Contracts in Restraint of Trade

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14.1 OVERVIEW

Contracts in restraint of trade are prima facie void under the common law, but can be enforceable if:

the party imposing the restraint has a legitimate interest to protect; and
the restraint is reasonable in the context of protecting that interest; and
the restraint is not otherwise contrary to the public interest.

The reasonableness of a restraint will be assessed in relation to:

the length of time for which it will operate;
the geographical area which it will cover;
the scope of the restraint (that is, for example, the range of activities covered).

The situations where these rules tend to apply are in relation to:

contracts of employment – in the form of restrictions on the employment that the employee can undertake once leaving the employment of the party imposing the restraint. Such restrictions may be, for example, justified to protect trade secrets, or connections with clients;
contracts for the sale of a business – the buyer of a business may be entitled to impose restraints on the seller, to prevent the seller setting up in competition with the buyer.

Other types of restraint that need consideration are as follows:

Contracts of exclusive dealing. Agreements to take all supplies of goods (for example, petrol or beer) from one supplier may be enforceable if reasonable.
Restraints on songwriters and entertainers. This is another type of contract of exclusive dealing, where the artist agrees to work only for one publisher, record company, etc. Such restrictive contracts may be enforceable if they are reasonable.
Restrictive trade agreements. Agreements between companies not to compete in certain areas will be unenforceable at common law unless reasonable in protecting
a legitimate interest. Such agreements may also be struck down by legislative controls against anti-competitive practices. In some situations the courts will be prepared to ‘sever’ an unreasonable part of the restraint and enforce the remainder.

14.2 INTRODUCTION

This chapter deals with an area of law which under classical contract theory brought two principles into direct conflict. On the one hand, classical contract theory endeavoured to promote ‘freedom of contract’ – it is the parties who determine their obligations and the courts should only intervene in exceptional circumstances. On the other hand, underlying classical contract theory was a view that the ‘free market’, in which competition takes place between those seeking to make contracts, is the ideal economic framework for the operation of exchange transactions. What happens when freedom to contract is used to restrict competition? The answer of the common law was limited. A range of contracts, or contractual provisions, which were regarded as being ‘in restraint of trade’ were treated as being ‘illegal’, on grounds of public policy and therefore unenforceable. The classic use of this approach, however, as will be seen below, was in relation to restrictions contained in contracts of employment or in contracts for the sale of a business, purporting to limit the economic activity which the employee or the seller could engage in after leaving the employment or selling the business. The broader problems of ‘anti-competitive’ practices, and in particular the problems arising from situations of monopoly or near monopoly in a particular market, were never really tackled by the common law. There is now, however, extensive statutory intervention to control this area, with much of the current law being shaped by the EU.

The approach taken here is to deal only with the common law rules on ‘restraint of trade’, since the statutory provisions (e.g. the Competition Act 1998) tend not be part of undergraduate contract courses.

14.3 RESTRANST OF TRADE UNDER THE COMMON LAW

Contractual provisions which attempt to restrict the ways in which one (or both) of the parties may do business, or earn a living, have at different times been treated by the common law as being prima facie void, or prima facie valid. The current position derives from the House of Lords decision in Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd.

Key Case Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd (1894)

Facts: Thorsten Nordenfelt had established a valuable business in the manufacture of machine guns, operating in Sweden and England. His customers included most national governments across the world. He sold the business to a company, which then transferred it to Maxim Nordenfelt. At that time Thorsten Nordenfelt entered into an agreement with Maxim that he (Thorsten) would not for a term of 25 years engage in the manufacture of guns, explosives, etc, other than on behalf of the company. Thorsten broke this covenant, alleging that it was unenforceable as being in restraint of trade.

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1 Though, more recently, there has been increasing case law on ‘exclusive dealing’, where one party commits itself to take all supplies of a particular product (for example, petrol or beer) from a single supplier.
3 Claygate v Batchelor (1602) Owen 143.
4 Mitchell v Reynolds (1711) 1 P Wms 181. Trebilcock (1986, pp 53–54) has suggested that throughout the changes of approach there is a ‘thread of continuity’: ‘The thread is the underlying purpose of the doctrine as a whole – the protection of the individual’s right to work – and the two values or principles which make that a desirable end: the value of equity or fairness with respect to the impact of a restraint on the party restrained, and the value of economic development more generally.’
5 [1894] AC 535.
Held: The House of Lords affirmed the decision of the Court of Appeal that the covenant, though operating as a world-wide ban, was not wider than was necessary to protect the interests of Maxim Nordenfelt.

Lord Macnaghten stated the House’s view of the correct approach to contracts of this type:

The public have an interest in every person’s carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: 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 . . .

The current presumption is, therefore, that contracts or provisions within a contract which are in restraint of trade are unenforceable. That presumption can, however, be rebutted by proving that the restraint is ‘reasonable’, both as between the parties and in relation to the public interest. Much of the case law in this area is concerned with deciding what is ‘reasonable’ in this context.

14.4 CONTRACTS RELATING TO EMPLOYMENT OR THE SALE OF A BUSINESS

Examples of the kind of restraint we are dealing with would include a restriction on a sales representative from soliciting the customers of a former employer, or a restriction on the seller of a business from setting up in competition to the buyer. For such restraints to be valid, there are three requirements which must be fulfilled: (1) there must be a valid interest which the party imposing the restraint is trying to protect; (2) the restraint must be no more extensive than is reasonable to protect that interest; and (3) the restraint must not be contrary to the public interest. Each of these requirements needs to be considered separately.

14.4.1 A VALID INTEREST

Looking at the first of these requirements, an employer may have a legitimate interest in restricting the activities of a departing employee, where that employee will have acquired trade secrets, or will have gained influence over the employer’s customers either because they will have relied on the employee’s skill and judgment, or because they will have dealt exclusively with that employee. However, as was made clear by the House of Lords in *Herbert Morris Ltd v Saxelby,* it is not sufficient simply that the employee may compete with the former employer, or use ‘skill and knowledge acquired by the employee in his employer’s business’.

Examples from the cases where a restraint on an employee has been held to protect a legitimate interest include particular clauses in relation to a hairdresser, a sales representative and a tailor.

In relation to the sale of a business, the interest which the buyer is trying to protect is likely to be the ‘goodwill’ in the business, that is, the existing trade which has been built up by the seller. The buyer may have paid a substantial sum as part of the purchase price for the benefit of taking over the ‘goodwill’. In that context, the buyer may have a legitimate interest in preventing the seller from setting up a business which will attract all the old customers.

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6 Ibid, p 565.
7 [1916] 1 AC 688.
8 Ibid, p 710. See generally Treitel, 2011, p.505 on the other issues that may be involved (e.g. confidentiality).
9 Marion White Ltd v Francis [1972] 1 WLR 1423.
11 Attwood v Lamont [1920] 3 KB 571 although note the comments in Lucas (T) & Co Ltd v Mitchell [1974] Ch 129 (above).
The courts have been prepared to recognise that the categories of legitimate interest are not closed. For example, in *Greig v Insole*, which concerned restrictions placed on professional cricketers by the cricketing authorities, Slade J recognised that there might be a public interest that the game of cricket should be properly organised and administered. On the facts, however, the restraint was in any case unreasonable. In *Eastham v Newcastle United Football Club Ltd*, however, Wilberforce J was unable to find a legitimate interest in relation to restrictions on freedom of transfer for professional footballers. It seems then that, although in theory the categories of interest are open, the courts may be very cautious in finding new interests.

14.4.2 RESTR AI NT MUST BE REASONABLE
The reasonableness, or otherwise, of the restraint must be looked at in the context of the interest which is being protected. There are three main factors to consider: (1) the geographical area covered; (2) the length of time involved; and (3) the scope of the activities covered. For example, if a business is sold in one town, a restriction preventing the opening of a similar business anywhere in the country would be perhaps unlikely to be regarded as reasonable.

In *Mason v Provident Clothing Co.*, a canvasser who had been employed to sell clothes in Islington was restrained from entering into similar business within 25 miles of London. This was held to be too wide.

As regards time, this will again depend on the type of contract. In many employment cases, a restraint of one or two years at most will be all that is reasonable. In *Beckett Investment Management Group Ltd v Hall*, for example, the Court of Appeal held that a 12-month restraint on a financial adviser, who had left the claimants' firm to set up his own business, was reasonable, though indicated that anything longer would probably not have been. In *Fitch v Dewes*, however, a potentially lifelong restraint on a solicitor's managing clerk was upheld.

Key Case  *Fitch v Dewes* (1921)

Facts: The defendant was employed as a managing clerk of the plaintiff's solicitors' practice in Taworth. His contract contained a clause that purported to restrict his work if he left the practice. He was not to work in a solicitor's office within seven miles of Tamworth for a period that could be extended to the rest of his life. Following the termination of his employment, the defendant intentionally committed a breach of the covenant to test its validity.

Held: The House of Lords held that the clause did not exceed what was reasonably necessary to protect the plaintiff's business. The justification was that the business was one to which clients were likely to return over a long period.

FOR THOUGHT

How would you advise an employer who is seeking to put a restraint clause in her employees' contracts as to the length of any restraint that

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12 See also 20:20 London Ltd v. Riley [2012] EWHC 1912 on “golden handcuffs”.
13 [1978] 3 All ER 449.
14 [1964] Ch 413; [1963] 3 All ER 139.
15 This area (that is, football transfers) is one which has now been developed further by the influence of EU Law: see, for example, the Bosman case – *Union Royale Belge des Sociétés de Football Association v Bosman* (Case C–415/93) [1995] ECR I–4921; [1996] 1 CMLR 645.
16 [1913] AC 724.
17 [1921] 2 AC 158.
18 Treitel, 2011, p.510 questions whether this case would be decided the same way today.
might be reasonable? What period would you advise for (a) a hairdresser, and (b) an accountant who handles the tax affairs of individual clients?

The type of activity restrained must also be related to the interest being protected. A clause restraining someone who had been employed as a chiropodist from working as a hairdresser would be unlikely to be regarded as reasonable. At one time, the approach of the courts was to take clauses literally in assessing their reasonableness. Thus, for example, if no area were specified, the restriction would be taken to be worldwide. The cases of Littlewoods v Harris19 and Clarke v Newland20 have suggested a different approach, requiring the restraint to be limited by the ‘factual matrix’ within which it was imposed.21 In Littlewoods v Harris, an employee who had been employed solely in connection with the plaintiffs’ mail order business was made subject to a restraint which, on its face, covered all aspects of the plaintiffs’ wide ranging business activities. The Court of Appeal, however, held that the relevant clause should be interpreted as being intended only to apply to the mail order business in the UK. On that basis, it was reasonable. Similarly, in Clarke v Newland, a broad agreement by a doctor ‘not to practise’ was held to mean ‘practise as a general medical practitioner’ (rather than, for example, in a hospital) since that was the role in which the defendant had previously been employed.

14.4.3 PUBLIC INTEREST
There is some controversy as to whether the so-called public interest part of the rules concerning enforceable restraints of trade does, in fact, exist.22 If it does, then it means that even if a restraint satisfies the other conditions (legitimate interest and reasonableness), it may still be struck down as being contrary to the public interest. This might be the case, for example, in relation to a restraint on the work of a leading artist, playwright, doctor or scientist, whose work might well be for the public benefit. The principle was stated in Wyatt v Kreglinger and Fernau.23 The plaintiff’s pension was made contingent upon his not taking any part in the wool trade. The Court of Appeal held that this stipulation was void, irrespective of whether it was reasonable as between the parties, because it was contrary to the public interest. This was followed in the similar case of Bull v Pitney Bowes.24 It seems difficult, however, to find later authorities that have clearly applied the principle, though Lord Denning supported it in relation to a solicitor in Oswald Hickson Collier & Co v Carter Ruck.25 In some subsequent cases, such as Deacons v Bridge26 and Kerr v Morris,27 the courts have refused to apply the principle to the circumstances before them, while not denying its existence.

14.4.4 EFFECT OF BREACH OF CONTRACT
As regards employment contracts, restraints may be unenforceable if the contract has been terminated following a repudiatory breach by the employer.28 This does not mean, however, that a restrictive covenant contained in a contract which purports to make it enforceable after a repudiatory breach is therefore automatically unreasonable.29 Thus, for example, if the
employee simply resigns, the restraint will be enforceable, provided it is otherwise reasonable according to the tests outlined above.

14.5 CONTRACTS OF EXCLUSIVE DEALING

It was confirmed by the House of Lords in *Esso Petroleum Co Ltd v Harpers Garage (Stourport) Ltd* 30 that a contract in which one party agrees to take all supplies of a particular product from one source (sometimes known as a ‘solus agreement’) could amount to an unreasonable restraint on trade. Such arrangements are particularly common in relation to the supply of petrol and in relation to the supply of beer, etc, to public houses. 31 The House of Lords recognised in *Esso v Harpers*, as had been acknowledged in a report from the Monopolies Commission published not long before its decision, 32 that solus agreements are not necessarily disadvantageous to the public. 33 It is a question of whether the restraints imposed by them are ‘reasonable’ overall. Such contractual arrangements may well also fall foul of legislative restrictions on anti-competitive. 34

**Key Case** *Esso Petroleum v Harpers Garage (1968)*

Facts: The case concerned two solus agreements in relation to two garages run by the defendant. In respect of both there was an agreement to take all supplies of petrol from Esso, and to keep the garage open at all reasonable hours. In relation to garage A, the agreement was to last for four years and five months. In relation to garage B, the agreement was to last for 21 years, and was linked to a mortgage over the premises held by Esso, which was also irredeemable for 21 years. The defendants started to sell cut price petrol of other brands. Esso sought an injunction to prevent them doing this. The defence was based on ‘restraint of trade’.

Held: The House of Lords held that contracts of this type could be regarded as being in restraint of trade. As with the categories looked at above, the question was then whether the restraint was reasonable as between the parties and reasonable in the public interest. In relation to garage A, the five year restraint was reasonable. The 21 years in relation to garage B, however, was unreasonable, particularly as it was linked to a mortgage.

The *Esso* case gives no indication of what period greater than five years, but less than 21 years, might have been considered reasonable. In the later case of *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*, 35 however, a 21 year restraint was held to be reasonable because it was terminable after seven or 14 years.

In *Shell UK Ltd v Lostock Garage*, 36 the Court of Appeal had to address the issue of the point in time at which a restraint should be judged. A solus agreement requiring L to take supplies of petrol exclusively from S had originally been entered into in 1955, for a period of 20 years. In 1966, however, it had been varied to become in effect a permanent arrangement, but terminable by 12 months’ notice. In 1975, at the time of an intense petrol price war, S began to supply petrol at heavily subsidised rates to garages in the same locality as L. L was not included in these arrangements, and was unable to compete without making heavy losses. It therefore sought to obtain supplies of petrol elsewhere. Part of its argument was that the restraint of trade had become unreasonable, by virtue of S’s discriminatory action in

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31 See, for example, *Byrne v Tibsco Ltd* [1999] UKCLR 110; *Inntrepreneur Estates (GL) Ltd v Boyes* [1993] 2 CMLR 293.
33 For example, it can lead to reductions in suppliers’ costs (if they are supplying larger quantities to a smaller number of outlets) and keep down prices for the consumer. Nor is choice unduly restricted provided there are sufficient outlets so that a consumer does not have to travel far to find an alternative brand. See, for example, para 379 of the Report.
34 [1985] 1 All ER 303.
35 [1977] 1 All ER 481.
response to the price war. The majority of the Court of Appeal (Lord Denning dissenting) disagreed. They felt that the reasonableness of a restraint had to be judged at the time it was made, not in the light of later circumstances. Ormrod LJ thought that any other approach would create considerable difficulties.  

It would introduce into the law an unprecedented discretion in the court to suspend for a time a term in a contract; the repercussions of this are quite unforeseeable and unmanageable. For example, it would at once alter the approach of the courts to covenants in restraint of trade generally, because, if the restraint could be temporarily suspended when it was operating oppressively, many more covenants would pass the normal test at the time they were entered into. Moreover, neither party will be able to know when a covenant is or is not enforceable, or if temporarily unenforceable, when it becomes enforceable again.

The agreement here, at least in the form which it had taken since 1966, was a reasonable one, and could not be struck down as being in restraint of trade. The conclusion is, therefore, that agreements have to be judged at the time they were made, and not in the context of subsequent developments.

14.5.1 RESTRAINTS ON SONGWRITERS AND OTHER ENTERTAINERS

A particular area of difficulty arises in relation to contracts entered into by songwriters, or pop musicians, with music publishers or recording companies. These often require the artists to commit themselves to one company for a lengthy period of time, with no necessary obligation on the company to promote, or even publish, the artist’s work. The validity of this kind of ‘exclusive dealing’ agreement was considered in the following case.

**Key Case** Schroeder Music Publishing Co Ltd v Macaulay (1974)

**Facts:** The plaintiff was a young and unknown songwriter who entered into a standard form agreement with music publishers (the defendants). The copyright in all the plaintiff’s compositions for five years was assigned to the defendants, with an automatic extension for a further five years if royalties exceeded £5,000. The defendants could terminate the agreement on one month’s notice but there was no similar power for the plaintiff. The defendants were under no obligation to publish any of the plaintiff’s work. The plaintiff sought a declaration that the agreement was in restraint of trade and void.

**Held:** The House of Lords held that, where there was unequal bargaining power, a standard form agreement has to be looked at to see if, amongst other things, the restrictions it contained only go so far as is reasonably necessary to protect legitimate interests. In this case, the contract was an unreasonable restraint of trade because, whereas the plaintiff was totally committed to the defendants, the defendants were not obliged to publish anything.

**FOR THOUGHT**

If publishers are required to make contracts which are more favourable to the songwriters will this have the effect that they will be reluctant to take on new writers? Would this be to the long-term benefit of the industry?

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37 [1977] 1 All ER 481, p 492.
38 Compare in the legislative context Passmore v Morland plc [1999] 3 All ER 1005.
39 [1974] 3 All ER 616.
The decision in *Schroeder v Macaulay* was applied in the similar case of *Clifford Davis Management Ltd v WEA Records Ltd*. In *Panayiotou v Sony Music Entertainment (UK) Ltd*, on the other hand, a recording contract which was probably in restraint of trade when entered into had been renegotiated after the performer concerned (George Michael) had become famous. His subsequent attempt to challenge the renegotiated agreement failed because, although it contained some unfavourable conditions, the performer had received full legal advice. Moreover, the renegotiated agreement was part of a settlement of the dispute of the original contract. In this context, public policy favoured giving effect to the settlement, and therefore the revised contract. In any case, the recording company had a legitimate interest to protect, in that it wished to sell as many records as possible, and the restrictions on the performer were not unreasonable as a means of protecting that interest.

### 14.6 RESTRICTIVE TRADING AGREEMENTS

A group of manufacturers or producers may make an agreement between themselves to protect their interests. Such agreements may fall foul of legislative provisions relating to competition under domestic or EU law, but they are also subject to the control of the common law and may be struck down as being an unreasonable restraint of trade. The relevant principles were considered in *English Hop Growers v Dering*. The defendant, in common with other hop growers, had agreed to deliver all crops produced by him to a central selling agency. The object of the agreement was to protect the producers at a time when it was feared that there might be a glut of hops on the market. The defendant sought to escape from the agreement on the basis that it was in restraint of trade. Adopting a similar approach to the other areas which we have considered, the majority of the Court of Appeal asked whether the restriction was reasonable to protect a legitimate interest. It was held that the restraint was not in this case an unreasonable one and the agreement was upheld. This perhaps reflects the fact that the agreement here had been reached between parties bargaining at arm’s length.

If such an agreement affects third parties, the court will be more likely to intervene, as in *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd*. This concerned an agreement between two companies that neither would, without the consent of the other, employ any person who had been employed by the other company within the past five years. The agreement was intended to protect trade secrets, since they were both working on similar products involving chemical processes. In addition, at the time it was thought that their factories would be adjacent, though this turned out not to be the case. One of the companies brought an action to restrain the other from employing a particular former employee. It seems clear that there was in this case some legitimate interest to protect, but the Court of Appeal held that the restraint was too wide. It had the potential to cover an unskilled labourer as much as the chief chemist. On that basis, it was unreasonable.

### 14.7 SEVERANCE

In many contracts that are found to be unenforceable for illegality, it is likely to be the case that it is only part of the arrangement which is objectionable. To what extent can the contract be split into its constituent parts, with one part being found valid and the objectionable part being found unenforceable? There are two aspects to this namely, severance of the

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40 [1975] 1 All ER 237.
42 [1928] 2 KB 174.
consideration and severance of promises. Suppose, for example, A agrees to pay B £1,000 if B will fraudulently obtain a valuable painting and frame it. The first part of this contract, involving the fraud, is illegal but the second part, for the framing, is prima facie a perfectly legal arrangement. If B does what is required and then sues for the £1,000, the issue of the severance of the consideration will arise. B’s consideration for the promise to pay the £1,000 consists of both an illegal and a legal act. Can the two be separated? In other words, can B recover the £1,000 simply for framing the picture? If the action is by A, however, in relation to B’s failure to frame the picture, the question concerns the separation of the promises. These two issues will now be considered in turn.

14.7.1 SEVERANCE OF CONSIDERATION
For severance of consideration to be allowed, the lawful part of the consideration must be more important than the unlawful part. For example, in a contract of employment, the employee’s consideration for the payment of wages may be made up of performing the required work (legal) and a promise not to compete after leaving the employment (possibly illegal). Nevertheless, even if the restraint on future employment is too wide, the employee will be allowed to sue for wages. The consideration can be severed here because the performance of the work is the major part of the consideration and the restraint is subsidiary.

Note that the approach will in general be ‘all or nothing’. Thus, in the example of the painting, given in the previous section, B would either be able to claim the full £1,000, or nothing at all (which would be the more likely outcome). This may not apply, however, if it is possible to assign a precise value to different parts of the contract. This occurred in Ailion v Spiekermann, where the contract to pay the illegal premium could be severed because a precise amount could be assigned to the illegal part of the agreement.

14.7.2 SEVERANCE OF PROMISES
The attempt to sever promises occurs most frequently in relation to restraint of trade cases, where the wish is to ‘edit out’ from a list of restrictions those which make the restraint too wide but to leave the rest in force. There have traditionally been two elements to the courts’ approach, namely the ‘Blue Pencil Test’ and the requirement that the nature of the contract be retained.

14.7.3 THE BLUE PENCIL TEST
The Blue Pencil Test means that severance must be possible simply by cutting out the offending words. The court will not become involved in redrafting the contract. Thus, in Mason v Provident Clothing Co, the court refused to substitute the phrase ‘in Islington’, for ‘within 25 miles of London’. In Goldsoll v Goldman, the court agreed to do.

The strict application of this test traditionally required that the clause as edited still make sense, but the modern approach seems a little more relaxed – as discussed below (see 14.7.5).

14.7.4 NATURE OF THE CONTRACT MUST BE RETAINED
The requirement that the nature of the contract must be retained seems to derive from Attwood v Lamont, but is quite difficult to apply. In Attwood v Lamont, the plaintiff owned a general outfitters. The defendant was employed in the tailoring department as a tailor and

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44 The area is, of course, subject to overall considerations of public policy; see Beale, 2012, 16-199.
45 [1976] Ch 158; [1976] 1 All ER 497 – see Chapter 13, 13.4.5. Compare also Carney v Herbert [1985] 1 All ER 438.
46 [1913] AC 724. See above, 14.4.2.
48 [1920] 3 KB 571.
He found that his contract of employment bound him, after leaving his employment, not to be concerned in the trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen’s, ladies’ or children’s outfitter. It was suggested that the clause could be made reasonable by cutting out all the trades except ‘tailor’. The Court of Appeal refused to do this, treating the covenant as an entirety intended to cover all aspects of the plaintiff’s business. To sever it would be to affect its nature.

It is very difficult to reconcile this decision with the earlier decision in Goldsoll v Goldman (discussed in the previous section) or the later decision in Putsman v Taylor.49 In the latter case, the employee worked as a tailor at one branch, but the restriction covered all three branches owned by his employer. The court agreed to sever the names of the branches where the employee had not worked. In the more recent decision in Beckett Investment Management Group Ltd v Hall50 the trial judge relied on Attwood v Lamont, but the Court of Appeal preferred the statement of principle set out in Sadler v Imperial Life Assurance of Canada Ltd51 where it was suggested that the requirement was that

the removal of the unenforceable provision does not so change the character of the contract that it becomes ‘not the sort of contract that the parties entered into at all’.

On this basis the Court of Appeal in Beckett’s case held that an unreasonable provision, extending the restraint to prevent dealings with individuals in their personal capacity with whom the employees had had contact as representatives of businesses, could be severed.

It seems that there is still a requirement that the nature of the contract should not be altered by severance, but that it is likely to be applied in a much more flexible way than might appear from the decision in Attwood v Lamont.

14.7.5 THE CURRENT APPROACH
As suggested by the decision in Beckett’s case, it may well be that neither of the tests outlined in the previous two sections will nowadays be applied so strictly by the courts. In Lucas (T) & Co Ltd v Mitchell,52 for example, the deletion left the phrase ‘any such goods’ in the contract. It was necessary to look at the deleted clause in order to see what ‘such goods’ meant but the deletion was nevertheless allowed to stand. Moreover, the approach taken to the interpretation of restraint clauses in Littlewoods v Harris53 and Clarke v Newland,54 discussed above,55 may mean that the severance of provisions may not be so necessary. As we have seen, the courts in these cases rejected the view that widely-phrased restrictions should be given their literal meaning. Instead, they had to be interpreted within the factual context in which they had been put forward. Such an interpretation is more likely to lead to the restraint, as redefined, being regarded as reasonable, thus obviating the need to consider severance.

14.8 SUMMARY OF KEY POINTS

Contracts in restraint of trade are prima facie void but may be found to be valid if they reasonably protect a legitimate interest and are not contrary to the public interest.

49 [1927] 1 KB 741.
53 [1978] 1 All ER 1026.
54 [1991] 1 All ER 397.
55 See 14.4.2.
The rules tend to be applied most frequently to restraints on employees leaving employment, on the sellers of businesses and in contracts of exclusive dealing.

For the restraint to be valid the party imposing it must have a legitimate interest to protect, such as trade secrets, customer contacts or goodwill (in the purchase of a business).

A restraint will need to be reasonable to protect that interest. The courts will look at the geographical area covered, the length of the restraint and the scope of activities covered.

In applying these tests the courts will not necessarily take the literal wording of the restraint but may interpret it within its factual context.

Unreasonable parts of a restraint provision may be severed, as long as this can be done by simply cutting words and the result does not make the nature of the arrangement fundamentally different.

14.9 FURTHER READING

Lucey, M, Europeanisation and the Restraint of Trade Doctrine (201) 32 LS 623.

Monopolies Commission, Report on the supply of petrol to retailers in the United Kingdom, 1965 HC 265


Whish, R and Bailey, D Competition Law, 7th edn, 2003, Oxford:OUP


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