1881 which provides; "A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, … <u>rights</u>, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, …", this argument was not advanced on behalf of the plaintiff. In any event I consider that there may be some difficulty in advancing such an argument as Michael Bernard Eastwood did not convey any land to Mr and Mrs Eastwood and the Eastwood Discretionary Trust, as he was not the owner of the premises at the date of this Deed. He only transferred his legal interest in the bookmakers licence to Mr and Mrs Eastwood and the Eastwood Discretionary Trust. A bookmaker's licence *simpliciter* does not probably come within the definition of "land", and accordingly section 6 may not be applicable. Accordingly I find that there was no assignment of the covenant in the settlement agreement from Michael Bernard Eastwood to Mr and Mrs Eastwood and the Eastwood Discretionary Trust. Consequently the chain of assignment is broken and Mr and Mrs Eastwood and the Eastwood Discretionary

Trust could not assign the covenant to the plaintiff as the covenant had not been assigned to them

[29] Mr Fee submitted, in the alternative, that when Michael Bernard Eastwood entered into the settlement agreement, as he held the licence on trust for his father he therefore signed the settlement agreement as trustee of his father Bernard Joseph Eastwood. Consequently his father held the beneficial interest in the covenant in the settlement agreement. I do not accept this submission. Michael Bernard Eastwood was not described as a 'trustee' in the settlement agreement. Rather, Michael Bernard Eastwood entered into and signed the settlement agreement in his own name as an "objecting bookmaker". He was the person who carried on the business of bookmaking and he held the licence (albeit on trust). Therefore, it was Michael Bernard Eastwood, as opposed to his father, who was actually the "objecting bookmaker". I therefore find that when he entered into the settlement agreement he did so in his own personal capacity and not as a trustee of his father.

[30] Accordingly, I am satisfied that the benefit of the covenant was never assigned to the plaintiff as Michael Bernard Eastwood did not assign the covenant to the persons who sold on the business to the plaintiff.

[31] If, contrary to my conclusion, the covenant in the settlement agreement had been assigned by Michael Bernard Eastwood to Mr and Mrs Eastwood and the Eastwood Discretionary Trust, then I would have been satisfied that it was assigned by them to the plaintiff under the Asset Purchase Agreement. This is because under Clause 2.1 (k) the plaintiff was assigned "all (if any) of the other assets, properties or <u>rights</u> of the seller relating to or connected with, or belonging to or required or intended for use in, the business or in the properties". I am satisfied that this clause included the covenant contained in the settlement agreement. I would also have been satisfied that it was not an excluded asset as Clause 2.2 (h) only excluded "all contracts and arrangements relating to the business entered into outside the ordinary course of business". I would have been satisfied, that the settlement agreement was part of the business of operating a bookmaking office as it was entered into as a compromise agreement relating to litigation over an application for a bookmakers licence. I would therefore have rejected the submission that the settlement agreement was excluded as it was entered into outside the ordinary course of business.

Question 4 - Is the covenant in the settlement agreement an unlawful restraint of trade?

[32] The defendant submitted that this was a classic case of restraint of trade and therefore the covenant could only be enforced if it was reasonable. He submitted that it was unreasonable as:

(i) The plaintiff had no legitimate interest to protect and in particular had no goodwill in the defendant's business.

(ii) The defendant derived no benefit from the settlement agreement as the costs order was not enforceable and even if it was, the benefit obtained by him was very modest.

(iii) The plaintiff's goodwill was already protected by Parliament through legislation for bookmaking office licences.

(iv) The agreement was anti-competitive.

(v) The agreement was contrary to public policy especially as it was unlimited in time and space.

[33] In contrast the plaintiff submitted that:

(i) The doctrine of restraint of trade did not apply as the defendant did not give up any freedom. In particular at the time the defendant entered into the agreement the court had already ruled that the defendant had no right to run a bookmaker's office from the subject premises.

(ii) The covenant was not in restraint of trade as it only prevented the defendant from applying for a licence at the subject premises and therefore the defendant was still able to trade from its other premises.

(iii) If it was in restraint of trade then it was reasonable as it arose as part of the settlement of litigation and was agreed to by all the parties who had equal bargaining power and had the benefit of independent legal advice.

(iv) The covenant was entered into for a legitimate purpose, namely the protection of the plaintiff's goodwill.

(v) The restriction was not contrary to public policy as it was modest in nature and the public interest was served by not limiting freedom of contract.

Consideration of Question 4

[34] The general rule is that all covenants in restraint of trade are prima facie unenforceable at common law and are enforceable only if they are reasonable with reference to the interests of the parties concerned and the public. The validity of a covenant in restraint of trade is assessed at the date when the contract is entered into. Accordingly, it is necessary to determine the following questions:

(i) Does the doctrine of restraint of trade apply?

(ii) If so, is the covenant in restraint of trade?

(iii) If so, is it reasonable in the interests of the plaintiff and the interests of the defendant?

(iv) If so, is it contrary to the public interest?

Does the doctrine of restraint of trade apply?

[35] Traditionally, the common law doctrine of restraint of trade applied to agreements between a master and servant whereby the servant agreed not to compete against his master after he left his service and to agreements between a vendor who agreed not to compete with the purchaser of his business. The doctrine of restraint of trade however is no longer limited to these traditional categories and has now been applied to a wide number of cases falling outside these two traditional categories. It is not an easy task however to determine whether the doctrine does or does not apply to any given contract. In *Esso Petroleum Company Ltd v Harper's Garage* [1968] AC 269 at page 298 Lord Reid observed that he "would not attempt to define the dividing line between contracts which are and contracts which are not in restraint of trade" and Lord Wilberforce at page 332 said that "no exhaustive test can be stated". Although there is no exhaustive test Lord Wilberforce helpfully stated that, "The doctrine of restraint of trade is one to be applied to factual situations with a broad and flexible rule of reason" and in *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146 Lord Diplock advanced the following test:

> "A contract in restraint of trade is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with any other persons not parties to the contract in such manner as he chooses."

Lord Reid in *Esso* at page 298 B-C held that the doctrine applies when a person "contracts to give up some freedom which otherwise he would have had."

[36] Clause 9 of the settlement agreement restricts Toals from making an application under the Betting, Gaming, Lotteries and Amusement (NI) Order 1985 for a bookmaking office licence in respect of the subject premises. I consider that in entering into the settlement agreement Toals gave up the right to apply for a licence to trade as a bookmaker from the subject premises and thereby restricted their ability to trade at the subject premises. Although the Resident Magistrate ruled that they were not entitled to apply for the licence that was not the end of the matter as they had a right of appeal and the right to make future applications. In the settlement agreement they gave up both the right of appeal and the right to make any future applications. Accordingly, I consider that they gave up freedoms they would otherwise have had and in accordance with Lord Reid's test the doctrine of restraint of trade is applicable. Further, in *Petrofina* the court held that the doctrine applied to restrictions imposed on trade on a particular piece of land where the effect was to restrict the trader's liberty to trade. I am satisfied that clause 9 imposed a restriction

on Toals' ability to trade as a bookmaker from the subject premises and accordingly the effect was to restrict Toals' liberty to trade. Accordingly, I am satisfied that the doctrine of restraint of trade is applicable.

[37] The plaintiff submitted that as both the plaintiff and defendant are successors in title to the original covenantee and covenantor the doctrine did not apply. In making this argument Mr Fee relied on *Peninsula Securities Ltd v Dunnes Stores (Bangor) Limited* [2017] NIQB 59 where the court ruled that the doctrine of restraint of trade did not apply to successors in title of land where the negative covenant restricting trade was imposed in a lease or conveyance of freehold land. In that case the court formed the view that, as the party seeking to escape from the burden of the covenant was a successor in title who had acquired the property subject to the restriction, he was not giving up any freedom and accordingly the doctrine did not apply as *per* Lord Reid's test.

[38] I reject this argument for a number of reasons. Firstly, the NICA in *Peninsula Securities Ltd v Dunnes Stores (Bangor) Limited* [2018] NICA 7 overruled the lower court's decision and held that there was no reason why the doctrine should not apply to successors in title. Although leave to appeal to the Supreme Court has now been granted, this court is bound by the NICA decision. Secondly, I consider that *Peninsula Securities* is not applicable as the covenant in the present case is not contained in a lease or conveyance of land. Rather the settlement agreement was in essence a trade agreement between traders as opposed to a transaction in property or a mere transaction between owners of property. Accordingly, I am satisfied that the doctrine of restraint of trade applies to the settlement agreement.

Is the covenant in restraint of trade?

[39] In accordance with Clause 9, Toals gave up the right to ever apply for a bookmaking licence in respect of the subject premises. As a result they are unable to ever carry on the trade of bookmaking from the subject premises. Whilst I accept the defendant was able to trade from his other premises, Clause 9 restricted Toal's ability to trade in bookmaking at the subject premises. By restricting the trade which could be conducted from the subject premises I find that the covenant was in restraint of trade. Further, although the Resident Magistrate ruled that Toals were not entitled to apply for the temporary licence, I consider that, by entering into the settlement agreement, Toals gave up a freedom they otherwise would have had, namely, the right to appeal the decision of the Resident Magistrate and the right to re-apply for a licence for the subject premises in the future. I am therefore satisfied that, in accordance with Lord Reid's test, the covenant was in restraint of trade.

Is the covenant reasonable in the interests of the plaintiff and the defendant?

[40] In *Esso,* at page 299 Lord Reid stated as follows:

> "It is now generally accepted that a provision in the contract which is to be regarded as a restraint of trade must be justified if it is to be enforceable, and that the law in this matter was correctly stated by Lord McNaughton in the *Nordenfelt* case [1894] AC 535, 565. He stated:
>
> > 'Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public …
> >
> > So in every case it is necessary to consider first whether the restraint went further than to afford adequate protection to the party in whose favour it was granted, secondly whether it can be justified as being in the interests of the party restrained, and, thirdly, whether it must be held contrary to the public interest … and Lord McNaughton said "… of course the quantum of consideration may enter into the question of the reasonableness of the contract.'
> >
> > Where two experienced traders are bargaining on equal terms and one has agreed to a restraint for reasons which seem good to him the court is in grave danger of stultifying itself if it says that it knows that trader's interest better than he does himself. But there may well be cases where, although the party to be restrained has deliberately accepted the main terms of the contract, he has been at a disadvantage as regards other terms …"

[41] To ascertain whether the covenant is 'reasonable' in the interests of the plaintiff and defendant it is necessary to consider the following:

(a) the interests of the plaintiff,

(b) whether the covenant is reasonable in the sense that the restraint is no more than is necessary to protect the interests of the plaintiff, and

(c) is commensurate with the benefits secured to the promisor.

The interests of the Plaintiff

[42] As Lord Reid noted at page 301 in *Esso* the question of what a party's legitimate interest is and what is necessary to protect it are questions of fact to be answered by evidence or common knowledge.

[43] Traditionally if the plaintiff's only interest in entering into the agreement was to protect against competition from a person with whom he had no trading relationship, this was not considered to be a legitimate interest to protect. In *Petrofina* Diplock LJ held at page 182:

> "Protection of the covenantee against future competition by the convenantor with whom he has no trading relationship was not an interest which he had any right to have protected."

[43] I am satisfied that the purpose of the covenant in the settlement agreement was to protect against future competition and I am further satisfied that there was no trading relationship between the parties to the settlement agreement. Therefore, on the traditional view expressed by Lord Diplock, the plaintiff had no legitimate interest to protect and accordingly the covenant cannot be reasonable.

[44] Chitty on Contracts 33rd Ed at paragraph 16.124 argues that as the doctrine of restraint of trade now applies beyond the traditional categories of master and servant and vendor and purchaser, a proprietary or quasi proprietary interest is not necessary in every case to support a covenant and the statement that, "the covenant must be reasonable in the interests of the parties" must be taken to mean that the restraint must be reasonable from their point of view.

[45] I am satisfied that due to the extension of the doctrine beyond the traditional categories the correct test to apply is whether the covenant is reasonable from the parties' point of view.

[46] The court did not hear any evidence about the nature of the business of bookmaking and in particular the geographical sphere of influence of a bookmaking shop. Nonetheless, the court applying common sense is satisfied that the covenant is in the interests of the plaintiff as it protects the plaintiff from competition.

Is the covenant more than is necessary to protect the interests of the plaintiff?

[47] The present covenant is limited in its geographical extent. It only restricts the activities carried on in neighbouring properties. Generally a covenant will only be considered reasonable if it is limited to the area within which other traders would be likely to compete with the plaintiff. The geographical limit of competition depends

on the nature of the trade in question. In most cases therefore to determine reasonableness the court will require expert evidence. The court was not provided with any expert evidence in this regard. Nonetheless, given the limited extent of the geographical restriction in this case namely to a neighbouring property, I am satisfied that it is no more than is necessary to protect the plaintiff's interest in restricting competition.

[48] The covenant however is unlimited in its duration. The burden rests on the plaintiff to establish why such a wide restriction is no more than is necessary to protect his interest. No expert or other evidence was provided to the court why such a restriction was needed to protect the plaintiff's interests. In the absence of expert evidence it is difficult to see, applying common sense how such a wide covenant, which effectively gives the plaintiff a right to be protected from competition in perpetuity, is necessary. I am therefore satisfied that the covenant is not reasonably in the interests of the plaintiff as it is more than is necessary to protect his legitimate interests.

Are the benefits to the defendant commensurate with the benefits secured to the promisor?

[49] In determining the "interests of the parties" the court must also consider what benefits are secured by the defendant and whether those benefits are commensurate to those secured by the plaintiff.

[50] In determining whether the covenant was reasonable in the defendant's interests the court will generally find that it is so as a trader is in a better position than the court to know what is in his interests. This is particularly so where the defendant freely and willingly enters into the covenant; has the benefit of independent legal advice and is in an equal bargaining position to that of the plaintiff. Notwithstanding this, the question of what is reasonable remains an objective question and therefore in certain cases, depending on all the circumstances, the court may find that the covenant is not reasonable in the defendant's interests. The court is most likely to make such a finding where the restraint is not commensurate with the benefits secured to the promisor under the contract.

[51] Under the settlement agreement Toals received the extinguishment of a costs order amounting to approximately £34,000. In return Toals agreed never to apply for a bookmaking licence in respect of the subject premises. Having regard to the interests of the defendant, I consider that the benefits secured to Toals were not commensurate with the benefits secured by the plaintiff namely a restriction unlimited in duration. Accordingly, I find that the covenant was not reasonable in the interests of the defendant.

Is the covenant in the public interest?

[52] In determining whether a covenant is in the public interest it is necessary to strike a fair balance between the freedom to trade and the freedom to contract. Clause 9 is designed to restrict competition *simpliciter.* In addition it is of unlimited duration. It is therefore not only anti-competitive but, given that it completely restricts one party ever trading in bookmaking from the subject premises, it is the akin to the "pernicious monopoly" of ancient times. I am therefore satisfied that the covenant is one which severely restricts the freedom to trade. Against this the court must give weight to the freedom of parties to contract especially in circumstances where the parties are of equal bargaining strength and have had the benefit of independent legal advice. In weighing the freedom to contract to restrict competition, I consider however, that the court is entitled to take into account any constraints parliament has already imposed on competition within the trade in question. In respect of bookmaking parliament has already imposed constraints on competition by requiring a person who wishes to trade in this business to satisfy certain criteria which includes "adequacy". In such circumstances I consider that less weight should be afforded to the freedom to contract. On balance I find, in light of all the circumstances that the covenant in the settlement agreement is contrary to the public interest.

Question 5 - Should the court grant the interlocutory injunctive relief?

[53] In light of my conclusion that the covenant is not enforceable by the plaintiff as the covenant was not assigned to the plaintiff; and/or the covenant is an unlawful restraint of trade; and, having regard to the principles set out in *American Cyanamid*, I refuse to grant the interlocutory injunctive relief sought.

[47] I will hear counsel in respect of costs.