MEDIUM PRIORITY

NZLR

IN THE COURT OF APPEAL OF NEW ZEALAND 30/4 C.A. 359/92

S64

BETWEEN DAVID JAMES WELSH
of Ashburton, Solicitor

Appellant

A N D LAURENCE KILLOH COONEY
of Ashburton, Solicitor

Respondent

Coram: Cooke P.
Hardie Boys J.
Sir Gordon Bisson

Hearing: 23 April 1993

Counsel: P.F. Whiteside for Appellant
D.H. Hicks for Respondent

Judgment: 23 April 1993

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This is an appeal and cross-appeal from a judgment of Holland J. in a restraint of trade case. The plaintiff in the High Court, Mr L.K. Cooney, has practised for some 28 years as a solicitor in Ashburton. The defendant, Mr D.J. Welsh, became employed by him in August 1984. Mr Welsh was then aged 31; he is a qualified solicitor and *inter alia* had worked as a staff solicitor for an Invercargill firm for about three years. By reason partly of having had the experience of a former partner setting up practice in competition with him, Mr Cooney insisted on a restraint of trade covenant from Mr Welsh in the following wide terms:

THIS DEED is made the 10th day of August 1984

BETWEEN DAVID JAMES WELSH of Ashburton Solicitor (hereinafter called "the employee") of the one part AND LAURENCE KILLOH COONEY of Ashburton Solicitor (hereinafter called "the principal") of the other part

WHEREAS:-

[a] the principal has agreed with effect from 10th August 1984 to employ the employee in the legal practice carried on by the principal at Ashburton under the name of Nicoll, Cooney & Co. ("the firm")

[b] prior to the employee being so employed in the firm it was agreed by and between the parties hereto as is hereby acknowledged and declared that the employee would covenant with the principal in the manner hereinafter set forth

[c] it is expedient that the said agreement be recorded by means of these presents

NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in consideration of the premises the employee DOTH HEREBY COVENANT with the principal as follows namely:-

1. THAT in the event that the employee shall for any reason whatsoever (other than the death of the employee) cease to be an employee or associate or principal in the firm (or in any reconstituted firm which is then carrying on the legal practice presently carried on by the firm) then the employee shall not (without the prior written consent of the principal (or his executors)) for a period of two (2) years thereafter practice in any capacity whatever as a Barrister and/or Solicitor in the Borough and/or County of Ashburton nor, without the like written consent during the same period directly or indirectly solicit or interfere with or act or be concerned as solicitor or agent for any person or corporation who is now or may from time to time become a client of the firm and shall not during the same period enter into or be engaged directly or indirectly in the service of or act as clerk agent or assistant to nor solicit or endeavour to obtain business for any solicitor or firm of solicitors practising in the Borough and/or County of Ashburton

IN WITNESS WHEREOF these presents have been executed the day and year first hereinbefore written.

SIGNED by the said DAVID JAMES WELSH in the presence of:	)))	'D.J. Welsh'
SIGNED by the said LAURENCE KILLOH COONEY in the presence of:	))))	'L.K. Cooney'

Mr Welsh's employment ceased on 31 August 1992, he having given notice of resignation in June, so there was a period of eight years service during which he was not taken into partnership. Since the High Court judgment now under appeal he has been working for Mr Cooney's above-mentioned former partner, Mr Argyle.

Mr Cooney sued for an injunction to enforce the covenant. In his judgment Holland J., citing some of the leading cases, stated the relevant principles in terms which counsel on both sides have accepted as correct. He took the view that the covenant was more extensive than could be justified, saying:

> I am satisfied that in this case the only legitimate property the plaintiff was entitled to protection of was the right to expect the clients of the firm for which the defendant acted as employee to remain with the firm or at least not to go with him.

In substance we agree with that view. The judgment of the Privy Council delivered by Lord Wilberforce in *Stenhouse Australia Ltd v. Phillips* [1974] A.C. 391, contains helpful guidance. That case was not concerned with a solicitor's practice but with the insurance business, but it was an employer and

employee case and restraint of trade covenants as between employer and employee are to be looked at somewhat differently from such covenants between vendor and purchaser. Lord Wilberforce said at p.400:

> The accepted proposition than an employer is not entitled to protection from mere competition by a former employee means that the employee is entitled to use to the full any personal skill or experience even if this has been acquired in the service of his employer: it is this freedom to use to the full a man's improving ability and talents which lies at the root of the policy of the law regarding this type of restraint. Leaving aside the case of misuse of trade secrets or confidential information (which is separately dealt with by clause 3 of the agreement and which does not arise here), the employer's claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation. For while it may be true that an employee is entitled - and is to be encouraged - to build up his own qualities of skill and experience, it is equally his duty to develop and improve his employer's business for the benefit of his employer. These two obligations interlock during his employment: after its termination they diverge and mark the boundary between what the employee may take with him and what he may legitimately be asked to leave behind to his employers.

Then at p.401 their Lordships said:

> These considerations make it appear that, in principle, a covenant against solicitation of clients may be entirely reasonable and necessary for the protection of the employer. It remains necessary to look carefully at the scope of the particular covenant in question. The significant points, in their Lordships' opinion, are the following:
>
> 1. Its expressed duration is for five years, but effectively is for less than 4½ years since the period runs from July 1971.

> 2. The prohibited activity is soliciting, a narrow prohibition, which leaves open (apart from other clauses in the agreement) a wide field in which competitive action by the employee is unrestrained, and one which has often, if suitably confined, been accepted by the courts.
>
> 3. The clients, whom the respondent may not solicit, though widely defined in clause 8 and including prospective clients, are limited to clients of the Stenhouse Group with whom the respondent has had dealings or negotiations....

By analogy with that approach we think here that it is unreasonable between the parties and also against the public interest that Mr Welsh should be restrained from any competition with Mr Cooney in the borough or county of Ashburton. That would be quite a severe fetter, having the effect of excluding him altogether from practising for two years in an area sustaining a number (seven) of legal firms. He could well have to make a fresh start and move his family elsewhere. It is not that Mr Cooney is the only practitioner in the area: cases such as *H. & R. Block Ltd* v. *Sanott* [1976] 1 N.Z.L.R. 213 and *Bates* v. *Gates* [1987] 1 N.Z.E.L.C. 95,269 are distinguishable, relating as they do to sole practitioner or sole specialist activity situations.

It follows that the cross-appeal, which seeks to restore the covenant in its contractual terms, or virtually so, cannot succeed.

As to the appeal by Mr Welsh, this is concerned with the modification of the covenant ordered by the Judge pursuant to s.8 of the Illegal Contracts Act 1970. He worded his modification as recorded in the sealed judgment as follows:

> 2. THE said deed is modified pursuant to section 8 of the Illegal Contracts Act to provide that for a period of 4 years from 31 August 1992 the Defendant will not act as solicitor either directly or indirectly or as an employee of another

> solicitor or solicitors for any person or organisation for whom he has acted while employed in the Plaintiff's practice except for his immediate relations.

Section 8(1)(b) has the term 'modify'. This can mean moderate or limit or confine; but it can also simply mean vary or change in part. As a matter of jurisdiction we see no reason why it should not bear the latter and broader meaning, but no doubt normally the Court will be slow to alter any part of a covenant so as to make it more restrictive on the employee. Nevertheless there may be cases where that is appropriate, particularly when accompanied by other changes which make the revised covenant as a whole less onerous for the employee. That is how the Judge saw this case.

With respect, however, we are unable in the circumstances of this case to see justification for selecting a longer period of restraint than Mr Cooney himself evidently thought sufficient. The suggestion of four years emanated from the Judge during the hearing of the case and we are forced to think that this change was not called for.

With regard to the terms of the prohibited activity, as already indicated we agree that essentially it is Mr Cooney's interest in the business of existing clients of his as at the termination of Mr Welsh's service that is properly to be protected. In principle therefore we endorse the Judge's approach in this part of the case, but there should be one minor addition to the wording selected by him. Mr Whiteside and Mr Hicks were agreed that the words 'or barrister' should be inserted after the words 'will not act as solicitor'.

Further, and restoring something more of the substance of the contractual provision, we consider that there should be restraint against soliciting or other conduct directing clients of Mr Cooney to another practitioner - to Mr Argyle for

instance - and accordingly after the words 'except for his immediate relations', the following words are to be added:

> nor will he solicit, procure, direct or otherwise be instrumental in the diversion of legal business of any such person or organisation from the plaintiff's practice to any other practice.

The modification and the injunction will be amended accordingly and, as mentioned previously, the words 'two years' will replace 'four years'. We add that no solution in such a case can achieve perfect justice; the above is the most practical solution which we see as available in the circumstances of this case.

The appeal has substantially succeeded and it is appropriate that the appellant should have costs in the sum of $1000 together with disbursements, including the reasonable cost of reproducing the case on appeal and travelling expenses of counsel, to be settled by the Registrar.

RB Cooke P.

Solicitors:
Wynn Williams & Co., Christchurch, for Appellant
Buddle Findlay, Christchurch, for Respondent