J.Q.A.T. PTY LIMITED *v.* **STORM**
(O.S. 749/1985)

Full Court (Connolly J., Williams J., Ambrose J.)

19, 23 June; 4 July 1986

Trade – Residual Matters – Restraint of trade by agreement – Validity – Restrictive Covenant in contract of employment – Eighteen possible combinations of restraint of trade – Whether covenant void for uncertainty.

The respondent's contract of employment with the appellant contained a clause which provided that, upon his employment being terminated, he was restrained from being interested, engaged or acting in specified activities for specified periods of time ranging from one to three months in Queensland and New South Wales. The succeeding clause provided firstly that the subclauses dealing with activity, the period of time and the locality of the restraint were to be construed as having a combined and cumulative effect and secondly that the preceding clause if found to be invalid or unenforceable was to be severable from the other subclauses. There were eighteen possible combinations of restraint which led the judge at first instance to find the clause uncertain.

Held, allowing the appeal, that where the terms of a covenant imposing restraints of trade are clear, the fact that, the individual restraints may overlap and be cumulative in their effects does not make them uncertain or inconsistent.

Austra Tanks Pty Ltd v. Running [1982] 2 N.S.W.L.R. 840 distinguished.

Davies v. Davies (1887) 36 Ch. D. 359, 387, 393 considered.

CASES CITED

The following cases were cited in the judgments:
Austra Tanks Pty Ltd v. Running [1982] 2 N.S.W.L.R. 840.
Clyde Engineering Co. Ltd v. Cowburn (1926) 37 C.L.R. 466.
Davies v. Davies (1887) 36 Ch.D. 359.
Haynes v. Doman [1899] 2 Ch. 13.
Ex parte McLean (1930) 43 C.L.R. 472.

ORIGINATING SUMMONS

Further facts relevant to the report sufficiently appear in the judgments reported below.

G. E. Fitzgerald Q.C., with him *D. J. S. Jackson*, for the appellant.

B. D. O'Donnell, for the respondent.

C.A.V.

CONNOLLY J.: The respondent is a former employee of the appellant who, on 30 July 1985, gave two months' notice of resignation from that employment. His contract of employment was in writing and contained the following provisions:

> "6.2 In the event that his Employment hereunder is terminated the Employee shall not, without the prior written consent of the Company, from the date of such termination for the period hereinafter specified be as principal interested, engaged or employed or act as an adviser or consultant in, or be an employee, agent or officer of, or an adviser or consultant to, any person, firm or corporation interested or engaged in:

(a) (i) the provision of personnel/Human Resource services;
(ii) any activity of a like or similar kind to that in which the Employee was interested or engaged during the course of his employment hereunder;
(iii) any business of a like or similar kind to that engaged in by the company:
(b) (i) for a period of one (1) month;
(ii) for a period of two (2) months;
(iii) for a period of three (3) months;
(c) (i) in the State of Queensland
(ii) in the State of New South Wales.

6.3 The preceding sub-clause 6.2 of this Clause 6 shall be construed and have effect as if it were the number of separate sub-clauses which results from combining the commencement of sub-clause 6.2 with each sub-paragraph of paragraph (a) and combining each such combination with each sub-paragraph of paragraph (b) and combining each such combination with each sub-paragraph of paragraph (c), each such resulting sub-clause being severable from each other such resulting sub-clause, and it is agreed that if any of such separate resulting sub-clauses shall be invalid or unenforceable for any reason, such invalidity or unenforceability shall not prejudice or in any way affect the validity or enforceability of any other such resulting sub-clause."

It would appear that the respondent did not accept his obligation to comply with the restraints contained in these provisions and on 27 September 1985 the appellant issued a writ of summons seeking an injunction and damages and on the same day gave notice of motion for an interlocutory injunction. This motion was refused on 7 October 1985, on grounds, some of which at least do not involve the question before this Court. There is no appeal from that order.

On 3 October 1985 the respondent issued an originating summons returnable that day for a determination that cll.6.2 and 6.3 are void for uncertainty. Judgment to that effect was pronounced on 7 October 1985 and on 11 October 1985 an order for the costs of the originating summons was made in favour of the respondent. On 11 October 1985, judgment in the action was ordered to be entered for the respondent with costs. The appellant appeals against the two orders on originating summons and the last mentioned judgment.

The question is a short one. There are eighteen possible combinations resulting in eighteen notional separate sub-clauses. Despite strenuous argument by Mr O'Donnell I am not persuaded that cl.6.3 contains any indication that these eighteen notional subclauses are either alternative statements of obligation or, what is probably the same thing, that the

intention of the parties was that only one of them should operate at a time. Thus the restraint is against the activity specified in each of these notional subclauses and it ranges from being involved as specified in the introductory passage in the provision of personnel/Human Resource services for three months in both Queensland and New South Wales to engaging in the specified activity in any business of a like or similar kind to that engaged by the appellant for one month in either Queensland or New South Wales. On the proper construction of these provisions, however, the employee is restrained from all the activities the subject of each of the notional subclauses for all the periods and in both the States. Is there any uncertainty in this?

It is true that the obligations the subject of the notional subclauses will overlap but that does not make them inconsistent if it is proper to regard them as cumulative. The fact that the obligations are imposed on the former employee by a series of overlapping covenants does not mean that the obligations are uncertain. He is subject to all eighteen, as a matter of construction. A question which is no doubt to be litigated in the action is whether cll.6.2 and 6.3 are, in any respect, in unlawful restraint of trade and whether, if that be so, the unlawful restraints may be severed from the obligation. It was not doubted in argument that the way in which these provisions are drafted is designed to facilitate severance should this be necessary. That, however, does not mean that the obligation which attaches to the employee under the contract is not clear. It is, in my judgment, an obligation to abstain from the activities specified in the commencing words in relation to the provision of personnel/Human Resource services, in relation to the activities in which he was engaged as an employee and in relation to a business similar to that engaged in by the appellant (the latter two possibly but not necessarily being covered by the first) for three months in both Queensland and New South Wales.

It is not disputed that if the obligations imposed by the notional subclauses are cumulative this conclusion is correct. However, in support of the argument that the intention of the parties was that one only of the notional subclauses should operate at a time, Mr O'Donnell relied upon the principle that such clauses should be construed with reference to the object with which they are formulated: *Haynes v. Doman* [1899] 2 Ch. 13. So much may be accepted but, in my view, the provisions reveal an intention to restrain the former employee in relation to the widest range of behaviour, locality and time which can be derived from its provisions. The possibility that a particular situation may bring into play the law relating to restraint of trade is faced but the primary intention is to oblige the former employee in the terms I have stated, the parties expressing a continued willingness to be bound should the Court hold that there is in some respect an unlawful restraint. Mr O'Donnell also contended that the notional subclauses cannot all stand together and he instanced a restraint of specified activities in New South Wales for three months and a

restraint against the same activities in the same State for one month. In my opinion, however, this is not correct. Both restraints operate for the first month and the longer for the balance of the three months.

Considerable reliance was placed on *Davies v. Davies* (1887) 36 Ch. D. 359 which concerned a covenant, on dissolution of a partnership, by the retiring partner "to retire from the partnership; and, so far as the law allows, from the business, and not to trade, act, or deal in any way so as directly or indirectly to affect the continuing partners". It was held by the Court of Appeal that the covenant to retire from the business so far as the law allowed was too vague for the Court to enforce. Bowen L.J. at 392 said of this covenant that if it meant that the covenant was not to be unlimited, but that the limit was to be found by an appeal to the law, then it seemed that the obvious answer was that the covenant was too vague for the Court to deal with and at 393 his Lordship observed:

> "… that, supposing the law will allow certain restrictions, there may be 20 different restrictions, all of which might serve the purpose of the parties, all of which would be absolutely inconsistent with each other; all of which the law would allow. How are we to know which of those particular restrictions the parties tended to impose? They leave it absolutely uncertain, and for the best of all reasons, because they have not made up their own minds."

At 395 Fry L.J. said of the same covenant that in his view the object of the contracting parties was to leave the law to make the contract between them.

Mr O'Donnell's contention was that the draftsman of cll.6.2 and 6.3 had in effect asked the Court to choose which combination is permissible and then to apply it. For the reasons I have already given I do not think that this is the right way to read these provisions. As I have already said, by the cumulative operation of the eighteen notional sub-clauses the respondent's obligation, subject to questions as to unlawful restraint of trade which are yet to be litigated, is as I have set it out above. However, should the Court be of the view that in any respect there is an unlawful restraint of trade, the parties have agreed that severance of the illegal features will not make a new contract for them and that they will be bound by so much of the covenants as remains.

It follows that the orders made on O.S. No. 749 of 1985 should be set aside. In lieu thereof, it should be declared that cll.6.2 and 6.3 are not void for uncertainty. The costs of and incidental to the originating summons should be borne by the respondent. The action was dismissed as against the respondent, as I understand it, solely by reason of the declaration made on the originating summons. The judgment of 11 October 1985 giving judgment in the action for the respondent against the appellant in action 3212 of 1985 should be set aside and in lieu thereof it should be ordered that the motion seeking that relief be dismissed with costs. It

follows that the appellant's costs of this appeal should be taxed and paid by the respondent. In all the circumstances, however, I would order that the respondent have an indemnity certificate under the Appeal Costs Fund Act in respect of the appeal.

WILLIAMS J.: The terms of the restraint clause in the relevant contract of employment, and the circumstances giving rise to the rulings and orders appealed against, are set out in the reasons for judgment of Connolly J., which I have had the advantage of reading, and I will not repeat such matters herein.

The learned Judge below came to the conclusion that the clause was uncertain because he was of the view that the reasoning of Wootten J. in *Austra Tanks Pty Ltd v. Running* [1982] 2 N.S.W.L.R. 840 was correct, and applied to the situation before him. But in my respectful view the clause under consideration in *Austra Tanks* was clearly distinguishable from that in issue here. The clause in the *Austra Tanks* was in the following terms: "Running shall not for the stipulated period engage in the business of the Partnership or any aspect thereof in the stipulated area". There was therefore one covenant and one covenant only. To give practical effect to that covenant the contract contained definitions of "stipulated period", "engage", "the business", and "the stipulated area". Each definition contained a number of paragraphs and with respect to time and area a particular form of drafting was used; an area or time would be stated and be followed by the words "or if this provision be unenforceable then", and a further time or area stated similarly qualified. Though there was but one covenant, what one had to do was substitute for the general words thereof a time and an area to give it practical meaning and effect. The contract provided a total of 82,152 possible combinations for the clause. As Wootten J. said at 843: "The present case is one in which the contract seeks to define the obligation through a series of enquiries as to what is enforceable." It was only after a decision had been made as to what was "enforceable" that one could say with any degree of certainty what the clause provided for. In that respect it was similar to the clause considered by the Court of Appeal in *Davies v. Davies* (1887) 36 Ch.D. 359; in that case the relevant clause provided that the retiring partner should retire "so far as the Court allows, from the trade or business …" It was against that background that Cotton L.J. said at 387:

> "If the parties wish to ask the Court to assist them in restraining those with whom they are dealing from breaking a limited covenant against carrying on a trade they must, in my opinion, themselves fix the limits within which there is to be no carrying on of the trade, and then they do it at their peril. The law will determine whether that limit is a good one, or whether it is one which is so unreasonable that the convenant must fail."

Bowen L.J., in the passage cited by Connolly J., was making the point that until the Court had adjudicated upon the matter the covenant had no

definite meaning. Thus the covenants in *Davies* and *Austra Tanks* were uncertain and therefore unenforceable.

But here the situation is different. On the proper construction of the clause each of the particulars in para.6.2 is cumulative, and it is possible to say with certainty and precision what the parties are agreeing to. The fact that there may be some overlapping does not mean that there is inconsistency such as would create uncertainty. This Court (as was the situation below) is not concerned with the reasonableness of the cumulative provisions, nor with the question whether if any particular thereof is unreasonable it could be severed. Such questions could only be resolved at trial.

The mere fact that there are eighteen covenants, some of which may be overlapping, does not mean that there is any uncertainty. Each covenant can be stated in precise terms, and the meaning and intent of each covenant is clear. There is therefore no uncertainty in the clause, and the only basis for attack could be on the ground of unreasonableness – an argument not open here.

I agree generally with the reasons of Connolly J., and with the orders he proposes.

AMBROSE J.: I have had the advantage of reading the judgment of Connolly J. and agree generally with the conclusions reached and the orders proposed therein. I wish only to add a few observations of my own.

The argument for the respondent was to the effect that the content of the eighteen various obligations imposed by cl. 6 (to which Connolly J. referred) or at least some of them, were inconsistent with the remainder and that resulted in the terms of the clause being uncertain.

The respondent relied upon the decision in *Austra Tanks Pty Ltd v. Running* [1982] 2 N.S.W.L.R. 840 where Wootten J. held the covenant considered in that case void for uncertainty. In that particular case it was possible, theoretically, to spell out of a covenant in restraint of trade 82,152 notional covenants, many of which, in his Honour's view, might be held to be enforceable but many others of which might be held not to be enforceable.

In that case however, the agreement was construed at 845 on the basis that:

> "The agreement contemplates only one covenant. Which one is intended? The problem is not to be solved by saying that the widest enforceable covenant is intended because in the absence of any statement as to the priority of application of the variables, it is not possible to say which covenant is widest. Does a 100 kilometre radius for one year give a wider covenant than a 10 kilometre radius for five years?"

His Honour construed the agreement as one which sought to define the obligations imposed "through a series of enquiries as to what is enforceable".

His Honour referred to the observations of Bowen L.J. in *Davies v. Davies* (1887) 36 Ch. 359, 393 to support his conclusion that the particular clause before him was void for uncertainty.

The essence of the observation made by Bowen L.J. seems to be that all the different restrictions which might be spelt out of the clause to which he referred "would be absolutely inconsistent with each other".

From my reading of cl.6 it appears clear that it has been drawn to provide eighteen separate and independent contractural restraints. If there is no uncertainty as to the definition of the contractual obligation or obligations created by that clause then the appeal must succeed. For the respondent it is argued that there is an inconsistency between the various contractual obligations imposed and therefore the clause is void for uncertainty.

I concur with the view expressed by Connolly J. that the contractual obligations imposed by cl.6 are cumulative.

In my view cl.6 could not be said to create mutually inconsistent contractual obligations. I refer to the observations of Higgins J. in *Clyde Engineering Co. Ltd v. Cowburn* (1926) 37 C.L.R. 466 where his Honour, dealing with the test of inconsistency between federal and state laws, said inter alia:

> "Etymologically I presume that things are inconsistent when they cannot stand together at the same time;"

Later in *Ex parte McLean* (1930) 43 C.L.R. 472, 483 Dixon J. dealing with the same question observed inter alia:

> "… by prescribing the rule to be observed the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience …".

The concept of "inconsistency" with which both Higgins J. and Dixon J. were dealing is constrained of course by the context in which that term is used in s.109 of the Constitution. Nevertheless in construing cl.6 I find the tests of "inconsistency" to which I have referred helpful and conclude –

(i) Clauses are inconsistent when they cannot stand together at the same time; and

(ii) Inconsistency does not lie in the mere co-existence of two or more clauses which are susceptible of simultaneous compliance even though the extent of the obligation imposed by each differs from that or those imposed by the others.

In my view the extent of the contractual obligation imposed by each of the eighteen "notional covenants" is precisely defined and the respondent

may perform the obligation imposed by each without thereby breaching the obligation imposed by any of the others.

The fact that he may by some action breach one or more of the eighteen contractual obligations without thereby breaching all of them could not lead to the conclusion that there is an inconsistency in the obligations which renders the clause creating them void for uncertainty.

Appeal allowed

Solicitors: *Chambers McNab, Tully & Wilson* (appellant); *Breens* (respondent).

A. D. McKINNON
Barrister