IN THE PRIVY COUNCIL No. 35 of 1983

11/84

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)

CIVIL APPEAL No. 28 of 1983

(On appeal from High Court Action No. 1530 of 1983)

BETWEEN:

DEACONS (a firm) Plaintiff/Respondent

- and -

ROBIN M. BRIDGE Defendant/Appellant

CASE FOR THE RESPONDENT

Record

10 1. The sole issue in this appeal is whether clause 28(a) of the Deacons partnership agreement is unenforceable. It is a covenant in restraint of trade and therefore enforceable only if reasonable in reference to the interests of the parties concerned and reasonable in reference to the interests of the public. p.61

2. A covenant is reasonable in reference to the interests of both the parties and the public if it goes no further than to afford adequate protection
20 for the legitimate interests of the party in whose favour it is granted. The public interest will determine the extent of the interests which may legitimately be protected. For example, the public interest limits the interests which an employer may protect against an ex-employee to his trade secrets and customer connection but does not allow him to protect himself against competition. On the other hand, a purchaser of the goodwill of a business may exact a covenant against competition as such.

30 3. It was not disputed in the Court of Appeal that the Appellant's retirement effected a sale of his undivided share in the assets of the partnership, including his share in the entire goodwill of the firm, to the continuing partners. It follows that the continuing partners were entitled to protect themselves against any competition which might damage the goodwill of the firm: Whitehill v. Bradford /1952/ Ch. 236, 246.

4. The goodwill of the firm is the probability
40 that its clients will continue to retain it. It

is therefore legitimate for the continuing partners to protect themselves from competition by the Appellant which may have the effect of inducing any client to cease to retain the firm. Clause 28(a) goes no further than is reasonable to afford adequate protection to the firm against competition in respect of its existing clients. It is reasonable because:

(a) A restraint specifically confined to existing clients of the firm is self evidently no more than is necessary to protect the firm against damage to its goodwill;

(b) An area restraint (e.g. against practising within the Colony of Hong Kong) would also have been reasonable, both on grounds of well-established practice in the profession of solicitors and on the ground that the firm is entitled to provide for reasonable growth in its practice. Such a covenant would have been far more onerous than clause 28(a);

(c) The clause was agreed between qualified solicitors (including the Appellant) who were in a position of equality in the sense that the covenant was mutual and none could tell whether in relation to any other partner he would be enforcing the covenant or having it enforced against him. On an assessment of probability the Appellant would have been likely when he first joined the partnership to look upon himself as a likely continuing partner rather than a retiring partner in relation to most of his colleagues;

(d) In June 1978 the Appellant joined with the other partners in refusing to waive 3 months
p.89 of the five year period of restraint in respect of Mr. H.F.G. Hobson, a retired partner;

(e) Such a clause is commonplace in solicitors' partnership agreements and has been in books of precedents for many years;

(f) The validity of the clause must be judged at the time it was made on 1st April 1974. The Appellant was then 31 and expected to remain a partner for many years. It was impossible to predict whether he would continue to specialise in intellectual property work or which clients he would come to know. He would have the opportunity to meet any clients and obtain information about their affairs, whether he personally acted for them or not.

A covenant restricted to particular classes of clients would have been difficult to frame in terms which were both precise and adequate to protect the outgoing partners.

5. The Appellant has repeatedly asserted that Deacons should have adduced evidence to justify the necessity for a covenant restraining him from acting for all clients of the firm, including those with whom he had had no personal contact. This argument is based on a misconception. In the case of an employee, the employer's legitimate interest is limited to protecting himself against damage to his goodwill caused by the use by the employee of connections formed during his period of employment. (Although even in the case of an employee, an area covenant may be reasonable to protect the employer's legitimate interests: see Fitch v. Dewes /1921/ 2A.C. 158.) It is therefore usually necessary to adduce evidence of the nature of the business, the nature and extent of the connections formed by the employee etc. (cf. Lord Shaw of Dunfermline in Herbert Morris v. Saxelby /1916/ 1 A.C. 688, 715.)

6. In the case of a sale of goodwill, however, the protectable interest is not confined to damage which might be caused by the vendor's use of his personal connections with clients of the firm. Although in 1982 Mr. Wimbush not unnaturally expressed concern over the damage which the Appellant could do to Deacons' goodwill in the area of intellectual property business, this did not represent the limits of the continuing partners' protectable interest. They had bought the Appellant's share in the goodwill of the whole firm and not merely that of his department. p.69

7. Lord Denning's assertion of an overriding public policy which disables a solicitor from covenanting not to act for former clients (Oswald Hickson, Collier & Co. v. Carter-Ruck 20 January 1982) is contrary to principle and authority.

(a) The function of public policy in this branch of the law is to determine the limits of the protectable interest: see Lord Pearce in Esso Petroleum Company Ltd v. Harper's Garage (Stourport) Ltd /1968/ A.C. 269, 324.

(b) A solicitor is not obliged to act for any person and it is impossible to discern a rational public policy in disabling him from contracting not to do so.

(c) In the case of a multipartner firm, the client is the client of the firm and not of the individual partner. In the absence

of some special contract, a client who has retained the firm is not entitled to insist that his work be done by a particular partner, still less that a new retainer be accepted on such terms. It is therefore no derogation from the legitimate rights of clients that an individual partner should contract not to act for them;

(d) In the case of a single-partner or multi-partner firm, Lord Denning's public policy would make the goodwill of the practice unsaleable;

(e) The proposition is irreconcileable with Fitch v. Dewes /1921/ 2 A.C. 158 and many other cases on solicitors and other persons such as doctors who also have a fiduciary relationship with their clients, patients or customers. It has been considered and not followed by the Supreme Court of New South Wales in Sharah v. Healey /1982/ 2 NSWLR 223 and by Walton J. and the Court of Appeal in Edwards v. Warboys (18 March 1983, C.A. 25 March 1983).

8. The Respondent therefore respectfully submits that your Lordships should advise Her Majesty this appeal should be dismissed with costs and the decision of the Hong Kong Court of Appeal affirmed for the following among other:

REASONS

(1) BECAUSE clause 28(a) goes no further than is reasonable to protect the Respondent's legitimate interest in the goodwill of the firm;

(2) BECAUSE there is no overriding public policy to invalidate such covenants;

(3) BECAUSE Hunter J. and the Hong Kong Court of Appeal were right.

LEONARD HOFFMANN
RICHARD McCOMBE

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CASE FOR THE RESPONDENT

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