19 August 2020

PRESS SUMMARY

Peninsula Securities Ltd (Respondent) v Dunnes Stores (Bangor) Ltd (Appellant) (Northern Ireland)
[2020] UKSC 36
On appeal from [2018] NICA 7

JUSTICES: Lord Wilson, Lord Carnwath, Lord Lloyd-Jones, Lady Arden, Lord Kitchin

BACKGROUND TO THE APPEAL

The appeal relates to a restrictive covenant given by the developer of a shopping centre in a lease that it granted to a retailer over part of the centre. In giving the covenant the developer and later the respondent ("**Peninsula**") each undertook not to allow any substantial shop to be built on the rest of the centre in competition with the appellant ("**Dunnes**"). Peninsula now argues that the covenant engages the doctrine of restraint of trade ("**the doctrine**"); that it is unreasonable; and that it is therefore unenforceable. This appeal concerns whether the covenant engages the doctrine.

The developer, Mr Shortall, wished to develop a shopping centre on land that he owned in Londonderry. He wanted an "anchor tenant" there in order to attract other retailers, and so he granted a lease to Dunnes, a subsidiary in a Dublin-based group of retail companies. In the lease he covenanted that any development on the site would not contain a unit of 3,000 square feet or more whose purpose was the sale of food or textiles. Dunnes built its store and the centre opened. Mr Shortall later assigned his freehold interest in the land, together with the burden of the covenant, to the respondent ("**Peninsula**"), a property holding company which he managed and which he and his wife owned.

The success of the shopping centre subsequently declined. Peninsula brought a claim in the High Court of Northern Ireland seeking (among other things) a declaration that the covenant was unenforceable at common law. McBride J dismissed the claim. She observed that, following the decision of the House of Lords in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 ("***Esso***"), it was necessary, in order to determine whether the covenant engaged the doctrine, to ask whether Mr Shortall or Peninsula had, on entry into the covenant, surrendered a pre-existing freedom of theirs to use the land. She held that Mr Shortall had surrendered such a freedom, but that Peninsula had not; and that the covenant had therefore engaged the doctrine only until the assignment to Peninsula had occurred. The Court of Appeal allowed Peninsula's appeal, holding that the doctrine had been engaged both before and after the assignment. Dunnes now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows the appeal and dismisses Peninsula's common law claim. Lord Wilson gives the lead judgment, with which Lord Lloyd-Jones, Lady Arden and Lord Kitchin agree. Lord Carnwath gives a concurring judgment.

REASONS FOR THE JUDGMENT

Lord Wilson observes that the court's duty in this appeal is to examine the decision in *Esso* in the light of questions of logic and public policy and to ask whether the surrender of a pre-existing freedom is an acceptable criterion for engagement of the doctrine **[16]**.

Dunnes made a preliminary argument that, as neither Mr Shortall, a developer, nor Peninsula, a property holding company, was a trader, no restraint on them could be a restraint of *trade*. That argument appears to be too narrow. The covenant does restrain trade because it restrains Peninsula from causing or permitting a trade in specified goods in a retail unit of a specified size on the site **[17]**.

The *Esso* case concerned a type of covenant under which the owner of a petrol station undertakes to buy from a particular supplier all the petrol to be sold at the station ("**a solus agreement**"). The respondent had entered into two solus agreements with Esso, each in respect of a different petrol station **[19]**. The respondent later repudiated the agreements and Esso sought an injunction requiring it to abide by them **[20]**. In the House of Lords, Lord Reid, with the support of the majority, formulated what has become known as the "pre-existing freedom" test: he stated that a covenant restraining the use of land would engage the doctrine if, on entering into it, the person doing so ("**the covenantor**") "gives up some freedom which otherwise he would have had" **[23-24]**. He held, again with majority support, that in relation to both agreements the doctrine was engaged **[28]**. Lord Wilberforce put forward a different test, known as the "trading society" test, under which a covenant restraining the use of land does not engage the doctrine if it is of a type which has "passed into the accepted and normal currency of commercial or contractual or conveyancing relations" and which may therefore be taken to have "assumed a form which satisfies the test of public policy" **[26, 46]**. Applying this test, he, too, concluded that the solus agreements engaged the doctrine **[28]**.

The pre-existing freedom test has received intense academic criticism **[31]**. In terms of public policy, which is the foundation of the doctrine, there is no explanation why a restraint should engage the doctrine if the covenantor enjoyed a pre-existing freedom but why an identical restraint should not engage it if he did not do so **[44]**. The trading society test, by contrast, is consonant with the doctrine **[47]**. The court should therefore make use of its ability, recognised in the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, to depart from a previous decision of the House of Lords, and should depart from the pre-existing freedom test formulated in the *Esso* case **[49-50]**. The objections to the test are that it has no principled place within the doctrine; that it has been criticised for over 50 years but scarcely defended; and that courts in Australia and parts of Canada have rejected it **[32-43, 50]**.

Application of the trading society test to the facts of this case is straightforward and so there is no need to send the matter back to a lower court. For it has long been accepted and normal for the grant of a lease in part of a shopping centre to include a restrictive covenant on the part of the landlord in relation to the use of other parts of the centre. It follows that the covenant in this case has at no time engaged the doctrine **[51]**. So the question of whether the assignment of the burden of the covenant to Peninsula affected the engagement of the doctrine no longer arises **[52]**. Peninsula seeks an alternative remedy under the Property (Northern Ireland) Order 1978, which gives the Lands Tribunal or the High Court the power to make an order modifying or extinguishing the covenant if it constitutes an impediment to the enjoyment of land. That is a more satisfactory vehicle for resolution of the issues in this case. Peninsula's claim under the Order should now proceed to be heard **[54-57]**.

In his concurring judgment Lord Carnwath agrees that the pre-existing freedom test should be discarded in favour of the trading society test and that the appeal should be allowed **[59-60, 68]**. As an exception to ordinary principles of freedom of contract, the doctrine should not be extended without justification beyond established categories **[61]**. What matters is the practical effect of the restriction in the real world, and its significance in public policy terms **[62]**.This case is different from *Esso* and the other trading cases: for the agreement is not in essence an agreement between traders but a transaction in land. The only trade which might be inhibited by it is that of a potential future occupier. None of the authorities suggests that there is any public policy reason or legal basis for protecting that mere possibility **[63]**. The covenant in this case does not restrict, but rather facilitates, the developer's business **[65]**.

References in square brackets are to paragraphs in the judgment