Privy Council Appeal No. 41 *of* 1933.

The Vancouver Malt and Sake Brewing Company, Limited - - *Appellants*

v.

The Vancouver Breweries, Limited - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND FEBRUARY, 1934.

Present at the Hearing:

LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.
LORD WRIGHT.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD MACMILLAN.]

The appellants challenge in these proceedings the validity of an agreement in writing which they made with the respondents on the 5th December, 1927. Having been advised that the agreement was not binding upon them, they intimated to the respondents that they proposed to act in disregard of it, whereupon the respondents brought the present action in the Supreme Court of British Columbia claiming a declaration that the agreement was valid and subsisting and enforceable by them against the appellants and an injunction restraining the appellants from acting in contravention of its terms. The appellants in their statement of defence pleaded that the agreement was " contrary to public policy, illegal, void and unenforceable as being [*inter alia*] an unreasonable and unnecessary restraint of trade in respect of the manufacture and sale of articles of commerce." This defence, and others which were stated by the appellants but which need not be detailed here, failed before Mr. Justice D. A. McDonald, who granted the declaration sought and also

an injunction though in less wide terms than claimed. His judgment was affirmed by a majority of the Court of Appeal (Macdonald, C.J.A., and Martin, Galliher and M. A. Macdonald, J.J.A.; McPhillips, J.A., dissenting). Hence the present appeal to His Majesty in Council.

The material facts are not in dispute. In 1923 the appellants were incorporated under the Companies Act of British Columbia as a private limited company under the name of the Vancouver Malt and Sake Brewing Company, Limited. The objects of the company as set out in the memorandum included the carrying on of "the business of brewers and maltsters in all their branches." At the date of the agreement in question the appellants held a licence under the Dominion Excise Act authorising them "to carry on the trade or business of a brewer of malt liquors" in their premises in Vancouver. By virtue of the definitions contained in Section 5 of the Excise Act this licence authorised them to manufacture beer, ale, porter, lager beer and all other fermented liquor made in whole or in part from malt, grain or any saccharine matter. In point of fact, however, they had never brewed any liquor other than sake, a Japanese liquor made from rice, and their plant was adapted to the manufacture of this liquor only. Their business was apparently confined to the Province of British Columbia, where the only permitted customer within the Province was the Government Liquor Control Board. Export trade was unrestricted, but the appellants did not engage in it. The respondents, Vancouver Breweries, Limited, who were incorporated in 1912 under the British Columbia Companies Act, also held a brewer's licence and carried on the business of brewers in Vancouver, but they brewed beer only. They had some, but not much, export business with China, and the beer which they manufactured was for the most part disposed of within the Province to the Government Liquor Control Board. According to the evidence the only breweries in operation in the city of Vancouver in 1927 were those of the appellants and the respondents. There were a few breweries operating in other parts of the Province.

In 1927 negotiations were entered into between the respondents and the appellants, who were then apparently not very prosperous, the outcome of which was the agreement now in question. In the agreement the appellants are called "the Vendor" and the respondents "the Purchaser." The terms of it, which it is necessary to set out at length, are as follows:—

> "Whereas the Vendor is the holder of a brewer's licence under the Excise Act and is engaged in the manufacture of Sake in the Province of British Columbia.
>
> "And whereas the Purchaser is desirous of purchasing from the Vendor the goodwill of the said brewer's licence and any renewal or renewals thereof so far as the same relates to the manufacture and sale of beer, ale, porter, or lager beer.

"Now therefore this Agreement witnesseth that in consideration of the premises and of the sum of $15,000·00 now paid by the Purchaser to the Vendor (the receipt whereof is hereby acknowledged) the Vendor has bargained, sold, transferred and assigned unto the Purchaser, and does hereby bargain, sell, transfer and assign to the said Purchaser all its right, title, interest, claim and demand in, to or out of the goodwill of the said brewer's licence or any renewal or renewals thereof (except insofar as the same relates to the manufacture, sale and distribution of Sake).

"And the Vendor for itself, its successors and assigns covenants and agrees with the Purchaser that during a period of Fifteen (15) years from the date hereof it will not engage in nor carry on the business of manufacturing, brewing, selling or disposing of beer, ale, porter or lager beer, and will not brew, manufacture or sell any article or articles made in imitation thereof other than Sake, either by itself or through its servants or agents or otherwise.

"And the Vendor further covenants that if at any time it shall sell its licence to brew or any renewal or renewals thereof any such sale shall be made subject to the foregoing conditions.

"And the Vendor further covenants that at no time during the said period of Fifteen (15) years will it be concerned directly or indirectly either as principal, agent, manufacturer, servant, financier or otherwise in any brewing business other than that of Sake, and in event of any breach of the covenants herein contained will pay to the Purchaser the sum of $15,000·00 to be recoverable upon every breach of this covenant as agreed in liquidated damages."

The terms of this document are certainly peculiar. It purports to be an agreement for the sale and purchase of the goodwill of the appellants' brewers' licence except in so far as it relates to the manufacture, sale and distribution of sake. As it is expressed in the narrative, the desire of the respondents was to purchase the goodwill of the appellants' brewers' licence so far as relating to the manufacture and sale of beer, ale, porter and lager beer. What exactly is meant by the goodwill of a licence or part of a licence, it is difficult to conceive. The subject-matter of the sale was not the goodwill of the appellants' business. The only business in which they were engaged was the brewing of sake, and the goodwill of their licence so far as relating to sake was expressly excluded from the sale. They had no goodwill to sell so far as regards the brewing of beer. Nor was the appellants' licence itself, even in part, the subject-matter of the sale. Presumably it could not be, for a licence is personal and not transferable by sale. There was in fact no sale of anything.

As Mr. Farris in his admirable argument very frankly put it, the primary object of the agreement is to be found not in the sale but in the restrictive covenants. It was a case, he said, not of restrictive covenants in aid of a sale, but of a sale in aid of restrictive covenants. It may be shrewdly suspected that the draftsman had read certain well-known cases on contracts in restraint of trade and was aware of the difficulty of supporting a bare agreement not to compete unrelated to any other contract; he consequently invented the imposing façade of a sale, which sold nothing, in order to conceal the nakedness of the restrictive

covenants which were the real object of the transaction. Stripped of its adventitious trappings, the agreement is nothing more or less than a contract whereby in consideration of a sum of money the appellants undertake for a period of fifteen years not to engage in the business of brewing beer and to confine themselves solely to the business of brewing sake. Indeed, Mr. Reifel, the president of the respondents, when asked in cross-examination: "You were paying $15,000 for the purpose of preventing that company [the appellants] from competing with you?" replied "Yes." The question is whether such a contract is legally binding and enforceable.

Their Lordships had the benefit of a full discussion of the law relating to contracts in restraint of trade, and many decisions and dicta were quoted. It is no doubt true that the scope of a doctrine which is founded on public policy necessarily alters as economic conditions alter. Public policy is not a constant. More especially is this so where the doctrine represents a compromise between two principles of public policy; in this instance, between, on the one hand, the principle that persons of full age who enter into a contract should be held to their bond and, on the other hand, the principle that every person should have unfettered liberty to exercise his powers and capacities for his own and the community's benefit. But that the law against contracts in restraint of trade, whatever be its precise scope at any given time, is a doctrine of full force and vitality at the present day cannot be gainsaid. The law does not condemn every covenant which is in restraint of trade, for it recognises that in certain cases it may be legitimate, and indeed beneficial, that a person should limit his future commercial activities, as, for example, where he would be unable to obtain a good price on the sale of his business unless he came under an obligation not to compete with the purchaser. But when a covenant in restraint of trade is called in question the burden of justifying it is laid on the party seeking to uphold it. The tests of justification have been authoritatively defined by Lord Chancellor Birkenhead in these words:—"A contract which is in restraint of trade cannot be enforced unless (*a*) it is reasonable as between the parties; (*b*) it is consistent with the interests of the public . . . Every contract therefore which is impeached as being in restraint of trade must submit itself to the two standards indicated. Both still survive." (*McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society* [1919] A.C. 548 at p. 562.)

The restrictive covenants in the present agreement, when submitted to these tests, are at once seen to present unusual features. They are not inserted as being reasonably necessary to render a sale effectual in the interests of both parties, for there is no transaction of sale to be protected. Nothing has been sold. Nor is it a case of an arrangement among traders to

submit themselves to mutual restrictions on their activities in the common interest of all the parties. It is simply a case of the appellants undertaking to the respondents in consideration of a sum of money paid to them that they will not for fifteen years carry on a particular branch of business. That is the whole substance of the agreement. If there was any sale, it was a sale by the appellants of their liberty to brew beer and a purchase by the respondents of protection against the possible competition of the appellants in the brewing of beer. In the case just quoted, the Lord Chancellor stated (at p. 563) that "the respondents were not entitled to be protected against mere competition," and so far as their Lordships are aware there is no case in the English Law Reports, and certainly none was cited at the bar, in which a bare covenant not to compete has been upheld. The covenants restrictive of competition which have been sustained have all been ancillary to some main transaction, contract, or arrangement, and have been found justified because they were reasonably necessary to render that transaction, contract or arrangement effective. Mr. Farris, however, invoked and relied on the Scottish case of *Stewart* v. *Stewart*, 1899, 1 F. 1158. In that case a photographer in Elgin obtained from his brother, who had been his assistant, an agreement whereby his brother, in consideration of a loan of £5 bound himself not to carry on the business of a photographer, or to enter into the employment of any photographer, in Elgin or within 20 miles thereof. The Second Division of the Court of Session, by a majority, held this to be a legal and enforceable obligation. Lord Young dissented with characteristic vigour. The circumstance that the restraint was locally limited was obviously a material element in the decision that the contract was reasonable in the circumstances. Their Lordships are not prepared to express approval of this decision; but it is perhaps enough to say that the contract there differed in the material respect of its local limitations from the agreement now under consideration. In another Scottish case referred to by Mr. Farris, viz., *Ballachulish Slate Quarries Co., Ltd.* v. *Grant*, 1903, 5 F. 1105, there was the important distinction that the restrictive obligation was ancillary to a contract of employment.

In their Lordships' opinion not only are the restrictive covenants of the present agreement open to the objection that they constitute a purchase of protection "against mere competition," but the terms themselves of the covenants are in any event so wide that they cannot pass the test of reasonableness as between the parties. The restrictions are not confined to Vancouver, or even to the Province of British Columbia; they prevent the appellants from manufacturing beer anywhere in the world. This, in their Lordships' view is in itself a sufficient ground on which to condemn them. World-wide restrictions have passed muster in the Courts, but only where the restrictions

to be reasonably effectual had to be world wide. Here, even if it was legitimate for the respondents to buy protection for their Vancouver business, which their Lordships are far from accepting, it was out of all reason to place an embargo on the appellants brewing beer anywhere. Mr. Farris maintained that the restrictions limited themselves by practical considerations to the Province, and that this limitation should be held to be implied as a matter of construction. But it is not so nominated in the bond, and their Lordships see no reason to import a limitation which the parties have not seen fit to express, in order to aid so unprecedented a contract. Nor did it help the respondents' case to point out that the appellants were badly in need of the $15,000 to enable them to improve their plant and carry on their business, and so to argue that the contract was to their benefit and even to the public benefit by enabling them to avoid closing down or insolvency. The receipt of a sum of money can generally be shown to be advantageous to a business man, but his liberty to trade is not an asset which the law will permit him to barter for money except in special circumstances and within well-recognised limitations.

The agreement being thus, in their Lordships' view, invalid and unenforceable for the reasons stated, it is unnecessary to say anything about certain other objections to it which were referred to by the appellants and dealt with in the Courts below.

Their Lordships will humbly advise His Majesty that the appeal be allowed, the judgments of the Supreme Court and the Appeal Court of British Columbia be recalled, and the action be dismissed. The appellants will have their costs here and below.

In the Privy Council.

THE VANCOUVER MALT AND SAKE BREWING COMPANY, LIMITED

v.

THE VANCOUVER BREWERIES, LIMITED.

DELIVERED BY LORD MACMILLAN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1934.