Privy Council Appeal No. 54 *of* 1939

Connors Bros. Ltd. and others - - - - - - - *Appellants*

v.

Bernard Connors - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH SEPTEMBER, 1940

Present at the Hearing:
THE LORD CHANCELLOR
(VISCOUNT SIMON)
VISCOUNT MAUGHAM
LORD RUSSELL OF KILLOWEN
LORD WRIGHT
LORD PORTER

[*Delivered by* VISCOUNT MAUGHAM]

This is an appeal from a judgment of the Supreme Court of Canada dated the 19th December 1938, which (by a majority of three Judges to two) reversed the judgment of the Supreme Court of New Brunswick, Appellate Division. The latter had dismissed an appeal from a judgment of the Chief Justice of New Brunswick. The divergence of judicial opinion is striking, since six judges in Canada were in favour of the present appellants and three—the majority in the Supreme Court of Canada—took the other view. These differences have perhaps been accentuated by the curious shape which the proceedings assumed. The main question has throughout been whether certain covenants entered into by Bernard Connors the present respondent with the appellants or any of those covenants are enforceable or whether on the other hand they are unenforceable as being in restraint of trade. This question has been raised not in proceedings instituted by the covenantee to enforce some or one of the covenants, but by an originating summons issued under Order 54A of the Rules of the Supreme Court of New Brunswick by the covenantor (the respondent) seeking to have it determined whether *upon the construction* of the covenants he was barred from engaging in a certain business or from doing certain other acts. These questions were not in the main matters for construction at all, though incidentally some matters of construction might have arisen for the consideration of the Court. They were questions of law based on public

policy depending to a large extent no doubt on the circumstances proved to exist at the time when the covenants were entered into. It is to be noted that the Chief Justice of New Brunswick seems to have entertained grave doubts as to the propriety of such a proceeding under O 54A. To their Lordships it seems clear that those doubts were more than justified. In the event the case proceeded without the advantage of pleadings or particulars or discovery of documents. The respondent made a concise affidavit in support of his summons in which he stated no facts or circumstances relating to the covenants beyond the statement that he was advised that they were not reasonably necessary for the protection of the appellants in their business and were in the nature of an effort to stifle or prevent lawful competition. At the trial he was cross-examined on his affidavit and no further evidence was called on his behalf. The appellants then called three witnesses. In these circumstances it is not surprising that the evidence before the Court was not of a very satisfactory character, and that differing opinions as to its result have been formed by the judges in Canada who have had to deal with the matter. Their Lordships have thus to deal with an appeal on questions raised under Order 54A of the New Brunswick Judicature Act which was not in their view an appropriate method of dealing with those questions; but, having regard to the fact that three Courts have delivered their judgments on the footing that the questions were properly raised before them, their Lordships feel bound to follow the same course and to express their opinion on the materials submitted to them. It should be added that the respondent did not lodge his case in the usual way and was not represented on the present appeal. Their Lordships naturally regret this circumstance which adds to their difficulties; but they think it right to state that Counsel for the appellants argued on their behalf with great candour and fairness, and they do not think that the respondent has suffered by reason of the absence of counsel on his behalf.

In or about the year 1890 the respondent's father and uncle Lewis and Patrick Connors established a business of canning fish of divers kinds including fish called sardines, in the Passamoquoddy area on the Bay of Fundy. It is not in dispute that this is the only area in Canada where it is commercially practicable to pack sardines, though there are a number of sardine packers in the State of Maine on the other side of Passamoquoddy Bay. The business was a successful one, and it was transferred to a company (which may be called " the old company ") in which Lewis Connors, Patrick Connors and the respondent were shareholders. There were then two factories and the respondent was the superintendent of one of them. In the year 1923 the business then having become a very large one, the shareholders sold all their shares to A. Neil McLean and three associates for $400,000 payable as to $200,000 in cash and as to $200,000 in preferred stock of Connors Bros., Ltd. (one of the appellants) a company which, having been formed for that

purpose, took over the assets of the old company. The respondent received $16,667 for his shares in the old com-company. Connors Bros., Ltd., after acquiring the assets and goodwill of the old company registered the name "Connors" as a trade mark to be used in connexion with the sale of fish and fish products, and a little later registered as a trade mark the words "Connors Famous Sea Food." Patrick Connors entered into a contract to act as general manager of Connors Bros., Ltd. for a period of five years at a salary of $10,000 per annum. The respondent was offered a position in the company but declined it. No restrictive covenant was entered into by the respondent with Connors Bros., Ltd. at this time.

Connors Bros., Ltd., were shortly afterwards faced with very severe competition throughout Canada and in the other countries in which they sold their products from a new business carried on by Lewis Connors, the respondent and another member of the family. This business was incorporated in 1924 under the name of "Lewis Connors and "Sons, Ltd." (the second appellants). The capital issued amounted to $150,000 divided into $50,000 preferred and $100,000 common stock, of which the respondent received a considerable amount from his father, Lewis Connors. The competition with Connors Bros., Ltd., as the trial judge found, was carried on by means not at all creditable to the respondent and his father. They canvassed for orders the old customers of the business representing themselves to be "the original Connors." They adopted brands and letter-paper headings similar to those of Connors Bros. They were selling, according to the finding of the trial judge, in all the provinces of Canada and in nearly every country in which Connors Bros. had sold sardines. The respondent in cross-examination said: "I imagine we "said we were the original and wanted to get the business." In this endeavour they had cut prices to such an extent that they had been carrying on business at a loss. By 1925 they had reached a very unsatisfactory financial condition which could not long continue. It was in these circumstances that Lewis Connors, plainly with the knowledge of the respondent (his son) who was a manager of the company, approached the directors of Connors Bros., Ltd., with a view to a settlement. Ultimately an agreement dated the 30th April, 1925, which may be described as "the option agree-"ment," was entered into between Lewis Connors and the respondent of the first part and Neil McLean and Allan McLean of the second part. The two companies were not parties; but they were under the control of those four stockholders who joined in the agreement. The covenants restricting trade which they all entered into are not those which the appellants could rely upon (since they were not parties), but the agreement shows very clearly the circumstances under which the covenant by the respondent now in question was entered into a few weeks later and the true nature of the transaction.

The substance of the option agreement was as follows: —

The McLeans were to buy from Lewis Connors and the respondent $25,000 preferred and $52,500 common stock of Lewis Connors & Sons, Ltd., and were to give in payment $25,000 preferred and $30,000 common stock of Connors Bros., Ltd. It is plain that the transaction would give the latter company a controlling interest in Lewis Connors Ltd.

With reference to the remaining capital stock of Lewis Connors Ltd. ($47,500 common and $25,000 preferred stock) the McLeans undertook to procure a contract to be executed by Connors Bros., Ltd., with the stockholders of Lewis Connors & Sons Ltd., providing that Connors Bros., Ltd., would at any time within five years from 1st January, 1926, and on demand from any of the stockholders of Lewis Connors & Sons, Ltd., who at the time of such demand held any part of the remaining outstanding issued capital stock of the said Lewis Connors, Ltd., purchase the holdings of such stockholders so making such demand on the basis of $35,000 cash for $72,500 capital stock.

It was further provided:

(Clause 3) That the McLeans would procure a contract by Connors Bros. to pay Lewis Connors a salary of $1,500 a year for five years for his services to Lewis Connors & Sons, Ltd., and a similar sum by way of salary from Connors Bros., for nominal services.

(Clause 4) That the McLeans would cause Connors Bros. to relieve Lewis and the respondent of a personal liability at the Bank of Nova Scotia.

(Clause 5) That Lewis Connors and the respondent should be continued as directors of Lewis Connors & Sons, Ltd., until they exercised their option to sell their stock in that company to Connors Bros., Ltd., and their stock was fully paid for.

(Clause 11) That the McLeans would procure that Lewis Connors & Sons, Ltd., should employ the respondent as manager for five years at a salary of $5,000, with the prospect of its being $7,500, the contract to be guaranteed by Connors Bros., Ltd.

The agreement contemplated that Lewis Connors & Sons, Ltd., would continue to carry on business and express provision was made as to the manner in which that was to be done.

Clause 9 was in these terms: —" All parties hereto agree " to work together for the benefit of the stockholders of Con- " nors Bros., Ltd., and Lewis Connors & Sons, Ltd., and " will not, either directly or indirectly, engage in any other " sardine business whatsoever in the Dominion of Canada, " nor directly or indirectly use the brands of either Connors " Bros., Ltd., or Lewis Connors & Sons, Ltd., in the Dominion " of Canada or elsewhere, nor, for a period of ten years from " the date hereof, use the name of Connors in connection " with sardine business in any country whatsoever."

The agreement was stated to be conditional on its acceptance and ratification by Connors Bros., Ltd., and to constitute an option given by the parties of the first part to the parties of the second part, which option should expire on the 30th May, 1925, unless the parties of the second part should give notice in writing of its acceptance.

The option was duly exercised and it was ultimately carried into effect by transfers of stock as agreed, which, however, were not produced in evidence. It was perceived that the control of Connors Bros., Ltd., was not adequately provided for, and a Voting Trust Agreement was entered into on the 23rd May, 1925, between Bernard Connors of the first part, the McLeans of the second part and the Eastern Trust Company of the third part. It recites that the parties of the first and second parts were shareholders in Connors Bros., Ltd., and had agreed to transfer 360 shares of the capital stock of that company to the trustee to the intent "that the stock should be voted in one block by A. Neil "McLean after consultation" with the other parties to the agreement. The agreement was expressed to be on the condition that McLean would vote the stock under proxy to him in support of the carrying out of the agreement between Lewis Connors and Bernard Connors and the McLeans bearing date 30th April, 1925; and also that if Patrick W. Connors should cease to manage the sardine factory of Connors Bros., Ltd., that the McLeans would give their support to obtaining the position for Bernard Connors at a salary of at least $7,500.00 per year and also that the said Neil McLean would "vote the stock in favour of continuing the operation "of the factory of Lewis Connors & Sons, Ltd., so long as the "same is being operated at a profit" and would also vote in favour of Lewis Connors and Bernard Connors as directors of Connors Bros., Ltd.

Two agreements in June, 1925, further carried into effect the option agreement. One was dated the 9th June, 1925, and was made between Connors Bros., Ltd., of the first part and Lewis and Bernard Connors of the second part. This recites that there was then issued an outstanding $100,000.00 par value common stock and $50,000.00 par value preferred stock of Lewis Connors & Sons, Ltd., and by contract of 30th April, 1925, that Lewis and Bernard Connors had agreed to sell to the McLeans $25,000.00 par value preferred stock and $52,500.00 par value common stock of Lewis Connors & Sons, Ltd. The agreement witnessed that with reference to the remaining outstanding issued common stock of Lewis Connors & Sons, Ltd., Connors Bros., Ltd., would at any time within five years from the 1st January, 1926, and on demand from any then stockholder of Lewis Connors & Sons, Ltd., purchase the holdings of such stockholder on the option mentioned in the previous agreement. The fourth paragraph is as follows: "The said Lewis "Connors and Bernard Connors agree with the said "Connors Bros., Ltd., that they will not, either directly or "indirectly, engage in any other sardine business whatso- "ever in the Dominion of Canada nor directly or indirectly

"use the brands either of Connors Bros., Ltd., or Lewis "Connors & Sons, Ltd., in the Dominion of Canada or else- "where nor for a period of ten years from the 30th April, "A.D. 1925, use the name of Connors in connection with "the sardine business in any country whatsoever." This is the important covenant in the present appeal. The date mentioned in it was the date of the option agreement.

The other agreement, which was of even date, was made between Bernard Connors of the first part, Lewis Connors & Sons, Ltd. of the second part, and Connors Bros., Ltd., of the third part by which the plaintiff agreed to work for Lewis Connors & Sons, Ltd., under direction of a board of directors in the capacity of manager of the company's sardine factory in the City of Saint John for a period of five years and Lewis Connors & Sons, Ltd., agreed to employ him for the term mentioned at $5,000.00 per year. Connors Bros., Ltd., guaranteed the payment of this salary. Provision was also made in accordance with the option agreement for his salary being raised to $7,500.00 if he became manager of two factories in operation at the same time.

The respondent commenced his duties as manager of the factory in West St. John and when the business was transferred to Black's Harbour, he went there; but he was not satisfied. Disputes had arisen between the respondent and the two companies and finally by an agreement of October 2nd, 1926, between the respondent, of the first part, Lewis Connors and Sons, Limited, of the second part, Connors Bros., Limited, of the third part, and the two McLeans, of the fourth part, the respondent sold his remaining 172 shares of the capital stock of Lewis Connors and Sons, Limited, to Connors Bros., Limited, for $11,416, and his employment agreement was ended by mutual consent. By clause 3 it was provided as follows:—

"The party of the first part also agrees with the said "parties of the second and third parts that he will not "directly or indirectly engage in any sardine business what- "soever in the Dominion of Canada or directly or "indirectly use the brands of either Connors Bros., Limited, "or Lewis Connors & Sons, Limited, in the Dominion of "Canada or elsewhere, nor for a period of ten years from the "30th day of April, A.D. 1925, use the name of Connors in "connection with sardine business in any country whatso- "ever." The date from which the period was to run was it will be noticed the same date as that mentioned in the agreement of the 9th June 1925. The fifth clause was as follows:—

"The parties of the second, third and fourth parts hereby "release the said party of the first part (Bernard Connors) "from all claims and demands of every nature and descrip- "tion which they or either of them have or which hereafter "they or either of them may have against the party of the first "part by reason of anything to the date of these presents "including but without limiting the generality of the fore- "going any claims by reason of any shortage in inventory "alleged misrepresentation or for alleged improper conduct

" of the party of the first part in connection with the business
" of the said Lewis Connors & Sons, Limited, or the purchase
" of an interest therein or stock thereof."

It will be convenient to mention here that in the opinion of their Lordships the option agreement and the two agreements of the 9th June 1925 have, for the present purpose, to be read together as constituting the transaction which has to be considered in deciding whether the covenant by the respondent with Connors Bros., Ltd., contained in the first agreement of the 9th June 1925 is or is not enforceable. As was observed in the judgment of Kerwin J. it is clear that it was not intended by the agreement of the 2nd October 1926 to release the respondent from that covenant since, apart from the words " by reason of anything to the date of these presents," which are sufficient to safeguard the future rights of the covenantees, the covenant was re-inserted, with the same date from which the last part of the covenant was to run, which was contained in the previous covenant.

The position therefore in effect was this. The respondent and his father Lewis Connors being in a position to sell a controlling interest in Lewis Connors & Sons, Ltd., and being the managers of the business of that company sold that controlling interest to Connors Bros., Ltd., or to the McLeans who were the managers of Connors Bros., Ltd., and the principal stockholders in it. Lewis and Bernard Connors and their associates obtained a large stock-holding interest in Connors Bros., Ltd., and they and other stockholders in Lewis Connors & Sons Ltd., were to be entitled to sell their remaining holdings to Connors Bros., Ltd., at a price which was proved to be above the market values, and until sale were to continue to act as directors of Lewis Connors & Sons Ltd. Bernard Connors was given a position as manager at a salary for a period of five years. The two McLeans and the two Connors agreed " to work for the benefit of the stock-" holders of the two companies." The respondent and Lewis Connors entered into the restrictive covenant with Connors Bros., Ltd., above set out. The precise terms of it will be considered later. Having regard to the previous history as above stated, and to the fact that the name of Connors could be used by Lewis Connors and the respondent, if they were left to compete in the sardine business with Lewis Connors & Sons, Ltd., it can hardly be doubted that this covenant was an essential feature of the transaction, and that if it had not been entered into the McLeans and Connors Bros., Ltd., would have refused to enter into this business arrangement. The cut-throat competition would then have continued in all probability until Lewis Connors & Sons Ltd., had been driven into liquidation.

Lewis Connors died in 1934; and the period of ten years from the 30th April, 1925, mentioned in the three covenants expired a year later. The respondent in the meantime had been carrying on a fish business under the name of the " The

"B. Connors Fish Company." It dealt with a number of products but not with sardines. Lewis Connors & Sons Ltd., continued to carry on its business, of which the packing and selling of sardines was much the more important part. Connors Bros., Ltd., continued to carry on its similar business. In the year 1936 the total sales of the two companies exceeded one and a half million dollars.

In the following year the respondent wrote to Connors Bros., Ltd., stating that he did not consider himself bound by the provisions of the covenants since they were in restraint of trade, and he stated that he desired to engage in and work at the sardine business in Canada and elsewhere, and that he also desired to use the name of Connors, if he so chose, in connexion with the sardine business in Canada and elsewhere. He went on to explain that he desired to ascertain his legal position before making plans for or investing capital in such a business. He received a reply from the solicitors of Connors Bros., Ltd., and Lewis Connors, Ltd., to the effect that their clients considered the provisions binding and had no intention of abandoning their rights.

The respondent commenced these proceedings by originating summons on the 27th April, 1937, and propounded the following questions for the determination of the Court:—

> (*a*) Whether, upon construction of the provision written variously in the said agreements as " will not directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada " and " will not directly of indirectly engage in any sardine business whatsoever in the Dominion of Canada," the said Bernard Connors, the covenantor mentioned in both agreements, is at the present time and shall be thenceforward barred from engaging in the sardine business in Canada as owner by himself or in partnership with others of such a business or as a shareholder of an incorporated company engaged in such business in Canada.
>
> (*b*) Whether, upon construction of the words " will not directly or indirectly engage in " used in said covenants the said Bernard Connors is barred at law from working at the sardine business in Canada as an employee of any person, persons, firm or corporations engaged in the sardine business in Canada.
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> (*c*) Whether, upon construction of the said covenants and particularly the following words contained therein " nor for a period of ten years from the 30th day of April, A.D. 1925, use the name of Connors in connection with the sardine business in any country whatsoever," the said Bernard Connors may at this time and thenceforward lawfully use the name of " Connors " in connection with the sardine business of Canada.

The Chief Justice of New Brunswick, by his judgment, determined that Question (*a*) should be answered in the affirmative and Question (*c*) in the negative. He declined, in the exercise of his discretion, to answer Question (*b*), for reasons which he stated, which appear to their Lordships to be entirely satisfactory. The learned Judges of the Appeal Division affirmed his order on all three points. In the Supreme Court of Canada the appeal was allowed by a majority, and it was declared that the covenant in question

" in so far as it prohibits the appellant " (the present respondent) " from engaging directly or indirectly in any sardine " business whatsoever in the Dominion of Canada " was unenforceable.

It will be convenient here to restate the covenant of the 9th June, 1925, dividing the material portion into three parts for the purpose of appreciating the position:—

The said Lewis Connors and Bernard Connors agree with the said Connors Bros., Ltd. that (1) they will not directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada; (2) nor directly or indirectly use the brands of either Connors Bros., Ltd. or Lewis Connors and Sons, Ltd. in the Dominion of Canada or elsewhere; (3) nor for a period of ten years from the 30th day of April, 1925, use the name of Connors in connection with the sardine business in any country whatsoever. In the opinion of their Lordships these three parts of the covenant relate to widely different matters and are clearly severable. The first part is *primâ facie* in restraint of trade in the ordinary sense. The second part appears to restrain a fraudulent or dishonest use of brands belonging to the covenantees. No question seems to be asked in relation to it. The third part, unlike the other two, is limited in time but unrestricted in space and relates to the use by the respondent of his name in connexion with the sardine business. Difficult questions might have arisen in relation to this part of the covenant, but the ten years had expired before the summons was issued, and it seems to their Lordships that Question (*c*) in view of that fact did not call for a judicial answer, since it had ceased to be of practical importance.

There remains Question (*a*) which relates to the first part of the covenant. The question is whether the respondent is barred from engaging in the sardine business in Canada (1) as owner by himself or (2) in partnership with others or (3) as a shareholder of an incorporated company engaged in such a business in Canada. But the relevant words of the covenant are " will not directly or indirectly engage in any other sardine business etc.," and the holding of shares is not mentioned. This is another illustration of the inconvenience which attends the answering of theoretical questions in a case of this kind. It appears clear that a small holding of shares in a company carrying on a sardine business in Canada, perhaps only as a part of its undertaking, would not be covered by the words " engage in " a sardine business. On the other hand a man might well be held to be engaging in such a business if he held a controlling interest in a company formed to carry on a sardine business. Much would depend on the particular circumstances of the case. It seems to their Lordships that it would be wrong to answer Question (*a*) as it stands in the affirmative without qualification, for whatever view may be taken as to the covenant not to engage in a sardine business in Canada, it cannot safely be declared that a shareholding in a company carrying on such business is necessarily a breach of the covenant. Their

Lordships are accordingly left with the question whether the first two parts of the covenant preclude the respondent from engaging in such a business in Canada as owner or partner, or whether it is not enforceable.

In the view of their Lordships the phrase "directly or indirectly engage in the sardine business" is not void for uncertainty. Such words found in like covenants have not infrequently been enforced in this country. It may be difficult to assign by way of definition exact limits to their operation, and in some cases it may not be easy to draw the line. The same observation might be made as to such well-known words as for example "negligence" or "nuisance." In actual practice however and in concrete cases where all the circumstances have been placed before the Court it is seldom that any difficulty is experienced in determining whether the alleged breach is or is not within the meaning of such a covenant.

The covenant is alleged to be one which the courts should not enforce because it was in restraint of trade and therefore contrary to public policy. There have been many statements of the general rule during the last thirty years, and their Lordships do not propose to add to their number, for every alteration of language is apt to be treated as if some slight difference in the rule or in its application were intended.

The principles now well-established cannot be better stated than in the often-quoted passage from the Judgment of the Board delivered by Lord Parker in *Attorney-General of Australia* v. *Adelaide* S.S. Co. [1913] A.C. 781, at p. 795.

> "Though, speaking generally, it is the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits. The existing law on the point is laid down in the case of *Nordenfelt* v. *Maxim Nordenfelt Co.* [1894] A.C. 535. For a contract in restraint of trade to be enforceable in a court of law or equity, the restraint, whether it be partial or general restraint, must (to use the language of Lord Macnaghten, evidently adapted from that of Tindal, C.J., in *Horner* v. *Graves* (1831) 7 Bing. 735) be reasonable both in reference to the interests of the contracting parties and in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public."

It should be observed that in this statement there is no attempt to limit or define the cases in which the community is "equally interested in maintaining freedom of contract "within reasonable limits." The same remark is true as regards the proposition stated by Lord Macmillan in delivering the judgment of the Board in *Vancouver Malt and Sake*

Brewing, Ltd. v. *Vancouver Breweries, Ltd.* [1934] A.C. 181 at p. 189:—

> " 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."

The cases which have most often come before the Courts have been those connected with the sale of a goodwill and those of master and servant; and the wide differences between these two categories from the point of view of restraint of trade have repeatedly been pointed out. (See *Mason* v. *Provident Clothing and Supply Co.* [1913] A.C. 724 at pp. 731, 738; *Morris* (*Herbert*) *Ltd.* v. *Saxelby* [1916] 1 A.C. 688 at pp 701, 708, 709. Reference may also be made to an excellent passage in the 18th edition of Anson's Law of Contract pp. 236, 7.)

Their Lordships are not here concerned to deal with cases in the second category. With regard to those in the first it is plain that considerations which apply in such cases will often be applicable with necessary modifications to a case in which the goodwill sold is the property of a limited company. A covenant by such a company not to compete with the purchaser would in general be useless as a protection, for the company would in due course be wound up, and the most serious competition might be expected to come from those who had been actively engaged in managing and carrying on its affairs. The necessary capital might be supplied out of the price paid by the purchaser.

To take a simple case, if the managing director of a private company, owning all or the great majority of its shares desires to effect a sale by the company of the whole undertaking and is willing in order that a better price may be obtained to enter into a reasonable covenant restrictive of his activities as regards carrying on such a business in the future, it is difficult to see why public policy should intervene. For though public policy requires that trading should be encouraged and that trade should as far as possible be free, on the other hand there would be a restriction on this freedom if the person in control of a company owning a business was not able to enter into such a contract as would enable him to obtain the full benefit of the proposed sale. As Lord Watson observed in *Nordenfelt* v. *Maxim Nordenfelt etc. Co.* [1894] A.C. 535 at p. 552) " It is now generally conceded that " it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. . . . Accordingly it has been determined judicially, that in cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him, within bounds which having regard to the nature of the business are reasonable and are limited in respect of space,

the obligation is not obnoxious to public policy, and is therefore capable of being enforced." That this principle is applicable even in the case of an important public company where the covenant is entered into by a managing director holding shares in the company is evident from the facts of the case from which that passage is taken; for Lord Herschell (at p. 541), Lord Watson (at p. 551), Lord Ashbourne (at p. 555) and Lord Macnaghten (at p. 560) found no difficulty in holding that the case must be treated on precisely the same footing as if the covenant had been entered into by Mr. Nordenfelt in connexion with the direct sale of the goodwill of his business.

This being accepted in the case of the sale of the business of a company and of a covenant entered into upon such a sale by a person who does not own the goodwill or any other assets of the company (which was the case of Mr. Nordenfelt) the same result may well follow in a case where, instead of selling the undertaking, the shares or stock of the company or a large interest therein is being sold and one or more of the directors or managers of the company being interested in the sale are willing, in order to enable the transaction to go through or to obtain a better price, to enter into restrictive covenants with the purchaser. Every such case must depend on the surrounding facts and circumstances, and their Lordships do not propose to lay down a general rule, but there are many cases of that character in which as it seems to them the principles above referred to will apply, where in other words, the community is as interested in maintaining freedom of contract within reasonable limits as it is in maintaining freedom of trade (see the *Adelaide Steamship* case [1913] A.C. 781 at p. 795). On the whole and with the greatest respect to the Chief Justice of Canada their Lordships are of opinion that this case for the present purpose must be treated as governed by the same principle as that which would have applied if the respondent had himself been selling the goodwill of the business of Lewis Connors & Sons, Ltd. Nor can they accept the view that the real purpose of the transaction was to obtain a monopoly in the business of Canadian sardines. They see no sufficient ground for differing from the view which must apparently have been held by all the other judges in Canada that the McLeans, the controlling shareholders in Connors Bros., Ltd., taught by an unhappy experience in the past, were seeking to obtain covenants from the two Connors who had been controlling and managing the business of Lewis Connors and Sons, Ltd., which would prevent those persons from gravely depreciating the value of the large stockholdings in that company which were being purchased at a full price.

There remain two questions. The first is whether the covenant was reasonably necessary for the protection of the goodwill of the business of Lewis Connors and Sons, Ltd., for if the restraint was larger than was necessary for that protection it could be of no benefit to either party and would be regarded in the eye of the law as oppressive and

therefore unenforceable. The second is whether the covenant is " consistent with the interests of the public." (*McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society Limited* [1919] A.C. 548 at p. 562.)

In the opinion of the Chief Justice of Canada and Davis and Hudson, JJ. the former question was the main question in the case and they agreed in answering that the restraint was not reasonable as between the parties. The Chief Justice of New Brunswick, the Judges of the Appeal Division and Kerwin & Crocket JJ. in the Supreme Court of Canada took the other view. The majority in that Court may perhaps have placed too heavy an onus on the appellants. Lord Parker in *Morris* (*Herbert*) *Ltd.* v. *Saxelby* ([1916] A.C. 688 at p. 706) remarked as follows:—" It is " not that such restraints (on trade) must of themselves " operate to the public injury, but that it is against the policy " of the common law to enforce them except in cases where " there are special circumstances to justify them. The onus " of proving such special circumstances must, of course, rest " on the party alleging them. When once they are proved, " it is a question of law for the decision of the judge whether " they do or do not justify the restraint. There is no question " of onus one way or the other." Lord Parker in this part of his speech was stating the effect of Lord Macnaghten's judgment in the *Nordenfelt* case. If however that judgment be referred to it will be seen that Lord Macnaghten in citing Lord Langdale's decision in *Whittaker* v. *Howe* (3 Beav. 383) said distinctly that on the facts of that case it lay on the defendant to prove that the area of restriction was unreasonable. ([1894] A.C. at p. 573.) This indeed was only following the opinion expressed by the Court of Queen's Bench in the important case of *Tallis* v. *Tallis* (1853 1 El. and Bl. 391 at p. 412) in an action relating to a covenant by a retiring partner, and in a number of other cases of which *Rousillon* v. *Rousillon* (1880 14 Ch. D. 351, at p. 365) is one example. It is possible that in a case where a goodwill is being sold by a covenantor the rule as to onus of proof of special circumstances may require further elucidation. The persons who have actively been concerned in the management of a business have sometimes had a knowledge of its trade secrets and have often become acquainted with its trade connexion. In such cases it may be *primâ facie* reasonable that the purchasers should insist on a covenant or covenants which will enable them to obtain the full benefit of the goodwill which they are purchasing, and if a company happens to be the owner it is only from individuals that useful covenants can be obtained. (See Smith's Leading Cases 13th Edn. vol. I at p. 481.)

Their Lordships however are referring to this matter of onus only to show that they regard it as one worthy of consideration on some future occasion, and they propose to deal with the present case as if the covenantee was called upon to prove all the special circumstances.

The unusual way in which the question was raised before the Court must be remembered. The respondent was the first witness called and in cross-examination he said with regard to the old company whose business was acquired by Connors Bros., Ltd., that he thought that company was carrying on business in every province in Canada. Asked as to the business of Lewis Connors and Sons, Ltd. he said in cross-examination "I think perhaps they were selling "some" (meaning, as the context shows, cases of sardines) "in pretty near every province in Canada." Neil McLean whose evidence was plainly accepted by the trial judge gave evidence as to the businesses of Connors Bros., Ltd. and Lewis Connors and Sons, Ltd. while they were engaged in severe competition everywhere, but it was never suggested to him in cross-examination that the business of either company did not extend over all Canada. In truth counsel for the respondent was not endeavouring to establish such a proposition. A clerk in charge of the export department (J. J. Hayes Doone) proved that when the old company sold its business to Connors Bros., Ltd., they were selling in all provinces in Canada as well as elsewhere, and it was assumed that Lewis Connors and Sons, Ltd., competed with Connors Bros., Ltd. throughout Canada. Burton M. Hill a director of Connors Bros., Ltd., gave evidence. The first question put to him in cross-examination elicited the answer that "Connors was known from one end of Canada to the other "in the sardine business and it was the only Canadian "company well known." This answer may have been ambiguous, but instead of making the point, if it could be made, that Lewis Connors and Sons, Ltd. were not in 1925 carrying on business all over Canada, the cross-examination proceeds thus:—" Q. It was also known all over the world? "—A. No—a certain number of countries. Q. We have had "evidence here that this company does a world wide busi- "ness?—A. It does now. Q. We also have evidence that "it did then.—A. In a number of countries." There is not a single question by counsel on behalf of the respondent which even remotely suggests that the two companies in the period up to May 1925 were not carrying on business in competition throughout Canada, and it would seem, taking the evidence as a whole, that this was in effect an admitted fact. It is important to note that the business of Lewis Connors and Sons, Ltd., like that of Connors Bros., Ltd., was a wholesale one. Cases of sardines sold in a province of Canada would presumably find their way into the Yukon Territory and the North-West Territory. Their Lordships do not take the view that the evidence is of a very satisfactory kind; but read as a whole they are of opinion that the Chief Justice of New Brunswick was justified in coming to the conclusion, which he apparently did without difficulty, that Lewis Connors and Sons, Ltd. had carried on the sardine business in each of the provinces of Canada. No point as to the Territories was made until the matter reached the Supreme Court of Canada, and the answer to that point if it had been made has been suggested above.

It should also be observed that the question of reasonableness being a matter of law for the Court, it has never yet been supposed that it is necessary in relation to the trade of a large manufacturer or merchant to prove to the satisfaction of the Court that the business which the covenant is designed to protect has been carried on in every part of the area mentioned in the covenant. In the cases in which the area has been the whole of England, or a substantial part of it such as 100 or 150 miles from a named town, it has never been held that the covenantee was under an obligation to prove that the business has been carried on in all the towns and villages within the area. In the *Nordenfelt* case no attempt was made to prove that all the governments of the world, or even of the civilised world, had ordered goods from the company though the greater number no doubt had done so. A great deal no doubt depends on the nature of the business and the area in question. In a country of vast spaces like the Dominion of Canada it will always be possible until the population of the country reaches a point now scarcely contemplated, to point to areas where there are only few settlers or inhabitants and where accordingly few if any of the goods sold by the manufacturer have penetrated. If, for example, a restrictive covenant were limited to the Province of Quebec it would seldom be possible to prove that the goods were used in every part of that province; but the goodwill of a business such as is now under consideration could not adequately be protected if the restrictive covenant had to be limited to the towns and villages where actual sales could be proved whilst leaving the vendor free to establish a business, which would almost certainly be competitive, in all the adjoining places.

It may be useful to cite in this connexion the words of Lord Parker in *Morris* (*Herbert*) *Ltd.* v. *Saxelby* (*supra* at p. 708). "The goodwill of a business is immune from the "danger of the owner exercising his personal knowledge and "skill to its detriment, and if the purchaser is to take over "such goodwill with all its advantages, it must, in his hands, "remain similarly immune. Without therefore a covenant "on the part of the vendor against competition, a purchaser "would not get what he is contracting to buy, nor could the "vendor give what he is intending to sell. The covenant "against competition is therefore reasonable if confined to "the area within which it would in all probability enure to "the injury of the purchaser." The words "in all pro-"bability" are important; for the question of law as to reasonableness does depend on probability. On careful consideration of all the circumstances their Lordships have come to the conclusion that the right conclusion is that the covenant, so far as space is concerned, was not unreasonable.

If the restriction as to space is considered to be reasonable it is seldom in a case where the sale of a goodwill is concerned that the restriction can be held to be unreasonable because there is no limit as to time. Their Lordships accept as correct the statement by Lord Cave:—

"It has been settled, I think, since *Hitchcock* v. *Coker* (1837, 6 Ad. and E. 438) that, where there is a goodwill to be protected,

a covenant in restraint of trade, even when imposed as a condition of employment, may be so framed as to give adequate protection not only to the covenantee himself but also to his successors in the business, and this although it may be necessary for that purpose to impose a restriction upon the covenantee for the remainder of his life" (*Fitch* v. *Dawes* [1921] 2 A.C. 158 at p. 168).

The question whether the restraint ought to be held to be injurious to the public can be briefly dealt with. It would appear that what is meant by the affirmative proposition is that the restriction is calculated to produce a pernicious monopoly, that is to say a monopoly calculated to enhance prices to an unreasonable extent. (*Nordenfelt's* case 1893 1 Ch. 630, 646, 668, *Adelaide Steamship Case* [1913] A.C. 781 at p. 796.) It is well settled that the onus of establishing such a proposition is upon the party who attacks the covenant. When the Court is satisfied that the restraint is reasonable as between the parties it must always be very difficult to prove in a case connected with goodwill that the public interest is affected (*Morris* (*Herbert*) *Ltd.* v. *Saxelby* [1916] A.C. 688, at pp. 700, 708). In the present case it seems to their Lordships that there are no grounds for holding that a restriction restraining the respondent from carrying on a sardine business in Canada is likely to produce a real monopoly, since every other person in Canada can set up such a business, and the evidence is to the effect that some persons have done so. The practical difficulty in successfully competing with the appellants may well be due to their skill and enterprise and long experience. This point therefore also fails.

The conclusion therefore must be that the covenant by Bernard Connors with Connors Bros., Ltd. contained in the agreement of the 9th June 1925 is binding as being a reasonable protection of the shares purchased by Connors Bros., Ltd. in Lewis Connors and Sons, Ltd.

In the result their Lordships are of opinion that the three questions raised by the originating summons should be dealt with as follows:—Question (*a*) should be answered by a declaration that the respondent is at the present time and will henceforward be barred from engaging in the sardine business in Canada as owner by himself or in partnership with others. No answer should be given to that part of the question relating to the holding of shares in an incorporated company carrying on such a business. Nor should any answer be given to questions (*b*) and (*c*).

Their Lordships for the above reasons will humbly advise His Majesty that the appeal should be allowed to the extent above mentioned and that the respondent should be ordered to pay to the appellant his costs here and below.

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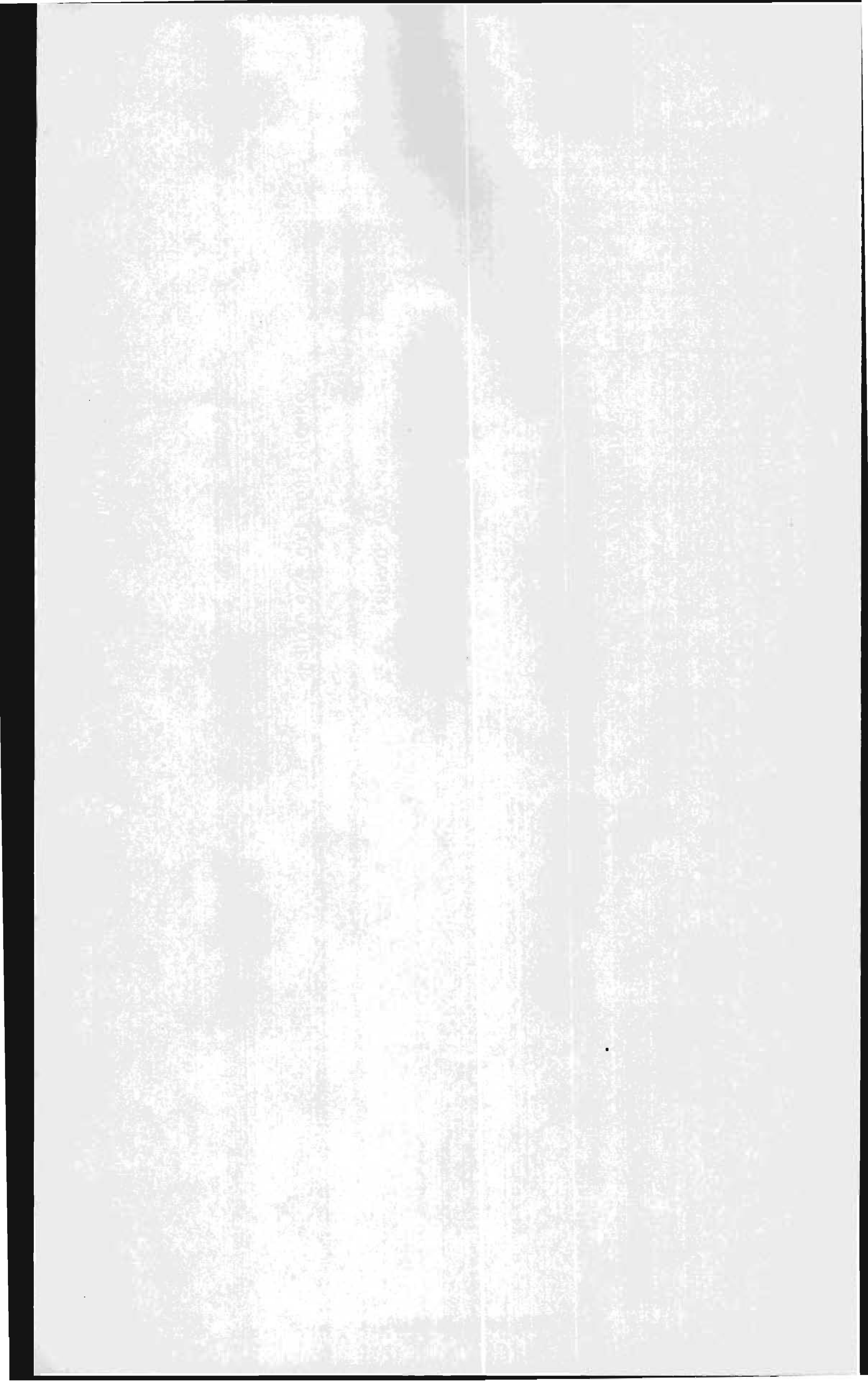

In the Privy Council

CONNORS BROS. LTD. AND OTHERS

v.

BERNARD CONNORS

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