RESTRICTIVE COVENANTS

Bernard Connors vs. Connors Bros., Ltd. and Lewis Connors and Sons, Ltd. (1941 I.D.L.R. 81)

The Privy Council judgment in 1940 in the case of Connors vs. Connors Bros. and Lewis Connors and Sons came up for decision in a recent Moot Court. Some points unconsidered by Lord Maugham merit a further discussion of the case.

The plaintiff had been a substantial stockholder in Lewis Connors and Sons Ltd. He had sold his shares to Connors Bros., Ltd. and thereupon had entered into a restrictive covenant not to "either directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada." Various transactions which are not material ensued Ten years later the plaintiff contemplating his re-entry into the sardine business commenced proceedings for an interpretation of the covenant.

Baxter, C. J. held that the plaintiff was bound by the covenant on the grounds that it was not too wide in the circumstances and was, therefore, reasonable between the parties. In addition, he held that it was in no way injurious to the public interest. The Appeal Division of the N. B. Supreme Court upheld the trial judge. On appeal to the Supreme Court of Canada, the judgement was reversed by a majority of the Court. On further appeal to the Privy Council the judgement of Baxter C. J. was restored.

A brief review of the law respecting covenants in restraint of trade might be appropriate at this point. The law has changed considerably since Elizabethen bays due to the changing nature of trade and commerce. **The Nordenfelt** case (1) before the House of Lords in1894 provides the best illustration of the modern law. This was summed up by Lord Birkenhead in the **McElliston** case in 1919: (2).

'An agreement in restraint of trade is **prima facie** void and cannot be enforced unless, (a) it is reasonable as between the parties, and (b) it is consistent with the interests of the public."

The question of reasonableness of the covenant seems to be the decisive factor since there are no decided cases where a covenant has been declared reasonable and yet void as being inconsistent with the interests of the public. However Lord Birkenhead in the **McEllistrom** case commented that it would not be difficult to imagine such a case.

The question of onus creates some difficulty as well. It seems quite certain that the onus of reasonableness lies on the covenantee. However once reasonableness is established, the onus of proving inconsistency with the public interest appears to fall on the covenantor. Lord Maugham indicated in the **Connors** case that the problem of onus will come up for futher elucidation in the future, though he didn't feel called upon to consider the point.

(1) *Nordenfelt vs. Maxim Nordenfelt Guns and Ammunition Co. 1894 A.C., 535*
(2) *McEllistrom vs. Ballymacelligott Co-Operative Agriculture and Dairy Society 1919 A.C. 548.*

In the **Connors** case Lord Maugham considered that the restriction covering the whole of the Dominion of Canada was reasonable between the parties, since the business protected by the covenant did in fact extend over Canada generally. This is in conformity with the modern law. However it is submitted that this particular covenant amounted to a restriction world-wide in area. It applied not only to the sale of sardines but also prohibited processing. The covenantor is **in fact** denied the right to process sardines in Canada **for sale** anywhere **in the world**...Thus the covenantee is receiving world-wide protection in fact whereas only protection in Canada is required for reasonable protection. It is submitted that this covenant is unreasonable as between the parties and therefore invalid.

Lord Maugham dismissed the contention that the covenant was inconsistent with the public interest, stating that to be so the covenant must create a "pernicious monopoly" calculated to enhance prices to an unreasonable extent.

It is submitted that such a view is not in conformity with Canadian combine legislation, though it is quite valid in England. It is extremely doubtful whether the covenant would fall within the prohibition of S498 of the **Criminal Code.** Under this section the agreement is illegal only if its purpose is to restrain trade.

On the other hand the covenant might well be within the range of the **Combines Investigation Act** being "likely" to operate to the detriment of the public. Furthermore it is quite certain that the covenant would not of necessity have to result in the enhancement of prices. It is sufficient if the covenant limits the activities of business. It is submitted therefore that Lord Maugham was in error on this point also and that the covenant was against the public interest as viewed by Canadian combines legislation.