Privy Council Appeal No. 40 of 1986

Michael A'Court Taylor *Appellant*

v.

Rotowax Trading Limited *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH MARCH 1987

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD BRIGHTMAN
LORD GRIFFITHS
LORD MACKAY OF CLASHFERN
LORD OLIVER OF AYLMERTON

*[Delivered by **Lord Oliver of Aylmerton**]*

This is an appeal from a judgment of the Court of Appeal of New Zealand (Cooke, Somers and Casey JJ.) dated 26th March 1986 dismissing the appellant's appeal from a judgment of Quilliam J. in the High Court of New Zealand whereby he granted to the respondent an injunction restraining the appellant until 31st May 1986 from competing with the respondent in breach of the terms of clause 15 of a deed dated 21st May 1981 to which both the appellant and the respondent were party.

Having regard to the fact that the injunction granted has now expired, the only matters now in issue between the parties are those relating to the costs of the proceedings in the High Court and the Court of Appeal and, if the appellant succeeds, his possible claim to damages under a cross-undertaking given on the grant of an interim injunction pending the trial.

The circumstances in which the appeal arises are these:-

Rotowax Limited (hereinafter referred to as "Rotowax") was a company carrying on a well-established business of manufacturers of wrapping materials. It had a capital of $36,700 divided into 17,500 ordinary and 850 preference shares of $2.00 each. It was a family business all the shares in which were owned by members of the appellant's family. He owned 2,475 ordinary shares. He was not a director but had been, for some years before the agreement referred to, the marketing manager of the business. In 1981 a Mr. Ryan became interested in acquiring the Rotowax undertaking and a sale agreement was negotiated with the family shareholders all of whom agreed to sell their respective shareholdings to Mr. Ryan or his nominees. The way in which that was carried out was by a deed dated 21st May 1981 which was expressed to be made between the individual shareholders (including the appellant) (therein referred to as "the Vendors"), Mr. Ryan, two new companies formed specially by Mr. Ryan for the purpose of acquiring specific parts of the undertaking and Rotowax itself. The two new companies, with the consent of Rotowax, were named Rotowax Holdings Limited ("Holdings") and Rotowax Trading Limited ("Trading"). The deed recited the vendors' respective shareholdings in Rotowax and that two of the vendors were the only directors. Recitals C to F were as follows:-

> "C. The Vendors are desirous of disposing of and selling all the said shares in Rotowax to Holdings and Holdings wishes so to purchase all the said shares.
>
> D. Ryan wishes to purchase certain land and buildings from Rotowax and Rotowax is prepared to sell.
>
> E. Trading wishes to purchase certain assets from Rotowax and Rotowax agreed to sell same to Trading.
>
> F. All parties hereto are not prepared to conduct the transaction independently and some of the transactions are conditional on each other and all parties agree that the agreement must be taken as a whole."

It is unnecessary to recite all the provisions of the operative part of the deed verbatim. It established a settlement date of 3rd June 1981 and in clause 2 provided for the sale by Rotowax to Mr. Ryan personally of certain land (which their Lordships infer to be the land on which the Rotowax business was carried on) for a sum of $1,000,000, part of

which was to be advanced to Mr. Ryan by the Vendors. The clause also provided for the purchase by Holdings of all the plant owned by Rotowax at book value. By clause 3 one of the Vendors, Mr. H.E. Taylor, who was also a director, agreed to purchase from Rotowax at specified prices certain land and two motor vehicles. Clauses 4 and 5 provided for the declaration of a tax-free dividend by Rotowax to the Vendors and for the assignment to Mr. Ryan of sums standing to the credit of certain of the Vendors on current account with Rotowax.

Clause 6, which is the clause primarily relied on by the appellant in support of his submissions, was in the following terms:-

> "Trading will on the date of settlement purchase all the net current assets of Rotowax (excluding advances made to Ault & Wilborg The Pacific Limited but including all remaining cash held by Rotowax) at book valuation. The value so fixed shall remain owing by Trading to Rotowax to be payable on demand made by Trading to Rotowax."

Clause 7 provided for the purchase by Holdings of all the Vendors' shares in Rotowax at a price of $1,850,000. Under clause 10 Trading assumed an obligation to pay consultancy fees to certain of the Vendors. Clause 11 contained the provisions and warranties usual in corporate sale agreements, including warranties that the business of Rotowax had been carried on in the normal course since the date of the last accounts (which were annexed to the deed) and had not entered into obligations otherwise than in the ordinary course of business. The last paragraph of this clause is important since it shows with absolute clarity what the intention of the parties was. It was in these terms:-

> "... The Vendors will do all things reasonably necessary to ensure that Rotowax up to the date of settlement will receive the benefit of the continuity of business on the understanding that Ryan and Holdings and/or Trading will receive the benefit of the Vendors' goodwill in the business of Rotowax and that the good name and reputation of Rotowax will be maintained."

Obviously the expression "the Vendors' goodwill" is not strictly appropriate where what the Vendors are selling consists only of shares in a company, but even the most pedantic construction of this provision cannot conceal the obvious intention that the goodwill of the business of Rotowax was to pass on the sale. It is also reasonably clear from the terms of clause 14 that the entity which Mr. Ryan proposed to employ for conducting the business purchased was Trading. So far as material that clause provided as follows:-

"As an integral part of the inducement and consideration for Ryan and/or Holdings to purchase shares in Rotowax, John Bell Taylor and Michael A'Court Taylor agree to commence employment with and be employed by Trading in an executive managerial capacity for a period of at least two (2) years from and including the date of settlement. The salary for such employment is to be $37,500 (index to inflation) payable weekly and each to have the use of a suitable Trading motor car for his business and personal use. ... Both John Bell Taylor and Michael A'Court Taylor undertake with Ryan, Holdings and Trading that they will use their best endeavours to ensure that existing key personnel continue to work for Trading."

The concluding clause of the deed was clause 15 which formed the foundation for the action out of which the present appeal arises. That requires to be set out in full and was as follows:-

"All the Vendors jointly and severally agree and declare that they fully understand that it was a fundamental term that induced Ryan and/or Holdings to purchase the plant and shares in Rotowax for the consideration previously set out, that they would not for a particular period of time and on terms appearing hereunder and provided the restraint of trade is legal compete with Rotowax anywhere in New Zealand and accordingly all the Vendors NOW HEREBY SOLEMNLY AND SINCERELY DECLARE AND UNDERTAKE jointly and severally with Ryan and/or Holdings and/or Trading that for a period of five years from the date of settlement that the Vendors either jointly or severally will not engage anywhere in New Zealand either directly or indirectly, individually or together, or in partnership or association with any person or company whether as principal or servant, in any business concerned with the manufacturing and/or marketing, distributing, selling, repairing and/or dealing in tinfoil, aluminium foil, ink, glues, gums, wax, paper, plastic, wood, cellophane, or cardboard or in the business of printing, wrapping, packaging products of any description which are in direct or indirect competition with any product manufactured or process carried out or produce or process researched by Rotowax AND FURTHER the Vendors covenant that they will hold no shares or beneficial interest in such shares in any company other than one listed on any Stock Exchange which does any of the foregoing AND ALWAYS EXCEPTING THEREFROM their possible employment by Trading or Rotowax."

The sale and purchase was duly concluded and Trading thereafter carried on the business formerly conducted by Rotowax. It duly entered into service contracts with Mr. J.B. Taylor and the appellant pursuant to clause 14. Unhappily its business did not prosper. Some eighteen months later a receiver of its business was appointed and the receiver terminated the appellant's employment. He was subsequently re-engaged but on less favourable terms and without prejudice to his right to pursue a claim for breach of contract. Such a claim, their Lordships understand, is in fact being pursued by the appellant.

On 13th May 1985, however, the appellant terminated his employment with Trading and commenced operations on his own account which it is not disputed constituted breaches of the covenant on his part contained in clause 15. The respondent accordingly commenced proceedings for an injunction restraining further breaches until the expiry of the period of five years from the settlement date prescribed by the deed of 21st May 1981. An interim injunction was granted on 10th October 1985 and a motion to discharge dismissed on 28th November 1985. From that the appellant appealed but it was then agreed that the action should be tried immediately in the High Court, the issues being limited to two, that is to say, (1) whether the respondent had any interest which it was entitled to protect by the covenant sued upon and (2) whether the competition complained of was within the scope of the covenant. No question arises in the present appeal on issue (2) nor is it in dispute that, if issue (1) was rightly decided in the respondent's favour, no question arises as to whether the covenant is unreasonable or confers more than adequate protection on the covenantee. Thus the only question before their Lordships is whether the respondent, Trading, had a sufficient proprietary interest to sustain an action upon the appellant's covenant.

In the High Court Quilliam J. accepted a submission that the respondent did not acquire the goodwill of Rotowax's business and concluded that, were it not for the fact that the deed created interlocking obligations, the action would fail for want of a proprietary interest to be protected. He held, however, that the covenant was for the benefit of Mr. Ryan as representing himself and Holdings and Trading and that a sufficient proprietary interest could be found in the group as a whole by a process of lifting the corporate veil. He accordingly determined the first issue in the respondent's favour.

From that decision the appellant appealed to the Court of Appeal which upheld the decision of the trial judge but on the ground that on the true

construction of the deed it was evident that Trading was intended to and did acquire the business formerly carried on by Rotowax. The argument advanced on behalf of the appellant, both before that Court and before their Lordships, was in effect that Rotowax's business came to an end on the completion of the agreement and that all that were acquired by the purchasers respectively were individual assets. In particular it was submitted that because "goodwill" does not figure in the balance sheet as a separate item any goodwill adhering to Rotowax's business disappeared, as it were, into limbo and no purchaser acquired anything that could be called "a business" to which the protection of the covenant could attach. The Court of Appeal had no hesitation in rejecting this submission and their Lordships have no doubt that they were right to do so. The starting position is that on its face the deed was intended to effect the sale of an existing business as a going concern and it is in their Lordships' view entirely immaterial that the real purchaser, Mr. Ryan, elected to carry that out by vesting some of the assets employed in the business in himself or in a company other than that through which it was intended that the business should actually be carried on. What the respondent purchased under clause 6 were all the current assets (with one specific exception). Reference to the annexed balance sheet demonstrates that that included *inter alia* the whole of the cash at bank, the accounts receivable and the stock and work-in-progress. That it was intended by all parties that those assets should be used by the respondent to carry on the existing business is demonstrated by the provisions of clause 14. The fact that goodwill does not figure as a separate item in the balance sheet to which a specific value is attached is neither here nor there and any argument that the goodwill of the business was not intended to be preserved and to pass on the sale is conclusively answered by the express provisions of clause 11 of the deed to which reference has already been made.

Something was sought to be made of the fact that the appellant personally sold nothing to the respondent but was merely a minority shareholder selling his shares to Holdings. The Court of Appeal thought nothing of this point and their Lordships agree. The deed expressly provides, if that were necessary, that its provisions must be taken as a whole and any point based on the fact that the respondent was a Vendor only of shares in a company which owned the business transferred is rendered completely unarguable, as the Court of Appeal held, by the decision of the Board in *Connors Bros. Ltd. v. Connors* [1940] 4 All E.R. 179.

This appeal raises no point of principle at all. The principles governing the approach of the Court to

covenants in restraint of trade are familiar and undisputed. It is clear that the covenantee must have a proprietary interest which he is entitled to protect by the covenant and the only question is whether, on the true construction of this document, the respondent had such an interest. Their Lordships have been referred to a number of decisions both of English and New Zealand Courts for the purpose of demonstrating that a purchase of particular assets is not necessarily a purchase of the business itself. That proposition is almost self-evident but decisions on the construction of other agreements are of no assistance whatever in the construction of this agreement. Their Lordships, in common evidently with the Court of Appeal in New Zealand, regard this as an absolutely plain case. Not only is it perfectly evident on the plain terms of the deed itself that the respondent was the company intended to carry on the Rotowax business but that it actually did so was recognised in no less than three places by the appellant himself in his affidavit in support of the motion to discharge the interim injunction.

Mr. Mathieson Q.C. has taken, with courtesy and assiduity, every point on the appellant's behalf that could be taken but has been unable, despite all, to persuade their Lordships that this appeal is or ever was anything but hopeless. Their Lordships will accordingly humbly advise Her Majesty that it should be dismissed. The appellant must pay the respondent's costs of the appeal before their Lordships.