SHERIFF APPEAL COURT

[2018] SAC (Civ) 29
ABE-CA23-17

Sheriff Principal Pyle

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL DEREK CW PYLE

in the appeal in the cause

JOHN ANTHONY NEKREWS AND CAROLINE NEKREWS,
Tigh Mara Bruntland Road, Portlethen, Aberdeen

Pursuers and Appellants

against

PMAC SCIENTIFIC LIMITED,
PMAC House Greenhole Place, Bridge of Don Industrial Estate, Aberdeen

Defender and Respondent

Pursuers and Appellants: Garioch (sol adv); Gilson Gray
Defender and Respondent: Reid; Aberdein Considine

19 November 2018

[1] In June 2016, the parties entered into a share purchase agreement whereby the respondent purchased the issued share capital of Gamm@Chek International Limited, a company which specialised in flood member detection services to the oil industry. The contract provided for payment of elements of the purchase price at varying times and on varying conditions being met. The initial element of the price was paid on completion. The next element, referred to as "the Secondary Consideration", was not paid when due. In this action the appellants demand payment of that sum. In response, the respondent avers

that payment is no longer due because the appellants are in breach of contract. The respondent counterclaims for damages arising from the alleged breach.

[2] Clause 9.1 of the contract is in the following terms:

> "Both of the [appellants] covenant with the [respondent] that they… shall procure that no Associate of theirs shall:
>
> (a) at any time during the period of 3 years beginning with the Completion Date, in any geographic area in which any business of the Company was carried on at the Completion Date, carry on or be employed, engaged or interested in any business which would be in competition with any part of the Business as the Business was carried on at the Completion Date; or
>
> (b) at any time during the period of 3 years beginning with the Completion Date, deal with any person who is at the Completion Date, or who had been at any time during the period of 36 months immediately preceding that date, a client or customer of the Company; or
>
> (c) at any time during the period of 3 years beginning with the Completion Date, canvass, solicit or otherwise seek the custom of any person who is at the Completion Date, or who has been at any time during the period of 36 months immediately preceding that date, a client or customer of the Company;
>
> (d) at any time during the period of 3 years beginning with the Completion Date:
>
> (i) offer employment to, enter into a contract for the services of, or attempt to entice away from the Company, any individual who is at the time of the offer or attempt, and was at the Completion Date, employed or directly or indirectly engaged with the Company; or
>
> (ii) procure or facilitate the making of any such offer or attempt by any other person."

Clause 1.1 of the contract provides that the term "Associate" means in relation to a person, a person who is connected with that person, and whether a person is so connected is to be determined in accordance with Section 993 of the Income Tax Act 2007. Section 993(2) provides:

> "An individual ("A") is connected with another individual ("B") if –
>
> (a) A is B's spouse or civil partner,

(b) A is a relative of B,

(c) A is the spouse or civil partner of a relative of B,

(d) A is a relative of B's spouse or civil partner, or

(e) A is the spouse or civil partner of a relative of B's spouse or civil partner."

Section 994(1) of the 2007 Act provides:

"In section 993… "relative" means brother, sister, ancestor or lineal descendent."

[3] The respondent avers that a Mr Nekrews, by means of a limited liability company in which he owns 50% of its shares, has undertaken activities of the kind proscribed by section 9 of the contract. The significance of that is that Mr Nekrews is the brother of the first appellant. Accordingly, the respondent avers that the appellants are in breach of the contract by failing to "procure" that Mr Nekrews would not undertake such activities.

[4] Before the sheriff in debate the appellants presented three arguments against the respondent's reliance on clause 9: first, that the clause was a restraint on trade; secondly, that it was impossible for the appellants to perform; thirdly, that it was void from uncertainty. The appellants were unsuccessful in respect of each. Before this court, they relied upon only the first of those arguments. Thus, the short point which arises is whether clause 9 can be properly characterised as a contractual term which is in restraint of trade. The appellants' position was that the provisions in the clause which required the appellants to procure third parties not to do certain acts, as compared to the appellants themselves, were in restraint of trade and were thereby unenforceable in the absence of averments by the respondent that they were otherwise reasonable. It was the fact of the obligation to procure, rather than the temporal or geographical nature of the restriction, which was a restraint on trade. The respondent's position was, put simply, that the provisions were nothing to do with the restraint of trade concept as developed in the authorities, this action not being, for example,

an action of interdict against Mr Nekrews. Any associate of the appellants was free to ignore attempts by them to procure his co-operation. Such refusal would have no consequences for him arising from the contract; the only consequences would fall upon the appellants arising from their failure to procure.

[5] In *Dickson v Pharmaceutical Society* [1970] AC 403 (at p 431), Lord Hodson remarked in the context of a discussion about where might lie the onus of proof of reasonableness of a restraint of trade:

> "The issue which in practice, once restraint is found to exist, is litigated between the parties is not "Is this the kind of case to which the doctrine applies?" but "Is the restraint unreasonable?""

As I understood him, counsel for the respondent framed his objection to the appellants' submission as there being no restraint of trade at all. That is in a literal sense incorrect. As I have noted, the issue of whether it was possible for the appellants to procure the co-operation of Mr Nekrews not to act in a manner in breach of the conditions in clause 9 of the agreement was debated before the sheriff who, in my view correctly, decided that the impossibility of doing so, or at least the impossibility of doing so without Mr Nekrews' co-operation, did not mean that the appellants could not be in breach of their contract with the respondent. But such impossibility without co-operation does not of itself mean that there cannot be a restraint of trade, in the general and non-technical sense of a hindrance. But it also does not follow that such a hindrance is encompassed in the definition of restraint according to the law. In *British Motor Trade Association* v *Gray* 1951 SC 586 (at p 598) Lord President Cooper described it thus:

> "The typical contract in restraint of trade is a contract by which some restriction is imposed which tends to deprive the community of the labour, skill or talents of men in the employments or capacities in which they might be most useful to the public as well as to themselves, and which may be on that account contrary to public policy."

The concept of restraint of trade is in the context of contracts which create enforceable obligations, but that does not mean that a restraint of trade in a literal sense cannot arise simply because there is no compulsitor upon one of the contracting parties, or indeed other parties who might be required to enter into contractual terms as a consequence, to perform an act or not to perform an act which creates the restraint. It is, I think, reasonable to assume that when the appellants entered into the contract with the respondent they expected to be able to effect the procurement required by clause 9 – and indeed that the respondent also expected that the appellants would be able to do so. The parties' intentions, thus, were that if any third party who was a relative of the appellants considered acting in competition with the respondent in breach of clause 9 he would be persuaded not to do so by the appellants. While that cannot be characterised as a restraint, in the sense that there is a compulsitor within it, it still would be a restraint of trade, albeit voluntarily entered into. To that extent, therefore, it could potentially be contrary to the public interest in depriving the community of the third party's labour, skill or talents. If that be correct, it follows that the question is, as Lord Hodson put it, "Is this the kind of case to which the doctrine applies?"

[6] The classic definition of the concept of restraint of trade in connection with contracts is that of Lord Macnaghten in *Nordenfelt* v *Maxim Nordenfelt Guns and Ammunition Co* [1894] AC 535 (at p 565):

> "The true view at the present time, I think, is this: 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 interest of the parties concerned and reasonable in reference to the interest of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

The idea of a restriction on liberty of action is reflected in later cases. For example, in *Esso Petroleum* v *Harper's Garage (Stourport) Ltd* [1968] AC 269 (at p 298) Lord Reid observed:

> "Restraint of trade appears to me to imply that a man contracts to give up some freedom which otherwise he would have had."

It is true that the concept of restraint of trade is not restricted just to the contractual field (*Dickson* v *Pharmaceutical Society*, *supra*, Lord Wilberforce at p 440). *Thompson* v *British Medical Association (NSW Branch)* [1924] AC 764 is an example of the rule being considered in the context of a professional body and the application of its rules to a member. Nevertheless, the vast majority of cases in which the concept has been invoked have been where parties have entered into a contract. Even in *Thompson* v *British Medical Association (NSW Branch)* and *Dickson* v *Pharmaceutical Society*, by joining the professional body the party had voluntarily agreed to be bound by its rules. Thus the concept of restraint is not the general sense of restraint merely as the prevention, restriction or distortion of competition, as might apply in modern concepts of competition law, such as the rules that apply among member states of the European Union (eg, Article 101 of the Treaty on the Functioning of the European Union 2009). Instead, it is a concept which applies in the context of a party entering into an agreement whereby he surrenders his unrestricted liberty to trade freely. The public interest is the effect which that surrender of liberty has in depriving the community of a person's skill and experience (*Herbert Morris Limited* v *Saxelby* [1916] AC 688 (Lord Atkinson at p 699).

[7] The solicitor advocate for the appellants prayed in aid a passage from the decision at first instance in *Kores Manufacturing Co Ltd* v *Kolok Manufacturing Co Ltd* [1957] 1 WLR 1012 (at p 1018-1019):

> "If the matter be approached from the standpoint of the public interests, the agreement appears equally objectionable… The enforcement of its terms by the court

> would… have produced a public mischief. In considering this aspect of the case, the court is not primarily concerned with what in practice has been done under the contract, but rather with what may be done and what mischiefs may arise if the full terms of the bargain are applied."

Thus, it was submitted, the court must consider what might have arisen in the event that the appellants had been able to procure the co-operation of the "associates", including Mr Nekrews. But that case concerned a contract between two companies to restrict the movement of the employees of one to the other. The restriction, if it occurred, would arise when an employee of one sought employment with the other. But the restriction would not be upon the employee, who unless already contractually bound under his existing contract of employment (which, incidentally, the Court of Appeal considered would not be an enforceable term ([1959] 1 Ch 108, at p 125)) would be free to apply to be engaged by the other company; instead, it would be upon the other company as one of the two parties to the contract. One of the incidental consequences might be the employee's loss of opportunity of employment, but the principal cause and effect were the restriction of liberty given by one company and the enforcement of the contract by the other. A similar case with the same result is *Mineral Water Bottle Exchange and Trade Protection Society* v *Booth* (1887) 36 Ch D 465, where again the restriction over the employment of certain classes of workmen would have had the incidental consequence of an individual's loss of opportunity of employment, but the cause and effect were the membership of a trade society with a consequential restriction of liberty of the member through the society's rules and the desire of it to enforce the rules against the member. In the instant case, there is no loss of liberty by the appellants. Instead, they have agreed to secure, if they can, the co-operation of third parties. In my opinion, that is nothing to the point and does not engage the concept of the rule of restraint of trade as developed in the authorities.

[8] Parties were agreed that there was an error in the sheriff's interlocutor in that he should have repelled the sixth rather than the fourth plea-in-law for the appellants. To that extent, I shall allow the appeal but otherwise the appeal falls to be refused. Expenses follow success. There was no opposition to the respondent's motion to certify the appeal as suitable for the employment of junior counsel.