Judgment 20. 1973

IN THE PRIVY COUNCIL No. 4 of 1973

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES
EQUITY DIVISION

BETWEEN

STENHOUSE AUSTRALIA LIMITED (Plaintiff) Appellant

- AND -

MARSHALL WILLIAM DAVIDSON PHILLIPS (Defendant) Respondent

CASE FOR THE RESPONDENT

A. INTRODUCTION

1. By a Summons dated 3rd July 1972 (subsequently amended), the appellant plaintiff commenced a suit against the respondent defendant in the Supreme Court of New South Wales in its Equity Division seeking certain injunctions and declarations. The proceeding came on for final hearing before Mahoney, J. on 27th and 28th September and 3rd and 4th October 1972. On 26th October 1972, His Honour gave judgment and ordered that the suit be dismissed. Page 156

2. This is an appeal by leave of the Supreme Court of New South Wales from that order. Page 240

3. In the subject proceeding, the appellant claimed declarations and injunctions based upon the allegation of a breach by the respondent as its former employee of the terms of certain covenants in restraint of trade contained in an instrument under seal dated 23rd March 1972 made between the appellant and the respondent. Page 254
Although there were no formal pleadings the parties agreed, at the hearing, upon the issues which were reduced to writing and tendered. Page 3
Certain oral and documentary evidence was also tendered.

B. MATERIAL FACTS

4. The general background to the dispute is as follows:-

Page 156 line 16 (a) The respondent commenced employment in about 1957 with an insurance broking company which was a member of a group of companies known as the Paxton group.

Page 157 line 3 (b) Towards the end of 1964, this company was taken over by a member of the Stenhouse group of companies.

Page 156 line 21 (c) At all material times, the Stenhouse group, although based in Glasgow, has operated in the various fields of insurance broking throughout the world and, in particular, in the United Kingdom, North America and Australia.

(d) Soon after the takeover referred to above,
Page 158 line 16 a member of the Stenhouse group, Stenhouse Scott North Australia Limited, secured the services of the respondent until he attained the age of sixty (60) years (the respondent then being some twenty-six (26) years of age) by an agreement dated 11th December
Page 243 1964. This agreement contained provisions (set forth below) restrictive of the respondent's operations in the fields of insurance broking or insurance agency during and after the termination of that agreement. The agreement provided for a fixed salary of £A.2,750 or such other amount as should be mutually agreed.

Although not sued upon, Clause 10 of this agreement is relevant to the dispute and was as follows :-

> "10. The Director as a separate and independent covenant enforceable as though Clause 11 were not contained herein covenants and agrees with the Company that he will not for Five years after the determination from any cause whatever of his services hereunder within Twenty-five miles radius of the General Post Office Sydney directly or indirectly engage or be concerned whether as principal servant or

agent in the business of insurance broking or the business of an insurance agent or solicit the custom of any person, firm or corporation who during the continuance of this agreement shall have been a customer of the Company and/or Stenhouse Holdings Limited and/or any Company associated therewith or a subsidiary thereof in competition with any such Company.".

Clause 11 of this Agreement was as follows :-

"11. The Director as a separate and independent covenant enforceable as though Clause 10 were not contained herein covenants and agrees with the Company that he will not for Five years after the determination from any cause whatever of his services hereunder directly or indirectly engage or be concerned in the business of insurance broking or the business of an insurance agent in any town in Australia in which the Company and/or any of its associated insurance broking companies shall have at the date of termination of this agreement a recognised place of business or in any place within Australia solicit the custom of any person, firm or corporation who during the continuance of this agreement shall have been a customer of the Company and/or Stenhouse Holdings Limited and/or any Company associated therewith or a subsidiary thereof in competition with any such Company."

(e) By agreement dated 6th September 1966, the rights and obligations of the parties under the agreement referred to in sub-paragraph (d) above were novated in favour of the appellant; in addition, the liability of the respondent to Stenhouse Scott North Australia Limited under Clauses 10 and 11 of the earlier agreement ~~were~~ was continued. Page 251

(f) The appellant is the holding company for a substantial number of "Stenhouse" companies operating in the several fields Page 157 line 9

of insurance broking in the various states and territories of the Commonwealth of Australia.

(g) During his employment, the respondent was principally concerned with reinsurance work for the Stenhouse group both in Australia and with United Kingdom companies. A particular member of the Australian Stenhouse group, Stenhouse Reinsurance Pty. Limited, was employed by the group for this purpose.

Page 159 line 5

Page 157 line 23

(h) In May 1971, the respondent tendered his resignation from employment with the appellant and such resignation was thereafter accepted and the respondent's employment was determined by mutual agreement as from 9th July 1971. Shortly thereafter, the respondent entered the employment of another insurance broker, C.E. Heath.

Page 159 line 22

(i) Some time after his resignation, discussion commenced between the parties as to the entry by the respondent into covenants restricting his activities as an insurance broker. At the end of March 1972, almost nine months after the termination of the respondent's employment, the Deed sued upon was executed.

Page 160 line 16

(j) The Recitals to the said Deed are as follows :-

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"WHEREAS by an Agreement dated 11th December 1964 made between Stenhouse Scott North Australia Limited of the one part and Mr Phillips of the other part it was agreed that Mr Phillips should serve that Company upon the terms set out therein AND WHEREAS by an Agreement dated 6th September 1966 between Stenhouse Scott North Australia Limited of the first part Stenhouse Australia Limited of the second part and Mr Phillips of the third part it was agreed that Mr Phillips should serve Stenhouse and that the said Agreement dated 11th December 1964 be construed as though originally entered into with Stenhouse AND WHEREAS Mr Phillips was heretofore a Director of the following companies namely Stenhouse Scott North Australia Limited, Stenhouse Reinsurance Pty. Limited and

Robert Paxton (Insurances) Pty. Limited but has tendered his resignation as a Director thereof with effect from the 9th day of July 1971 AND WHEREAS Mr Phillips has tendered his resignation as an employee of Stenhouse and has requested Stenhouse to release him from his obligations under the abovementioned Agreements AND WHEREAS Stenhouse has agreed so to release Mr Phillips but only on the conditions that he undertakes to be bound by the obligations hereinafter stated.".

Clause 1 provided :-

"1. With effect from the 9th day of July 1971 notwithstanding the date hereof the abovementioned Agreements and Mr Phillips' employment pursuant thereto and his obligations thereunder shall cease and determine.".

The provisions now sued upon (Clauses 4, 5 and 6) are as follows :-

"4. Mr Phillips covenants that he will not for a period of five years from the said 9th day of July, 1971 unless with the prior written consent of Stenhouse directly or indirectly as principal servant or agent solicit whether by written or oral communication or otherwise insurance business from any client as hereinafter defined.

5. In the event that any client of Stenhouse shall within a period of five years from the said 9th day of July 1971 (and that whether or not such client is a client of one or more of the Stenhouse companies at the time) place insurance business (whether or not business of a type presently transacted by Stenhouse for such client) through the agency of Mr Phillips or through any agency other than that of one of the Stenhouse companies referred to in Clause 2 of this Agreement so that Mr Phillips

or any person firm or corporation for whom Mr Phillips is a principal or agent or by whom Mr Phillips is employed and with whom he is associated or connected in any other way receives or becomes entitled to receive directly or indirectly any financial benefit from the placing of such business then Mr Phillips agrees to pay or procure that there shall be paid to Stenhouse a one-half share of the commission received in respect of such transaction and such commission shall be the gross commission (including any allowances) paid by the Insurance Company in respect of such transaction without allowance for any rebate made to the client and after deduction of any procurement fee properly payable in respect of prospective clients as hereinafter defined to any third party for the introduction of such business such procurement fee not to exceed one-third of the total initial commission. The sums payable to Stenhouse pursuant to this clause shall continue to be paid for a period of five years (but only if there is a financial benefit as aforesaid for each year) from the date on which such insurance business is so first placed and shall be paid to Stenhouse concurrently with the settlement of the net premium due to the Insurance Company concerned.

6. Mr Phillips covenants that except in the circumstances provided for in Clause 5 hereof he shall not for a period of three years from the said 9th day of July 1971 unless with the prior consent in writing of Stenhouse directly or indirectly as principal servant or agent act as Insurance Broker for any client as hereinafter defined.".

Clauses 8 and 9 are also relevant :-

"8. For the purposes of Clauses 4, 5 and 6 of this Agreement the word "client"

shall mean any person firm or corporation who at the said 9th day of July 1971 or in the preceding month was a client of Stenhouse or any of its associated companies with whom in the course of his employment with Stenhouse Mr Phillips has had dealings or negotiations and further shall mean a prospective client of Stenhouse or of its associated companies whose insurance business was the subject of negotiation with Stenhouse through the services or agency of Mr Phillips either at the said 9th day of July 1971 or within the period of 12 months preceding that date but shall be construed as excluding any person firm or corporation who was a client or prospective client of Stenhouse as aforesaid and whose business is acquired by or who becomes thereafter a subsidiary of any other person firm or corporation which is at the said 9th day of July 1971 or may become during the term of this Agreement a client of Mr Phillips or any person firm or corporation by whom he is employed or for whom he is acting as agent, and further shall be construed as excluding any Insurance Company

9. For the purposes of this Agreement "associated company" or "associated company of Stenhouse" shall mean and include any company which is a subsidiary or related corporation of Stenhouse within the meaning of Section 6 of the Companies Act 1961."

(k) The breach relied on was alleged by the appellant in these terms :- Page 162 line 23

"The defendant is alleged to have acted as an Insurance Broker for Boral Limited and/or its Subsidiaries and Associated companies and alternatively Boral Insurance and Fund Management Pty.

Limited between July 1971 and October 1972. It is alleged that Boral Limited and/or its Subsidiaries and Associated Companies and alternatively, Boral Insurance & Fund Management Pty. Limited were clients within the meaning of the Deed between the parties dated 23rd March 1972. It is alleged that the defendant solicited, as servant or agent of C.E. Heath Insurance Broking (Australia) Pty. Limited, business of Boral Limited and/or its Subsidiaries and Associated companies and alternatively, that of Boral Insurance & Fund Management Pty. Limited between July 1971 and October 1972. The insurances placed were the Industrial All Risk Insurance; the Crime Policy and the Loss of Profits Policy.".

(1) Clause 8 excluded insurance companies from the operation of the said Deed. Boral Insurance & Fund Management Pty. Ltd., ("B.I.F.M.") was an insurance company, in the strict sense, but was also a member of the Boral group of companies. B.I.F.M. undertook the arranging of insurance for the Boral group. In general terms, B.I.F.M., for this purpose, acted as both an insurance company, in the strict sense, and as an insurance broker. The appellant relied, in the present context, upon certain discussions between the respondent and Mr Hargreaves, the General Manager of B.I.F.M.

Page 164 line 14

Page 5

5. The issues were settled as follows :-

"1. Did the defendant directly or indirectly in breach of clause 4 of the Deed made between the Plaintiff and the defendant dated the 23rd March 1972 as servant or agent of C.E.Heath Insurance Broking (Australia) Pty. Limited solicit insurance business from a person or corporation?

2. If so, was such person or corporation a client within the meaning of the said Deed?

3. Did the defendant as servant or agent in breach of clause 6 of the Deed made by the plaintiff and the defendant dated 23rd March 1972 directly or indirectly as servant or agent of C.E. Heath Insurance Broking (Australia) Pty. Limited act as Insurance Broker for a person or corporation?

4. If so, was such person or corporation a client within the meaning of the said Deed?

5. Did a client within the meaning of the said Deed place insurance business so that the defendant or C.E. Heath Insurance Broking (Australia) Pty. Limited received or became entitled to receive directly or indirectly any financial benefit from the placing of such business ?

6. Whether the provisions of the Deed sued upon are void and unenforceable.

7. On the exercise of the Court's discretion :

   (i) Would the enforcement of the provisions sued on be harsh or oppressive to the defendant?

   (ii) Was it intended by the parties that clause 5 of the Deed be the fixed price for which the defendant might lawfully do the acts prohibited by clause 4 and 6 of the said Deed?

   (iii) Whether the plaintiff by claiming to recover, in the alternative, under clause 5 of the Deed, has elected to accept payment under that clause, and if so, whether the Court should refuse to grant an injunction.

8. Whether clause 5 of the said Deed (if otherwise not invalid) constitutes a penalty and is therefore unenforceable.".

6. His Honour, the learned trial Judge, dismissed the proceeding, in a reserved written judgment, upon the ground that Clauses 4, 5 and 6 of the said Deed were illegal and invalid as being, in each case, an unreasonable restraint of trade.

C. SUBMISSIONS AND REASONS

7. It is submitted that this appeal should be dismissed for the following, amongst other, reasons :

A. Clauses 4, 5 and 6 of the said Deed are illegal and invalid as constituting unreasonable restraints of trade whether viewed singly or collectively -

(i) Each is unreasonably long in duration. No evidence was sought to be tendered on this issue by the appellant to justify the restraint although it bore the onus and although it called a number of witnesses to depose to other issues but who were qualified to testify on this score. Further, no relevant cross-examination of the respondent was directed to this vital issue. The proper inference, therefore, is that the appellant framed the duration of its restrictions arbitrarily and without proper consideration of what the period of the respondent's influence or relationship with clients might be. However, His Honour the learned trial Judge, asked certain questions of Mr Hargreaves on the question of the period of time over which an (employee) broker's influence or relationship in respect of a client would continue after the broker had left his employment. The respondent also gave some evidence in this regard. His Honour in his judgment, framed his general findings of fact on this issue as follows :-

Page 179 line 16 and Page 184 line 17

Page 71 line 35; Page 180 line 8.

"In the light of the evidence generally, I concluded that in respect of a

Page 185 line 3.

company having complex activities (such as the Boral group) the particular influence or relationship here in question would cease after some two and two and one half years; in a case of a company having less complex activities (such as an ordinary manufacturing company), such influence or relationship would cease after about three to four years; and the period of time over which such influence or relationship would continue, would vary significantly according to the particular client, the nature of his business, the nature of the insurance cover dealt with through the particular broker, and, no doubt, by virtue of other factors.".

Dealing specifically with Clause 4, His Honour found as follows :-

"In all these circumstances, I am of the view, that the period of five years fixed by cl. 4 is longer than is reasonable in the interests of both parties. This period is not supported in terms by any witness as a period over which the influence or relationship in question would extend in respect of any client of the Stenhouse Group. In relation to large and complex companies (such as the Boral Group), the period suggested is considerably less than five years. It is relevant to note that a significant number of the clients with whom the defendant was alleged by the plaintiff to have come in contact were of a substantial kind, e.g. the Nabalco Group, the B.H.P. Group, and the Brambles Industries Group. In respect of less complex companies, the period of three or four years or perhaps more, was referred to, but I note that, although the period of time in effect runs from 9th July, 1971, the definition of the term "client" in cl. 8 is such that the restriction could operate in

Page 187 line 2

respect of a company whose only association with the defendant was that, within the period of twelve months preceding 9th July, 1971, he had had unsuccessful negotiations in respect of insurance business.".

Page 195 line 1.24 — Dealing specifically with Clause 5, His Honour adopted the same reasons in holding that a 5 year period was longer than could be justified.

Page 207 line 24 and Page 208 line 20 — As regards Clause 6 His Honour was of the view that by 23rd March 1972 the appellant was in a position to determine what period of restraint was appropriate in the case of particular clients; but in fact the appellant sought to apply the 3 year term in every case.

It is therefore submitted that in terms of duration alone, the restraints are excessive and thus invalid.

(ii) Further, and alternatively, each of the restraints is too wide in geographical operation. The restraints purport to have a world-wide operation and, as His Honour observed, insurance broking is a business which has international connections and a substantial number of the companies engaged in insurance broking in Australia are subsidiary or associated companies of United Kingdom or American corporations. Further, the evidence established that the respondent had had significant knowledge of and contact with the London insurance market. In those circumstances, a world-wide restraint could have a real and not a mere theoretical or "fantastic" impact upon the respondent's activities.

Page 190 line 22; Page 211 line 18 — Page 211 line 25 — Page 189 line 15

(cf. J.W. Plowman & Sons Ltd. v. Ash /1964/ 1 W.L.R. 568 At 572). Further, as with the time point so with the area point, the appellant (on whom the

onus rested) failed to adduce evidence justifying the restraint. Page 191 line 7

(iii) Further, and alternatively, the definition of "client" in clause 8 is wider than is reasonably necessary. The subject restraints were not formulated before the commencement of the respondent's employment but after it had determined. At that stage, the appellant was well aware of the identity of those of its clients with whom the respondent had actually dealt. They were few in number and the appellant tendered a list of them in evidence at the hearing. These companies could easily have been specified precisely in any covenant. Page 207 line 19 Page 208 line 4

Further, the unreasonable nature of the restraint is illustrated by the uncertainty inherent in the definition of "client" - the consequence being that the respondent could unwittingly breach the covenant. (Konski v. Peet [1915] 1 Ch.530). Page 209 line 11

Further, the respondent was mainly concerned with re-insurance, but Clause 8 is not limited to those aspects of insurance (so far as the respondent was concerned), or, indeed, to that aspect of the "client's" insurance business in which the respondent was involved. Page 159 line 4 and Page 208 line 17

Further, the respondent's contact with a particular "client" (as defined) could well have been quite without significance. For example, the restriction could operate in respect of a company whose only association with the respondent was that, within the period of twelve months preceding 9th July 1971, he had had unsuccessful negotiations in respect of insurance business. In addition, the Deed purports to embrace "prospective clients" which would include persons as to whom there was no more than a mere possibility, in the period 10th July 1970 to 9th July 1971, that they might become clients of the Stenhouse group. Page 209 line 25 Page 257 line 33 and Page 209 line 17

(iv) Clause 4 is also unreasonable in that it purports to place a blanket restraint over

soliciting "insurance business from any client" without attempting to single out those aspects of insurance business where protection was legitimately required. Further to show the unreasonable width of each of Clauses 4, 5 and 6 the respondent relies on the matters referred to under (x) 2 below.

Page 191 line 18

(v) The provisions of Clause 5, when read in conjunction with Clause 6, clearly constitute a restraint of trade. Clause 6 operates to prohibit the relevant trading activity unless payment is made under Clause 5. The severity of Clause 5 will be referred to later but the imposition of a pecuniary obligation clearly works as a deterrent to engagement in the relevant activity. It thus falls to be determined in accordance with the normal principles of restraint of trade. (Howard F. Hudson v. Ronayne (1972) 46 A.L.J.R. 173; Buckley v. Tutty (1971) 46 A.L.J.R. 23; Dickson v. Pharmaceutical Society of Great Britain /1970/ A.C. 403).

(vi) As to the severity of Clause 5 :-

Page 194 line 5

(a) The pecuniary obligation is not imposed upon solicitation or other activities by the respondent which in terms relate to the exercise by him of any influence or relationship with a client; all that is stipulated for is merely the placing of business. The participation of the respondent at any level is not stipulated for.

(b) The substantial proportion of the commission (viz, one-half) has to be paid even if the respondent does not receive it.

(c) The words "financial benefit" are sufficiently uncertain to render void clause 5 (and therefore clause 6) and His Honour ought so to have held. Further or in the alternative the words are so wide

as to embrace the most remote type of advantage.

(vii) Clause 6 was unreasonable in that the appellant was in a position as at 23rd March 1972 to formulate with precision a properly framed covenant excluding the respondent from illegitimate forms of competition whereas the clause actually adopted failed to have regard to the considerations which His Honour rightly regarded as material. Page 208 line 9

(viii) The subject Deed, whilst purporting to confer upon the appellant the benefit of substantial restrictions, gave nothing to the respondent:

(a) His employment had ceased and determined by mutual consent some nine (9) months earlier. Page 160 line 1

(b) Any supposed advantage to the respondent arising out of the release of the earlier restrictive covenants (set out in 4(d) above) was illusory since those covenants were of such width as themselves to constitute clearly an illegal restraint of trade. Page 213 line 24

(c) The ~~appellant's~~ respondent's only significant business experience had been as an insurance broker dealing with substantial clients of the type which Stenhouse acted for. The elimination of these clients would involve a substantial restriction on the range of his business activities. Page 212 line 20 Page 212 line 23

(ix) It follows from the foregoing that the subject restraints are illegal and invalid as they went beyond what was reasonably necessary for the protection of the business of the appellant since :

(a) At the time of their being framed, the appellant had the benefit of hindsight, so that when regard is had to the width of the restraints Page 207 line 19

it could not be said that the restraints were "plainly in terms to protect the employer's trade connection" and no more; nor could it be postulated that they were "carefully framed for a legitimate purpose" and no more. The restraints went well beyond that connection and that purpose, and the appellant must have been aware of this. (cf. Home Counties Diaries Ltd. v. Skelton /1970/ 1 W.L.R. 526 at 538).

(b) In particular, the restraints went beyond what was necessary to protect the appellant from the use by the respondent of knowledge obtained by the respondent of the appellant's customers or of any influence which the respondent might have obtained over those clients in the ordinary course of business. (Herbert Morris Ltd. v. Saxelby /1916/ A.C. 688; T. Lucas & Co.Ltd. v. Mitchell /1972/ 3 W.L.R. 934; Lindner v. Murdoch's Garage (1950) 83 C.L.R. 628; Stephens v. Kuhnelle (1926) 26 S.R. (N.S.W.) 327).

(x) Alternatively, the subject restraints, even if otherwise reasonable, are unenforceable as restraints "in gross" because :

1. They were not annexed to any proper transaction -

(a) The respondent's employment had ceased or determined by mutual agreement some nine (9) months before the execution of the Deed.

(b) The restraints were not ancillary to any relevant or legitimate principal transaction or interest. (Butt v. Long 88 C.L.R. 476 at 486; Esso Petroleum Ltd. v. Harper's Garage (Stourport) Ltd. /1968/ A.C. 269 at 341-2; Howard F.

Hudson Pty. Ltd. v. Ronayne 71 S.R. (N.S.W.) 269 at 286 (N.S.W. Court of Appeal). In particular, the restraints are not ancillary to any contract of service but at the highest merely followed disputes between the parties relating to the validity of restrictive covenants not here sued upon and which were clearly invalid. Such disputes were not a legitimate main or principal transaction within the meaning of the authorities. (See also Mobil Oil (Aust.) Pty. Ltd. v. McKenzie (1972) V.R. 315 at 317-8; Lido v. Parades (1972) V.R. 297 at 300 et seq.).

(c) The recitals and clauses 1 and 2 of the Deed are no more than fictions or a device endeavouring to create a legitimate principal transaction or interest. (See the Esso case, above).

(d) The case is thus one of a restraint "in gross" (c.f. Howard F. Hudson Pty. Ltd. v. Ronayne (1971) 46 A.L.J.R. 173).

2. Alternatively, they are restraints "in gross" because the protection stipulated for is excessive as extending beyond the business of the covenantee and what is necessary for its protection. The appellant has a business of its own and a large number of subsidiary and associated companies with distinct businesses of their own. The appellant cannot lawfully seek to protect the businesses of those other companies. (Leetham v. Johnstone-White /1907/ 1 Ch. 189; McGuigan Investments Pty. Ltd. v. Dalwood Vineyards Pty. Ltd. /1970/ 1. N.S.W.R. 686 at 693-4; Stephens v. Kuhnelle, supra; Woodmasons v. Kinstone (1924) V.L.R. 475; cf. Macaura v. Northern Assurance Co. /1925/ A.C. 619).

(xi) Further each of clauses 4, 5 and 6 was unreasonable having regard to the public

interest. Thereunder the respondent relies upon :

(a) the matters hereinbefore set forth;

(b) the evidence which established that there was a very small supply of and a very great demand for persons having the respondent's talents and qualifications;

Page 75 line 3 and Page 91 line 31

and further as regards Clause 5 the respondent contends that the tendency of this Clause was to impose a tax or financial burden on the appellant's competitors or to induce them not to employ the respondent.

(xii) If contrary to the respondent's submissions, it be held that some only of the restraints are unreasonable and therefore unenforceable, the remaining restraints even if otherwise valid, cannot be "severed" out and thus upheld since what is involved is, in substance, a single promise and any attempt at severance would alter the character of the transaction entered into and His Honour was wrong in expressing the contrary view:

Page 218 line 37

(a) In the context of master and servant (which is closest to this case) as distinct from vendor and purchaser, the Court will be reluctant to permit severance. (Attwood v. Lamont [1920] 3 K.B.571; Ronbar Enterprises Ltd. v. Green [1954] 1 W.L.R. 815; cf. T. Lucas & Co. Ltd. v. Mitchell [1972] 1 W.L.R. 938; [1972] 3 W.L.R. 934).

(b) Since the definition of "client" is common to each of clauses 4, 5 and 6, it is evident that the intention of the draftsman, in drawing these provisions, was to inhibit business transactions with a particular and common class of persons. In this sense, what is involved in clauses 4, 5 and 6 is, in substance, a

single promise. In those circumstances, severance is not permissible. (Brooks v. Burns Philp Trustee Co.Ltd. (1969) 43 A.L.J.R. 131; Howard F. Hudson Pty. Ltd. v. Ronayne, supra.).

(c) Even if this submission be not upheld, if clause 5 is held unreasonable, clause 6 will also be unenforceable since, in truth, clauses 5 and 6 were intended to be read together (one the appendage to the other) so as to confer a single primary obligation, namely, a prohibition on acting as broker with a proviso for the payment of a pecuniary impost in the event of breach of that prohibition. Although typed out in separate paragraphs, clauses 5 and 6 are, in their terms, inextricably linked together in such a way as to preclude severance.

B. Alternatively, clause 5 is a penalty. It is in terrorem and is not a genuine pre-estimate of the damage to be suffered by the appellant since the payment must be made whether or not the appellant would or could have placed the business itself or, in other words, earned the commission itself. Further, clause 5 requires payment to be made even where the respondent may have had no connection with and himself received no commission from the transaction in question.

C. Alternatively, clause 5 was intended by the parties to be the fixed price for which the respondent might lawfully do the acts prohibited by clauses 4 and 6 and injunctive and declaratory relief should be refused on that ground. (Halsbury, Laws of England, Third Edition Vol. 21 p. 381-2; Hamilton v. Leathbridge 14 C.L.R. 236; Leagh v. Lillie 6 C. & P. 165; 158 E.R. 69; General Accident Assurance Co. Ltd. v. Noel [1902] 1 K.B. 377 at 380). His Honour wrongly rejected this argument. Page 220 line 1

D. Alternatively, and contrary to the view intimated by His Honour, injunctive relief should be refused on discretionary grounds. Page 236 line 11

In this respect, it is submitted that enforcement of the provisions sued on would be harsh and oppressive to the respondent upon the following (amongst other) grounds :

(i) By reason of the uncertainty inherent in the definition of "client", the respondent could commit an unwitting breach (see above).

(ii) By reason of the severity of the provisions of clause 5 and therefore clause 6 (see above).

D. CONCLUSION

8. The respondent therefore submits that the order of Mahoney, J. dismissing the suit was correct for the following (amongst other) reasons :

(1) The restraints sued upon were illegal and invalid as constituting an unreasonable restraint of trade.

(2) If, contrary to the respondent's submission, it be held that some only of the subject restraints were valid, the Court should not sever these restraints from the remaining invalid restraints.

(3) Alternatively, clause 5 constitutes a penalty and is thus unenforceable.

(4) Alternatively, injunctive and declaratory relief should be refused on the discretionary grounds referred to in paragraphs 7(C) and (D) of the above reasons.

(Sgd) F.P. NEILL

(Sgd) B.A. BEAUMONT

Counsel for the Respondent

No. 4 of 1973

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUT WALES EQUITY DIVISION

B E T W E E N

STENHOUSE AUSTRALIA LIMITED
(Plaintiff
Appellant

- and -

MARSHALL WILLIAM DAVIDSON PHILLIPS
(Defendant
Respondent

CASE FOR THE RESPONDENT

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