Neutral Citation No. [2017] NIQB 59 | *Ref:* **MCB10333**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **25/05/2017**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

_____

BETWEEN:

PENINSULA SECURITIES LTD

Plaintiff;

and

DUNNES STORES (BANGOR) LTD

Defendant.

_____

McBRIDE J

Introduction

[1] This case concerns the question whether a negative covenant contained in a lease is unenforceable on the grounds that it is an unreasonable restraint of trade.

Applications before the Court

[2] The plaintiff seeks the following relief in its Amended Amended Amended Statement of Claim:-

(i) A declaration that the covenant specified in the third schedule, paragraph (b) of the lease dated 2 February 1981, between the plaintiff and the defendant is unlawful and void and/or unenforceable and/or ought to be severed from the said lease.

(ii) Further, or alternatively, and in the event the court holds that the covenant is not an unreasonable restraint of trade, the plaintiff seeks an order pursuant to Article 6(2) of the Property (Northern Ireland) Order 1978 modifying or extinguishing the covenant on the grounds that the covenant is an impediment which unreasonably impedes the enjoyment of the plaintiff's land or, if not modified or extinguished, would do so, pursuant to Article 5 of the Property (Northern Ireland) Order 1978.

[3] By way of counterclaim the defendant seeks, in the event the court finds the covenant is an unreasonable restraint of trade, and/or the court finds the covenant

constitutes an "impediment" to the enjoyment of the plaintiff's land, an order under Article 6(2)(a) of the Property (Northern Ireland) Order 1978 for:

(i) the modification of the covenant so that it does not unreasonably impede the plaintiff; and

(ii) a sum to compensate the defendant for loss and damage arising from such modification.

[4] At a review hearing, the plaintiff and defendant's respective legal representatives agreed that the issues arising under the Property (Northern Ireland) 1978, as pleaded in the claim and the counter-claim be adjourned until after the determination of the plaintiff's claim for a declaration that the covenant and lease was unlawful/void or unenforceable, as it was an unreasonable restraint of trade. The court acceded to the request.

[5] The plaintiff's original claim under the Competition Act 1998 and its claim for loss and damage were both abandoned.

[6] The plaintiff was represented by Mr Aidan Robertson QC and Mr David Dunlop. The defendant was represented by Mr Stephen Shaw QC and Ms Margaret Gray. I am grateful to counsel for their very detailed, well researched and marshalled skeleton arguments, oral submissions and speaking notes.

The Lease

[7] On 2 February 1981 Patrick Shortall ("the lessor") of the one part and Dunnes Stores (Bangor) Ltd, the defendant ("the lessee") of the other part, in consideration of the sum of £50,000 paid by the lessee to the lessor and in consideration of a yearly rent of £100, the lessor demised to the lessee, 1.05 acres of land (hereinafter referred to as the "leasehold lands") at or about Springtown, Londonderry to hold the same for a term of 999 years from 1 February 1981.

[8] As appears in the third schedule of the lease, at paragraph (b), Mr Shortall as the lessor, covenanted with the lessee as follow:-

> "That any development on the lessors' land comprised in the lessors' Folio and on his other lands adjoining the premises shall not contain a unit in size measuring 3,000 sq ft or more for the ... purpose of trading in textiles, provisions or groceries in one or more units."
> (hereinafter referred to as "The covenant").

The Lease further provided at paragraph 9(g) as follows:

> "In case the said shop units or any other premises on the lessors adjoining lands or any part thereof shall be sold conveyed demised licensed or otherwise disposed of by the lessor or become vested in any other person or persons whomsoever the lessor will so deal with the premises or part thereof only on condition that the purchaser or lessee or other person to whom any interest or licence respecting the said premises shall be disposed shall enter into a covenant for the benefit of the lessee that he or any person deriving title under him shall observe the covenants on the part of the lessee and conditions herein contained and the lessor further covenants that he will at the request of the lessee join as plaintiff in any action by the lessee to enforce these covenants and the conditions."

The Leasehold and Freehold Lands

[9] Mr Shortall was registered as the fee simple owner of the lands contained in Folio 25992 County Londonderry on 22 August 1980. He thereafter leased part of these lands ("the leasehold lands") to the Defendant on 2 February 1981. The reference in the lease to "the lessor's Folio and on his other lands adjoining the premises" refers to the freehold lands contained in Folio 25992 County Londonderry which were retained by Mr Shortall after he entered into the lease. The freehold lands which were retained are hereinafter referred to as "the freehold lands". The freehold lands are immediately adjacent to the leasehold lands and as appears from the terms of the lease are the lands which are burdened by the covenant contained in the lease.

[10] The covenant in the lease was registered as a burden on Folio 25992 County Londonderry ("the freehold lands") on 3 March 1981 and states:

> "Part of the land herein is subject to a lease made on 2 February 1981 from P Shortall to Dunnes Stores (Bangor) Limited for 999 years from 1 February 1981…"

Factual Background

[11] The plaintiff is a property holding company. Mr Shortall is its Managing Director. He owns 99 of the 100 shares in the company. His wife owns the remaining share.

[12] In or around 1979 Mr Shortall purchased approximately 5½ acres of land at Springtown, Londonderry with the intention of developing it as a retail shopping unit. These lands were contained in Folio 25992 Co Londonderry.

[13] On 18 June 1980 planning permission was granted for the development of Springtown Shopping Centre.

[14] On 2 February 1981 Mr Shortall and the defendant entered into the lease in respect of 1.05 acres (the leasehold lands) of the lands contained in Folio 25992 County Londonderry.

[15] Springtown Shopping Centre was constructed on the leasehold lands by Peninsula Construction Co Ltd ("the plaintiff"). The defendant paid for the cost of building the supermarket and contributed to the costs of the carpark. The centre opened for trading in October 1982.

[16] When the centre opened it comprised an anchor store together with a number of retail units and 250 carpark spaces. The defendant was the anchor tenant. The retail units were situated along a mall which gave access to the defendant's store. The retail units include an off-licence, a post office, a chemist shop, a bureau de change and a fashion store.

[17] In or around 1983 the defendant opened a direct entrance to its store thus enabling its customers to bypass the mall.

[18] By instrument number 6828/33/11, which was registered on 27 April 1983 Mr Shortall transferred the freehold lands to the plaintiff. The plaintiff thus became the registered owner of the freehold lands which are the subject of the covenant contained in the lease. Mr Shortall also assigned his interest in the leasehold lands to the plaintiff and the plaintiff therefore became the successor in title to Mr Shortall's lessor's interest in the leasehold lands.

[19] On 14 November 2001 the plaintiff applied for planning permission to develop part of the freehold lands which adjoin the Springfield Shopping Centre. Planning permission was granted for this new development in April 2002 and a new shopping centre was built on the freehold lands subject to the covenant. The centre was completed in or around 2006.

[20] As the result of not being able to attract tenants to the shopping centre the plaintiff initially applied to the Lands Tribunal on 22 February 2010 seeking relief pursuant to the Property (Northern Ireland) Order 1978 and relief on the basis that the covenant was an unlawful restraint of trade.

[21] As the Lands Tribunal does not have jurisdiction to rule on the question whether the covenant is an unlawful restraint of trade the plaintiff issued the present proceedings.

[22] The defendant continues to occupy the leasehold lands and to trade from its store in the shopping centre.

Issues in Dispute

[23] When this matter was originally listed for hearing the court asked the parties whether, in law, the doctrine of restraint of trade applied to a negative covenant contained in a lease. The matter was adjourned to allow the parties time to consider this question. The defendant thereafter amended its pleadings and the parties then filed amended skeleton arguments. As directed by the court, the parties then filed a list of the agreed questions, which the parties considered required determination by the court. The agreed questions were:

(i) Can the plaintiff rely on the doctrine of restraint of trade as applying to the covenant attaching to its lands as contained in the lease with the defendant? This question contained the following three sub-questions:

- Does the restraint of trade doctrine apply to this type of long lease?

- Did the transfer of the freehold from Shortall to the plaintiff make a covenant which was void and enforceable against Mr Shortall enforceable against the plaintiff?

- Does the Competition Act 1998 exclude the application of the restraint of trade doctrine?

(ii) If yes, was the covenant 'reasonable'?

(iii) If the covenant is not 'reasonable' is the plaintiff barred from obtaining a declaration that the covenant is unenforceable?

(iv) If the covenant is unenforceable, can and ought the court sever the covenant?

In respect of the question whether the restraint of trade doctrine applied to a negative covenant in a lease the court invited the parties to consider whether this question should be dealt with by way of a preliminary issue. All parties indicated that it was not suitable to deal with it in this way. The court therefore proceeded to hear the evidence which was relevant to the other issues in dispute.

Evidence before the Court

[24] The plaintiff called one factual witness, Mr Shortall. In addition the plaintiff called one expert witness, Paul Scott, Planning Consultant, who had prepared a reported dated 9 May 2016.

[25] The defendant called one witness of fact, Mr Neil Faris, solicitor who had acted on behalf of the defendant in respect of the negotiations of the lease. The plaintiff accepted the evidence in Mr Faris' witness statement and he was not called for the purposes of cross-examination. The defendant's two other witnesses were Mr Martin Kelly, Town Planning Consultant who tendered a report he had prepared dated 18 May 2016 and Mr Kenneth Crothers, Chartered Surveyor, who had prepared a report dated 17 May 2016. Mr Martin's report was accepted as evidence and he was not required for cross-examination. Mr Crothers was called and cross-examined albeit to a limited extend.

Evidence on behalf of the Plaintiff

Evidence of Mr Shortall

[26] The principal factual evidence was given by Mr Shortall upon which he was cross-examined. He gave evidence that he is the Managing Director of the plaintiff company which is a property holding company. He stated he owned 99% of the shares and his wife owned 1%. Initially he was a private housing developer working in Londonderry in the early 1970s. In 1979 he purchased lands at Springtown as these were zoned for retail development. He secured planning permission for a shopping development which commenced in 1982. Mr Shortall said he had a vision for the city and wanted Dunnes Stores as the anchor tenant. It was his view that Dunnes was a prized branded retailer. He contacted Dunnes and met Mr Ben Dunne in Dublin in January 1980. Subsequently Mr Ben Dunne came to the site in or around May/June 1980. The parties met in the office of John Doherty, Estate Agent, in Ferryquay Street, Londonderry. At this meeting Mr Dunne offered to take the land by way of a long lease at a premium of £50,000 and a nominal rent. At Mr Dunne's request Mr Shortall agreed to the inclusion of a negative covenant in the lease, on the basis it was necessary to attract Dunnes to Londonderry, which Mr Shortall described as 'an economic and political wasteland' at that time. Mr Shortall had not sought to attract other anchor tenants, save Marks and Spencers who had politely declined. Although he did not contact any other potential anchor tenants it was his view that Stewarts were another possibility but he acknowledged they already had stores in Shantallow and Lisnagelvin. Mr Shortall said in evidence "I therefore had little choice but to grab the offer made by Mr Dunne with both hands as it was the `only deal in town'".

[27] After the terms were agreed at the meeting in May/June 1980 Mr Shortall instructed Mr Hasson of Hasson & Co Solicitors to prepare a lease. Thereafter there was a "travelling lease" which passed between Mr Hasson and Mr Faris, solicitor from Cleaver, Fulton & Rankin who acted for Dunnes Stores. As the lease was negotiated each side made amendments before agreement was eventually reached and both parties entered into the lease in its final form. Mr Shortall gave evidence that it was not explained to him that the covenant ran for the duration of the lease and therefore he did not appreciate it had a duration of 999 years. He said in

evidence "I didn't link the two of them". "I had no mental linkage between the 999 year lease and the covenant."

[28] Heads of agreement were subsequently prepared by Mr Faris and these were signed by the parties on 3 November 1980.

[29] During the construction of the centre Mr Shortall recalled Mr Dunne telling him that he would have his money back in 3-4 years and that he could "beat any competition".

[30] When the shopping centre opened it initially traded very successfully. Thereafter, Mr Shortall said he had difficulty attracting tenants to his units due to a number of other retail centres opening in Londonderry and because the centre was now unattractive as Dunnes made no improvements to it. He said his view was corroborated by the findings of the Planning Appeals Commission in 2004 which described Springtown Centre as "unappealing and rundown".

[31] In 2002 Mr Shortall took the decision to redevelop and build a new centre on his freehold lands which are directly adjacent to Dunnes Stores.

[32] Mr Shortall described an inability to attract tenants to the new shopping centre and attributed this to the existence of the covenant. He stated that the covenant "permanently neutralises the economic value of the land".

[33] Mr Shortall first complained about the covenant in 2006. This came about after he attended a lecture on restrictive covenants.

[34] Whilst Mr Shortall's answers under cross-examination were very circuitous and often expressed in picturesque terms and by the use of superlatives I found Mr Shortall to be an honest witness who despite the idiosyncratic manner in which he answered the questions always attempted to answer them to the best of his ability and recollection. This is supported by the fact he sometimes gave answers which were not always favourable to the case he was seeking to make.

Evidence of Paul Scott

[35] Mr Scott, Town Planner, was called as an expert witness in respect of the question of public interest. He had prepared a report dated 27 May 2016 in which he stated the Springtown Centre was originally granted planning permission in 1980 and was intended to serve the north-west expansion of the city. It included no restriction on the layout or use of floor space and he concluded "any restrictions on the planning permission for the centre would not have been in the public interest at that time." On re-examination he confirmed that in 1982 there was no planning restriction on further retail development at the Springtown Centre. When cross-examined by Mr Shaw QC he accepted that zoning was not the same as creating demand for land, although he felt zoning gave a better chance of securing

retail development. He stated it was outside his expertise to comment on the question whether Dunnes may not have come to the centre but for the negative covenant.

Evidence on behalf of the Defendant

Evidence of Mr Faris

[36] The defendant relied on his written statement of evidence dated 2 June 2016. He was tendered but not cross-examined by the plaintiff. In his written statement he stated that usually commercial leases were for a term of 125-150 years but Hassons, Solicitors acting for Mr Shortall had proposed a 999 year term.

[37] Mr Faris first entered into correspondence with Hassons in May 1980. These negotiations continued until August 1980 when final agreement was reached. At that stage Cleaver Fulton Rankin, Solicitors, drew up Heads of Agreement to encompass the contractual arrangements. This was signed by the parties in September 1980. During the negotiations in respect of the terms of the lease, Mr Faris stated "Hassons never took issue with the terms or duration of the negative covenant". Mr Faris accepted that Hassons were "not so adept at the intricacies of modern drafting required for development of this nature and they generally accepted amendments without demur". When Mr Shortall engaged new solicitors, McKinty & Wright, to draw up a supplemental lease, still no issue was taken with the terms or duration of the negative covenant.

Evidence of Mr Kelly

[38] Mr Kelly, Town Planner, was not called to give evidence but the parties agreed that his report dated 18 May 2016 be admitted in evidence. In his report Mr Kelly reported on the planning application relating to development of the Springtown Shopping Centre and examined the relevant planning policy prevailing in 1981 and that prevailing in 2016.

Evidence of Mr Crothers

[39] Mr Crothers, Chartered Surveyor, gave expert evidence to the court. He adopted his report dated 2 June 2016 as his evidence. He set out the difficult marketing conditions which prevailed in Northern Ireland in the 1970s and described the bringing of Dunnes to Derry as a 'great achievement' as Dunnes was a highly sought after anchor tenant. In his view it was not uncommon to find negative covenants in leases in favour of anchor tenants. This was especially so in long leases as the landlord, having received a premium, had no financial interest thereafter in how the centre traded. It was therefore the tenant who had everything to lose if the landlord put in competition. In this case he stated it would have been unpalatable and commercially offensive for the landlord to put direct competition on Dunnes' doorstep as Dunnes had come to an untested location and had invested significant

sums in buying the site, building the store and contributing to the costs of the car park. He accepted, when asked by the court, that in terms of the return on capital, the premium for a 125 year lease and a 999 year lease was similar. Under cross-examination he accepted he was not involved in the negotiations for the lease. He further accepted that the period of time to recover the initial investment by an anchor tenant was a relevant consideration in respect of the duration of a negative covenant. He was not able to say if it was unusual to find a covenant such as the present covenant in a 999 year lease.

[40] As appears from the evidence given and also from the limited nature of cross-examination the facts in this case were not too much in dispute. The dispute essentially turned upon the application of the law to the facts.

Submissions of the parties on Question 1:

Can the plaintiff rely on the doctrine of restraint of trade as applying to the covenant attaching to its lands contained in the lease with the defendant?

Plaintiff's Submissions

[41] The plaintiff made the following submissions:

(a) Mr Robertson QC submitted that the doctrine of restraint of trade applied to the covenant in this lease as the lessor gave up a pre-existing freedom when he entered into the covenant. To support this proposition he relied on three of the five Law Lords' speeches in Esso Petroleum v Harper's Garage [1968] AC 269. He further referred to a number of subsequent cases both in England and Wales and Ireland and the commonwealth which he submitted applied this principle on the basis it formed part of the ratio of Esso. In addition he relied on a number of leading texts including Chitty on Contracts (32nd Edition 2005) paragraph 16.085-16.141, Wylie, Landlord and Tenant Law (3rd Edition 2015) and Goldman and Bodrug, Competition Law of Canada (2015) which he submitted accepted that this proposition formed part of the ratio of Esso. He therefore submitted that Esso enunciated principles which were of general application and therefore applied to long leases. He rejected the defendant's submission that Esso was fact specific and therefore only applicable to solus agreements.

(b) He submitted that Mr Shortall had given up a pre-existing freedom when he entered into the covenant, as prior to the lease he could trade without any restriction.

(c) All the parties agreed that the doctrine of restraint of trade applies as of the date the agreement containing the covenant is entered into, in accordance with the dicta of Ormrod LJ in Shell v Lostock Garage [1976] 1 WLR 1187 of 1202 A-C.

(d) Given the excessive duration of the restriction on trading in the covenant, Mr Robertson QC submitted it was an unreasonable restraint of trade when entered into. As the covenant was unenforceable when it was entered into, it could not therefore bind anyone, whether Mr Shortall the original lessor or the plaintiff, who was his successor in title.

(e) The Plaintiff further submitted that as the covenant was contained in a lease, its enforceability by and against successors in title to the original parties was governed by Deasy's Act. He submitted that the rules of enforcement in respect of freehold restrictive covenants by and against successors in title of the original covenantor (person who owns or is in possession of the land bearing the burden of the covenant) and covenantee (the person who owns or is in possession of the land having the benefit of the covenant) were not applicable to the present covenant as it was contained in a lease and the lease, not the restrictive covenant, was registered as a burden on the freehold lands. The Defendant agreed with this proposition of law.

(f) He further submitted that in the event the doctrine of restraint of trade was held not to be applicable on the basis the plaintiff was a successor in title, the court should look to substance rather than form. As the plaintiff is wholly owned and controlled by Mr Shortall he submitted there is no difference in substance such as to affect the applicability of the doctrine of restraint of trade. The plaintiff relied on dicta of Dillon LJ at 178 B-E in Alec Lobb (Garage) v Total Oil [1985] 1 WLR 173 in support of this submission.

(g) The plaintiff rejected the defendant's submission that the Competition Act 1998 precluded the application of the restraint of trade doctrine and submitted that the plaintiff's argument based on Days Medical Aids v Pihsiang [2004] EWHC 44, proceeded on a fundamentally misconceived basis.

Defendant's Submissions on Question 1

[42] The defendant submitted:

(a) The doctrine of restraint of trade did not apply to negative covenants in a lease. Mr Shaw QC submitted that Esso was fact specific and dealt only with solus agreements. It therefore did not establish any principles of general application relating to the application of the restraint of trade doctrine to leasehold or freehold covenants.

(b) Mr Shaw QC further submitted that, according to Days Medical Aids v Pihsiang [2004] EWHC 44, once the plaintiff abandoned its claim under the Competition Act 1998 the court was precluded from ruling the covenant was unenforceable under the common law doctrine of restraint of trade. He

further submitted that the Property (Northern Ireland) Order 1978 precluded the application of the restraint of trade doctrine.

(c) The defendant further submitted that even if the doctrine of restraint of trade applied the covenant was not in restraint of trade as the defendant was free to let and sell the lands for any lawful use, save for retailing of textiles, provisions or groceries in units of more than 3,000 sq ft.

(d) If the restraint of trade doctrine did apply to leasehold negative covenants it did so only when a person gave up a pre-existing right to use the land. The defendant submitted that Mr Shortall had not given up such a freedom. Rather he had gained as a result of entering into the covenant as he acquired an anchor tenant, consideration of £50,000 and the opportunity to develop complementary retail facilities on his own land due to the retail draw of the defendant.

(e) The defendant further submitted that even if the doctrine applied to Mr Shortall on the basis that he was a lessor who gave up a pre-existing freedom to use the land, the plaintiff as a separate legal entity and successor in title to Mr Shortall had not given up any such pre-existing right to use the lands. Therefore, the plaintiff could not avail of the restraint of trade doctrine as it purchased the lands when they were already encumbered by the covenant.

(f) The defendant submitted Alec Lobb did not assist the plaintiff as it could be distinguished on its facts. In Alec Lobb the lease and subsequent under-lease were found to form a single transaction and the court held that the under lease was a device to avoid the application of the restraint of trade doctrine. In contrast the defendant submitted Mr Shortall transferred the lease to the plaintiff two years after the date it was entered into. Thus it was an entirely unrelated transaction. The defendant submitted there was no evidence to show that the transfer was done to avoid the restraint of trade doctrine or was otherwise a sham or a device. The defendant further submitted that the court should not pierce the corporate veil because it was not asked to and there was no reason to do so.

Legal Framework

Enforcement of Leasehold and Freehold Covenants against Successors in Title

[43] Negative covenants in freehold and leasehold land have been a feature of our land law for centuries. Frequently, such negative covenants not only relate to the use the land can be put to but in many cases relate to the trade which can be carried out on the lands.

[44] In accordance with section 12 and 13 of Deasy's Act all covenants contained in a lease are enforceable by and against successors in title to the original parties to the lease. In contrast at common law there were considerable difficulties in passing the burden of a covenant relating to freehold land to successors in title. Equity subsequently developed special rules relating to the enforcement of restrictive covenants whereby the burden of such covenants could be enforced against successors in title. This is referred to as the rule in Tulk v Moxhay after this leading case. In that case the court laid down the general principle in equity that the burden of a restrictive covenant will run with the land so that it binds successors in title of the original covenantor. Rules have now been developed setting down when such covenants run with the land. The rule in Tulk v Moxhay is used as shorthand to refer to the enforcement of restrictive covenants affecting freehold land against successors in title of the original parties.

Development of the Law of Restraint of Trade

[45] In order to determine whether the doctrine of restraint of trade applies to leasehold and freehold covenants it is necessary to consider the public policy grounding this doctrine and how this doctrine has developed at common law.

[46] The doctrine of restraint of trade has traditionally been applied to two categories of cases, namely, agreements between a master and servant whereby the servant agrees not to compete with his master after he leaves his service. The second category of case relates to agreements between a vendor who agrees not to compete with the purchaser of his business. Whilst there are now a number of reported cases in which the doctrine of restraint of trade has been applied to cases falling outside these two categories, as Lord Reid noted in Esso Petroleum v Harper's Garage [1968] AC 269 at page 293 F "I have not found it an easy task to determine how far the principles developed for the original categories have been or should be extended".

[47] This case raises the interesting and somewhat novel question whether the doctrine of restraint of trade applies to negative covenants affecting leasehold and freehold lands.

[48] All counsel agreed that the question whether the doctrine applied to the covenant in question required a careful analysis of the seminal House of Lords decision in Esso Petroleum v Harper's Garage [1968] AC 269.

Esso Petroleum v Harper's Garage

[49] In Esso two different garage owners entered into solus agreements with Esso. Under the respective agreements the garage owners agreed to buy all their fuel from Esso and in consideration of various commercial benefits including discounted fuel rates, they agreed to sell only Esso products at agreed retail prices and to abide by various other conditions set down by Esso in respect of the operation of the garages. One solus agreement was for a period of four and a half years and the other

agreement, which was contained in a mortgage agreement, was for 21 years being the period of the mortgage. When cheap fuel came onto the market the garages began to sell another brand of fuel. Esso applied to the court for injunctive relief. The Court held that the agreements were within the scope of the common law doctrine of restraint of trade as the garage owners each gave up a pre-existing freedom when they entered into the agreements, namely the right to sell any brand of fuel. The Court held that the tie for four and half years was reasonable and therefore valid. The tie for 21 years however was held not to be reasonable. The court further held that the fact a solus agreement was contained within a mortgage deed did not exclude the operation of the doctrine.

[50] Although this case involved solus agreements all five Law Lords specially addressed the question whether the doctrine of restraint of trade applied generally to covenants which restricted the use of land for trading. I find, from a survey of the subsequent jurisprudence in England & Wales, Ireland and the Commonwealth that Esso has been interpreted as establishing principles of general application and has been applied to many cases which did not concern solus agreements. For example in Sibra Building Company v Ladgrove Stores [1998] 2 IR 589 the principles in Esso were applied to a case involving the sale of land for development of a shopping centre which contained a covenant restricting the building of a pub or licensed premises in the shopping centre; in Quadramain v Sevastapol Investments [1976] HCA 10, (1976) 133 CLR 390 Esso was applied to a covenant in respect of the sale of alcoholic drinks and in Robinson v Golden Chips [1971] NZLR 257 the principles in Esso were applied when the covenant was in respect of the sale of fast food. In all of these cases it was accepted that Esso set down the relevant principles to be applied in determining whether the doctrine of restraint of trade applied. In addition the principles set out in Esso have now been cited in a number of property law texts and contract law texts including Chitty on Contracts, Wylie Landlord and Tenant Law in Ireland, 3rd Edition 2004 and Hill and Redmond Law of Landlord and Tenant as setting out principles of law relating to agreements involving land. I therefore reject the submission of the Defendant that Esso is fact specific. Rather, I find that Esso establishes principles relating to when the doctrine of restraint of trade applies to covenants affecting freehold and leasehold lands.

Principles established by Esso

[51] The House of Lords in Esso were seeking to reconcile two lines of authority, namely the common law principle that restraint of trade is contrary to public policy unless it is reasonable and the long established principle that covenants imposing restrictions on the use of land are valid even though the restriction may totally prohibit the carrying on of trade upon the land subject to the restrictive covenant.

[52] Whilst their Lordships did not speak with one voice I find that Esso established the following three principles, in respect of the application of the doctrine of restraint of trade to freehold and leasehold negative covenants:

(a) Principle 1 – The doctrine of restraint of trade applies to a person who gives up a "pre-existing freedom" when he enters into the covenant.

(b) Principle 2 - The doctrine of restraint of trade does not apply to either a lessee who accepts a negative covenant in a lease or a purchaser of freehold land who accepts a negative covenant in respect of the land he purchases.

(c) Principle 3 – The doctrine of restraint of trade, in respect of both freehold and leasehold land, does not extend to successors in title of the original covenantee and covenantor.

Principle 1

[53] The doctrine of restraint of trade applies to a person who gives up a "pre-existing freedom". This was the view of at least three of the five law lords. Lord Reid stated so at page 298C and E when he said:

> "Restraint of trade appears to me to imply that a man contracts to give up some freedom which otherwise he would have had … in the present case the respondents before they made this agreement were entitled to use this land in any lawful way they chose, and by making this agreement they agreed to restrict their right by giving up their right to sell there petrol not supplied by the appellants."

Lord Hodson at page 316G also held the doctrine applied:

> "If you subject yourself to restrictions as to the use to be made of your own land so that you can no longer do what you were doing before, you are restraining trade and there is no reason why the doctrine should not apply."

Lord Morris at page 309E-F accepted:

> "There is a clear difference between the case where someone fetters his future by parting with the freedom which he possesses to the case where someone seeks to claim a greater freedom than that which he possesses or has arranged to acquire."

Lord Pearce at page 325F equivocally accepted that the doctrine when he said it:

> "may apply when a man fetters with the restraint land which he already owns or occupies".

Lord Wilberforce held that the doctrine was not applicable to negative leasehold and freehold covenants at all.

Giving up a Pre-existing Freedom

[54] Thus a majority of at least three of the Law lords were prepared to extend the doctrine of restraint of trade to a lessor who gave up a pre-existing freedom when he agreed to be bound by a negative covenant.

[55] In Esso the Court held that the garage owners gave up a pre-existing freedom when they entered into the tie as they gave up the right they previously had to sell any brand of fuel. Further, in Cleveland Petroleum v Dartstone [1969] 1 WLR 116 Lord Denning F-G when considering this test stated at page 118:

> "a distinction is taken between a man who is already in possession of land before he ties himself to an oil company and a man who is out of possession and is let in by an oil company. "

[56] The defendant submitted that Mr Shortall gave up no pre-existing freedom when he entered into the negative covenant because he gained commercially as a result of the lease. I do not accept this is the correct test to apply when assessing whether someone has given up a pre-existing freedom. Mr Shortall by agreeing to enter into a covenant restricting the trade he could carry on his own lands was, I find, giving up a pre-existing freedom, as before he entered into the agreement he was not so restricted in respect of the trade he could carry out on his lands. This is very similar to the position of the garage owners in Esso who were held to have given up a pre-existing freedom to trade when they entered into the tie. The fact that they gained commercially from the solus agreement and in particular obtained discounted petrol rates, did not mean they were not giving up a freedom they had before they entered into the solus agreements. Indeed, most covenants in leases form part of a wider commercial context. The fact a person may gain financially or commercially in other ways does not mean they have not given up a pre-existing freedom. I therefore do not accept the submission that because Mr Shortall may have gained commercially from the lease he did not give up a pre-existing freedom.

[57] The doctrine was expressed by the three Law Lords to extend to a person who 'gives up a pre-existing freedom'. Although none of the Law Lords expressly stated the doctrine extended to a vendor who when selling or leasing part of his land agreed to enter into a restrictive covenant in respect of the lands he retained, I find that the doctrine extends to such a person on the basis that he, like a lessor, is giving

up a pre-existing freedom. The fact the land is freehold and not leasehold would not affect the applicability of the doctrine.

Principle 2

[58] The doctrine of restraint of trade does not apply to either a lessee who accepts a negative covenant in a lease or a purchaser of freehold land who accepts a negative covenant in respect of the land he purchases. This principle was accepted by all five Law Lords. Lord Reid at page 298 B-C and E states:

> "It is true that it would be an innovation to hold that ordinary negative covenants preventing the use of a particular site for trading of all kinds or of a particular kind are within the scope of the doctrine of restraint of trade. I do not think they are… A person buying or leasing land had no previous right to be there at all, let alone to trade there, and when he takes possession of that land subject to the negative restrictive covenant he has no right or freedom which he previously had … ."

Similarly Lord Morris at page 309 paragraph B stated:

> "There is a considerable difference between the covenants in the present case and covenants of the kind which might be entered into by a purchaser or by a lessee. If one who seeks to take a lease of land knows that the only lease which was available to him is a lease with a restriction, then he must take what is offered (on the appropriate financial terms) or he must seek a lease elsewhere. … In such a situation (that is that of voluntarily taking a lease of land or a restrictive covenant) it would not seem sensible to regard the doctrine of restraint of trade as having application. … There is a clear difference between the case where someone fetters his future by parting with the freedom which he possesses and a case where someone seeks to claim a greater freedom than that which he possesses or has arranged to acquire."

Further at paragraph E he stated:-

> "So, also, if someone seeks to buy a part of the land of a vendor and can only buy on the terms that he will covenant with the vendor not to put the land to some particular use, there would seem in principle to be no reason why the contract should not be honoured".

Lord Hodson, having rejected the argument that the doctrine never applied to covenants relating to land accepted that there were some situations in which the doctrine would not apply and at page 316G to 317A he accepted the doctrine did not apply to a person who buys or leases land which is subject to a negative covenant. He said as follows:

> "My Lords, I do not think it is possible to accept this general proposition. All dealings with land are not in the same category, the purchaser of land who promises not to do with the land he buys in a particular way is not derogating from any right he has but is acquiring a new right by virtue of his purchase. The same considerations may apply to a lessee who accepts restraint upon his use of land; on the other hand, if you subject yourself to restrictions as to the use to be made of your own land so that you can no longer do what you were doing before, you are restraining trade and there is no reason why the doctrine should not apply."

Lord Pearce at page 325 paragraph C stated:

> "It seems clear that covenants restraining the use of the land imposed as a condition of any sale or lease to the covenanter (or his successors) should not be unenforceable. It would be intolerable if, when a man choses of his own free will to buy, or take a tenancy of, land which is subject to a tie (doing so on terms more favourable to himself owing to the existence of the tie) he can then repudiate the tie while retaining the benefit. … in my view they are not subject to the doctrine at all."

Lord Wilberforce held that whilst the doctrine of restraint of trade was broad and flexible some contracts remained entirely outside its scope, on the basis that they had become part of the structure of a trading society. On this basis he found that the doctrine did not apply to negative covenants affecting leasehold and freehold land. At page 334F - 335C he stated as follows:

> "…In the normal exploitation of property, covenants are entered into, by lessee or lessor, not to trade at all or not to carry on particular trades. In 1613 (Rogers v Parry) the issue, whether a covenant in a lease for 21 years not to exercise a particular trade was in restraint of trade, was still susceptible of debate, but Holt CJ and the judges of the Kings Bench upheld it validity. By 1689 this seems to have become accepted doctrine, for in Thompson v Harvey Holt CJ was able to say: "It is usual to restrain a

> lessee from such a trade in the house let," giving as the reasons "for I can choose whether I will let the house, or not."…The same has come to be true of dispositions of the freehold: for over 100 years it has been part of the normal technique of conveyancing to impose and to accept covenants restricting the use of land, including the use of trades or for trade generally, whether of that conveyed or of that retained. A modern example of this is Newton Abbot Co-operative Society Limited v Williamson and Treadgold Limited.
>
> One may express the exemption of these transactions from the doctrine of restraint of trade in terms of saying that they merely take land out of commerce and do not fetter the liberty to trade of individuals: but I think one can only truly explain them by saying that they have become part of the accepted machinery of a type of transaction which is generally found acceptable and necessary, so that instead of being regarded as restrictive they are accepted as part of the structure of a trading society. If in any individual case one finds a deviation from accepted standards, some greater restriction of an individual's right to "trade", or some artificial use of an accepted legal technique, it is right that this should be examined in the light of public policy."

[59] It is clear from this survey that all five Law Lords exempted purchasers of freehold land subject to negative covenants and lessees who entered into leases containing negative covenants, from the doctrine of restraint of trade

Principle 3

[60] The doctrine of restraint of trade, in respect of both freehold and leasehold land, does not extend to successors in title of the original covenantee and covenantor.

[61] Although three of the Law Lords held the doctrine of restraint of trade applied to the original lessor/covenantor and arguably the original vendor/covenantor on the basis each gave up a pre-existing freedom, none of the Law Lords stated that the doctrine should extend to their successors in title. This appears both expressly and implicitly from their speeches.

[62] Lord Reid, Lord Morris and Lord Hodson stated the doctrine applied when a person 'gave up a pre-existing freedom'. As noted by Denning LJ in Cleveland this means a person wishing to avail of the doctrine must have been in possession when he entered into the covenant otherwise he cannot fulfil the test that he has given up a

pre-existing freedom. A person who is a successor in title is generally not in possession when he enters into the restrictive covenant and therefore I find that the doctrine does not apply to successors in title.

[63] Further, there is authority that the doctrine does not apply to Tulk v Moxhay type covenants. This is shorthand for saying the doctrine does not apply to successors in title of freehold land burdened by a restrictive covenant. In Quadramain v Sevastopol Investments [1976] HCA 10, 1976 133 CLA 390, a case concerning the transfer of freehold land subject to a negative covenant McTiernan J held at paragraphs 5 and 6 as follows:

> "5. It is not in doubt, on the authority of Tulk v Moxhay, that a covenant between vendor and purchaser, on the sale or lease of land, that the purchaser or his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against persons who were not parties to the original covenant or agreement, if they take with notice. In the present case the covenant was notified in the certificate of title..
>
> 6. In my opinion the covenant in question – a Tulk v Moxhay type of covenant – is not invalid by reason of the doctrine of restraint of trade. The House of Lords in Esso made it clear, albeit in dicta that the doctrine does not apply to a Tulk v Moxhay covenant."

[64] Further Chitty on Contract at para 16.095 accepts that Tulk v Moxhay type covenants are exempted from the doctrine.

Application of Esso in subsequent cases

[65] The three principles I have set out have been accepted and applied in a number of cases in Ireland, England and the Commonwealth. In Ireland there are at least two authorities in which the courts have applied these principles. In Irish Shell v Elm Motors [1984] IR 200 the parties entered into a solus agreement. Costello J held at page 212:

> "It seems to me that, as pointed out by Lord Morris, when someone voluntarily takes a lease of land with a negative covenant it cannot reasonably be said that he is restricting his trading by such a bargain and therefore in my view his position is very different from the trader who enters into an exclusive trading arrangement in respect of land he already owns."

He further stated at page 213:

> " I am satisfied that, as a general principle, the commonlaw doctrine of restraint of trade does not apply to restraints on the use of a particular piece of land when imposed by a conveyance or lease of the land in question. However, this exemption would not apply if the restriction is contained in a demise when the lessor has obtained the land as part of a transaction which enables the restriction to be imposed. If such a transaction takes place, the restraint must pass the test of reasonableness laid down in the doctrine."

Secondly, in Sibra Building Company v Ladgrove Stores [1998] 2 IR 589 a site for a shopping centre was sold subject to a negative covenant whereby the developer and its successors undertook not to construct or erect or have a public house or licensed premises of any nature on the property "so long as the vendors owned the pub opposite the site". When the supermarket wanted to sell wine, beer and spirits the court granted an injunction. The Irish court rejected the argument that the negative covenant amounted to an unreasonable restraint of trade. Barron J applying Esso held that the doctrine of restraint of trade did not apply to a purchaser of freehold land. He stated at page 4:

> "Restrictive covenants upon the sale of land have never been regarded as being unlawful. The purchaser is not obliged to purchase. If he does so upon the basis of a restriction which applies only to the piece of property being purchased, he cannot complain. He could not have obtained that piece of property otherwise."

Similarly, in England in Cleveland Petroleum v Dartstone [1969] 1 WLR 116 Lord Denning observed at page 118F-G as follows:

> "It seems plain to me that in three, at least, of the speeches of their Lordships, a distinction is taken between a man who is already in possession of land before he ties himself to an oil company and a man who is out of possession and is let in by an oil company."

In the Australian case of Quadramain Gibbs J at paragraph 3 summarised the ratio of Esso as follows:

> "All the members of the House of Lords who took part in that decision agreed that the rules do not apply to a covenant given by a purchaser or lessee restricting the use to which the land purchased or leased may be put… The conclusion that the rules relating to restraint of trade

> do not apply to negative covenants given by a person purchasing or leasing lands should be accepted as correct, at least as a general rule."

In addition in New Zealand in Robinson v Golden Trips [1971] NZLR 259, the court held, applying the principles set out in Esso, that the doctrine of restraint of trade did not apply to a person who was out of possession and was then let into possession on terms that he was tied to the landlord.

Restraint of Trade and Public Policy

[66] The doctrine of restraint of trade is based on public policy and the Law Lords in Esso explained on public policy grounds why restrictive leasehold and freehold covenants were exempt from this doctrine. Lord Morris explained at page 309:

> "No feature of public policy requires that if he freely contracted he should be excused from honouring his contract. In no rational sense could it be said that if he took a lease with a restriction as to trading he was entering into a contract that interfered with the free exercise of his trade or his business or with his `individual liberty of action and trading'."

Further, Lord Pearce stated at page 325 paragraph C:

> "It would be intolerable if, when a man chooses of his own free will to buy, or take a tenancy of land, which is made subject to a tie (doing so in terms more favourable to himself owing to the existence of the tie) he can then repudiate the tie while retaining the benefit."

Lord Wilberforce points out another public policy ground for exempting these covenants from the doctrine, when he referred with approval to the words of Selwyn LJ's in Catt v Tourie:

> "We should be introducing very great uncertainty in to a very large and important trade if we were to now suggest any doubt as to the validity of a covenant so extremely common as this is."

In Irish Shell Costello J referred with approval to Lord Wilberforce's analysis and stated at page 213, "no good reason has been suggested for overruling such long-established principles".

[67] Given that there are very good commercial and conveyancing reasons for permitting negative covenants to run with land, it is my view that public policy

militates against applying the doctrine of restraint to trade to (a) original parties who enter into negative covenants affecting either freehold or leasehold (unless they give up a pre-existing freedom), and (b) to successors in title of the original covenantor and covenantee (save in exceptional circumstances). To apply the doctrine of restraint of trade to successors in title would, I find, cause havoc in the conveyancing and commercial world. It would mean parties would be able to apply to the court many years after a leasehold or freehold covenant was entered into, even in some cases hundreds of years later, to have the covenant set aside on the basis that it was in restraint of trade when originally entered into. This would create great uncertainty and adversely affect proper commerce and trade.

[68] The enforceability of such covenants by and against successors in title has been in existence for literally hundreds of years and for this reason the Property (Northern Ireland) Order 1978 exists to establish a scheme by which covenants can be modified or extinguished in certain circumstances.

Consideration

[69] All the parties accepted that the plaintiff was the successor in title to Mr Shortall in respect of both the freehold and leasehold lands.

[70] The plaintiff's central submission was that the doctrine of restraint of trade applied to Mr Shortall as he was a lessor who gave up a pre-existing freedom. The issue of restraint of trade fell to be considered at the date Mr Shortall originally entered into the covenant and therefore, if it was unenforceable against him, it could not bind his successors in title. He submitted that assigning the lease to the Plaintiff did not affect the application of the restraint of trade doctrine.

[71] I do not accept the submission that if the doctrine applies to the original lessor/covenantor his successor in title can avail of the doctrine. Lord Reid at page 297 held:

> "One must always bear in mind that an agreement in restraint of trade is not generally unlawful if the parties choose to abide by it, it is only unenforceable if a party choose not to abide by it."

All the other members of the House were also careful to use the word 'unenforceable' rather than the word 'void' – see Lord Morris at page 309, Lord Hodson, page 321, Lord Pearce, page 324 and Lord Wilberforce at page 333. Mr Shortall always abided by the covenant and therefore as of the date of transfer of the leasehold and freehold lands to the plaintiff it was a lawful covenant. Therefore, I do not accept that it is now open to the plaintiff, to retrospectively argue that, in some way, the covenant was unenforceable and void when it was entered into.

[72] Secondly, I have found Esso establishes the principle that the doctrine of restraint of trade does not apply to successors in title. When the plaintiff purchased the lands from Mr Shortall it was a successor in title which was not in possession of the lands. The lands were already subject to the restrictive covenant and therefore the plaintiff did not give up a pre-existing freedom. Therefore, I find the doctrine of restraint of trade does not apply.

[73] Thirdly, I am satisfied that the restraint of trade doctrine does not apply as the covenant is a Tulk v Moxhay type covenant. As already set out I have found that such covenants are exempt from the doctrine of restraint of trade.

[74] Although both the plaintiff and defendant submitted that the covenant in question was a leasehold covenant and its enforceability was therefore governed by the rules in sections 12 and 13 of Deasy's Act and not the rules relating to enforcement of negative freehold covenants I do not accept that proposition. The covenant does not affect the leasehold lands. It is rather a burden on the freehold lands and can therefore only be enforced against successors in title of the freehold lands in accordance with the rules relating to enforcement of restrictive freehold covenants. It is therefore a Tulk v Mochay type covenant.

[75] I find this for a number of reasons. First, the covenant in the lease can only be enforced by and against the parties to the lease and their successors in title. Therefore, if Mr Shortall or his successor in title was to sell the land to a third party who was not also the lessor of the leasehold lands, then Deasy's Act is of no application as it only acts to enforce covenants against successors in title to the original parties to the lease. Such a third party is not a successor in title to a party to the lease. The only means by which the covenant affecting the freehold lands owned by such a third party could be enforced would be in accordance with the rules relating to the enforcement of freehold covenants. I have no doubt that Mr Faris, an experienced conveyancer and frequently an expert witness on these matters, well understood that this covenant, insofar as it affected the freehold lands was a freehold covenant and therefore he took all necessary steps to ensure any third party who succeeded to the freehold lands was bound by the covenant. In particular he ensured it was registered as a burden on the freehold lands and he further inserted paragraph (g) into the third schedule of the Lease. Such steps would have been entirely unnecessary if in fact the covenant was a leasehold covenant as under Deasy's Act the covenant would have been automatically enforceable against the successors in title.

[76] For all these reasons I am satisfied the covenant was a Tulk v Moxhay covenant and for this reason the restraint of trade doctrine does not apply to it.

[77] Fourthly, I find there are public policy reasons why the doctrine does not apply to original lessee/covenantors and purchasers and why it also does not apply to successors in title of covenantors. The covenant in this case is typical of restrictive covenants which apply to both leasehold and freehold lands. These covenants have

been in existence and enforced for hundreds of years even though they restrict trade. If the court was to overrule such long established principles, I find, it would cause much uncertainty and would adversely impact commercial dealings with land where certainty is required.

[78] The plaintiff submitted that even if the doctrine of restraint of trade did not apply to a successor in title, the fact the plaintiff was wholly owned and controlled by Mr Shortall meant that there was no difference in substance so as to affect the applicability of the restraint of trade doctrine. In this regard he relied on the case of Alec Lobb (Garages) v Total Oil [1985] 1 WLR 173. In this case a company, in which a husband and wife were the shareholders, operating a petrol station from its own freehold premises leased that property to the petrol supplier. The petrol supplier then leased back the property, not to the company but to the husband and wife, the shareholders in the company, on terms which included a tie. The court held, by way of exception to the general rule, the restraint of trade doctrine applied to the tie in the leaseback, even though it was the company, rather than the husband and wife, which had previously owned the property. Dillon LJ at page 178B-E stated:

> "… in the present case however the granting of the lease back to Mr and Mrs Lobb rather than to the company was a palpable device in an endeavour to evade the doctrine of restraint of trade. Mr and Mrs Lobb were only selected as lessees because they were the proprietors of the company previously in occupation. The court has ample power to pierce the corporate veil, recognise a continued identity of occupations and hold, as it should, that Total can be in no better position quoad restraints of trade by granting the lease back to Mr and Mrs Lobb than if it had granted the lease back to the company."

[79] In Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Company [1973] HCA 40 133 CLR 288 Rocca owned land which it leased to Amoco and Amoco built a service station on it. Amoco then granted an under-lease of the service station to Rocco, which contained a tie. Although it was true in a sense that Rocca's possession was as an under lessee the substance of the matter was that Rocca, by granting the lease and taking an under lease did not acquire possession of the land, it was never out of possession of its lands. In these circumstances the court held that it was artificial to conclude that it was Amoco that had let Rocca into possession of the service station. The court held that the lease and under lease were merely the machinery whereby the parties effected their purpose of arranging for the supply of petrol to a petrol station with a tie in favour of the supplier. For these reasons the court held that the doctrine of restraint of trade did apply, by way of exception to the general rule.

[80] I find that Alec Lobb can be distinguished from the present case on its facts. In Alec Lobb the original lease and the lease-back all formed part of a single transaction and took place at the same time. Secondly, they were done as a device to evade the doctrine of restraint of trade and the same parties remained in possession throughout the entire period. In contrast, none of these features appear in the present case. In particular the transfer to the freehold lands from Mr Shortall to the plaintiff was entirely unrelated to the imposition of the covenant. The transfer to the plaintiff was an entirely unrelated transaction which took place some two years later. It was not therefore part of a single transaction. Further, there is no evidence it was done in an attempt to avoid the application of the doctrine of restraint of trade. There is no evidence it was a sham or device. Further, the court has not been asked to and no reason has been advanced why in this case the court should take the exceptional step of piercing the corporate veil. I further find that Amoco can also be distinguished on its facts, as in this case, unlike in Amoco, the plaintiff was not originally in possession of the lands.

[81] These two cases are exceptions to the general rule. As Costello J notes in Irish Shell at page 213 the exception to the rule applies, only when the court, looking at the reality of the transaction, decides it is an objectionable one, that is, the purpose of the transaction is to impose a restraint. The transaction in the present case was not for such a purpose. Therefore, it is not an objectionable transaction. I therefore find that the plaintiff, as a successor in title who was not in possession of the land as of the date the covenant was entered into, cannot avail of the doctrine of restraint of trade.

Conclusion

[82] In answer to Question 1 I find that the doctrine of restraint of trade does not apply to the covenant in the lease. In view of this conclusion it is not necessary for me to consider the other questions upon which counsel gave very detailed submissions and indeed the parties were called to give evidence upon. I therefore refuse to grant the declaration sought in the Amended Amended Amended Statement of Claim, as set out at paragraph 2(i) above.

[83] It now remains for the parties to address the court in respect of the outstanding Property Order (Northern Ireland) 1978 applications.

[84] I will hear counsel in respect of costs.