Judgment 20. 1973

IN THE PRIVY COUNCIL No. 4 of 1973

ON APPEAL FROM THE SUPREME COURT
OF NEW SOUTH WALES

B E T W E E N:

STENHOUSE AUSTRALIA LIMITED (Plaintiff) Appellant

- and -

MARSHALL WILLIAM DAVIDSON PHILLIPS (Defendant) Respondent

CASE FOR THE APPELLANT

WILKINSON KIMBERS & STADDON,
Hale Court,
Lincoln's Inn,
LONDON W.C.2.
Solicitors for the Appellant.

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RECORD

1. This is an appeal by leave of the Supreme Court of New South Wales against the order of the Supreme Court of New South Wales dated the 26th October 1972, by which the Suit commenced by Summons was dismissed with Costs. pp.238-240 p.237 pp.1-3

2. The question raised by this appeal involves the enforceability of certain provisions contained in an agreement under Seal made the 23rd day of March 1972 between the Appellant of the first part and the Respondent of the second part, being an agreement made between the parties following the tender by the Respondent of his resignation as an employee of the Appellant. By Clause 4 of the said agreement it was provided as follows :- pp.254-258 p.255

> "Mr. Phillips covenants that he will not for a period of five years from the said 9th day of July, 1971 unless with the prior written consent of Stenhouse directly or indirectly as principal servant or agent solicit whether by written or oral communication or otherwise insurance business from any client as hereinafter defined".

By Clause 5 of the said agreement it was provided as follows :- p.255-256

> "In the event that any client of Stenhouse shall within a period of five years from the said 9th day of July 1971 (and that whether or not such client is a client of

one or more of the Stenhouse companies at the time) place insurance business whether or not business of a type presently transacted by Stenhouse for such client through the agency of Mr. Phillips or through any agency other than that of one of the Stenhouse companies referred to in Clause 2 of this agreement so that Mr. Phillips or any person firm or corporation for whom Mr. Phillips is a principal or agent or by whom Mr. Phillips is employed and with whom he is associated or connected in any other way receives or becomes entitled to receive directly or indirectly any financial benefit from the placing of such business then Mr. Phillips agrees to pay or procure that there shall be paid to Stenhouse a one-half share of the commission received in respect of such transaction and such commission shall be the gross commission (including any allowances) paid by the Insurance Company in respect of such transaction without allowance for any rebate made to the client and after deduction of any procurement fee properly payable in respect of prospective clients as hereinafter defined to any third party for the introduction of such business such procurement fee not to exceed one-third of the total initial commission. The sums payable to Stenhouse pursuant to this Clause shall continue to be paid for a period of five years (but only if there is a financial benefit as aforesaid for each year) from the date on which such insurance business is so first placed and shall be paid to Stenhouse concurrently with the settlement of the net premium due to the Insurance Company concerned."

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p.256 By Clause 6 of the said agreement it was provided as follows :- 40

"Mr. Phillips covenants that except in the circumstances provided for in Clause 5 hereof he shall not for a period of three years from the said 9th day of July 1971 unless with the prior consent in writing of Stenhouse directly or indirectly as

principal servant or agent act as Insurance Broker for any client as hereinafter defined."

By Clause 8 of the said agreement "client" was defined as follows:- pp.257-258

"For the purposes of Clauses 4, 5 and 6 of this Agreement the word "client" shall mean any person firm or corporation who at the said 9th day of July 1971 or in the preceding month was a client of Stenhouse or any of its associated companies with whom in the course of his employment with Stenhouse Mr. Phillips has had dealings or negotiations and further shall mean a prospective client of Stenhouse or of its associated companies whose insurance business was the subject of negotiation with Stenhouse through the services or agency of Mr. Phillips either at the said 9th day of July 1971 or within the period of 12 months preceding that date but shall be construed as excluding any person firm or corporation who was a client or prospective client of Stenhouse as aforesaid and whose business is acquired by or who becomes thereafter a subsidiary of any other person firm or corporation which is at the said 9th day of July 1971 or may become during the term of this Agreement a client of Mr. Phillips or any person firm or corporation by whom he is employed or for whom he is acting as agent, and further shall be construed as excluding any Insurance Company."

The Appellant claims that in the circumstances of this case the Respondent was and is bound to observe the provisions contained in each of the said Clauses.

3. The Appellant is a Company having an office in Sydney and having a number of subsidiary companies carrying on the business of insurance broking in each of the States of Australia. The Appellant has itself at all material times carried on business as an insurance broker. The Appellant and its subsidiary companies are hereinafter collectively referred to as "the Stenhouse Group". pp.11-12,25 18-22, 92-96, 102-105, 157-158, 261,262 pp.84-88, 102,104, 223,224

RECORD

pp.243-250 4. By an agreement made the 11th December 1964 between Stenhouse Scott North Australia Limited of the one part (a subsidiary of the Appellant) and the Respondent of the other part the Respondent accepted employment by Stenhouse Scott North Australia Limited and entered into certain covenants for the benefit of Stenhouse Scott North Australia Limited.

pp.243-244 By Clause 3 of the said agreement it was provided as follows :-

> "The Director's employment hereunder shall be deemed to have commenced on the 7th day of December 1964 notwithstanding the date hereof and as from that date this agreement supersedes all or any existing agreements which subsist or may subsist between the Company and the Director and subject to the provisions herein contained this agreement shall continue from the said 7th day of December 1964 until the Director shall attain the age of 60 years but shall not then terminate unless six months' notice in writing of termination shall have been given by one party to the other terminating the same and unless so terminated as aforesaid this agreement shall continue from year to year thereafter until terminated by at least six months' notice in writing given by one party to the other or until the Director shall attain the age of 65 years whichever shall first occur. If the service of the Director hereunder shall continue after he attains the age of 60 years he shall during the month preceding 15th January in each year thereafter submit himself for examination by a medical practitioner nominated by the Company and his continued employment shall be dependent upon such medical practitioner certifying that he is fit to carry out his duties hereunder, failing which this agreement shall terminate without notice on the 15th January following such examination."

pp.245-246 By Clause 10 of the said agreement it was provided as follows :-

> "The Director as a separate and independent covenant enforceable as though Clause 11 were not contained herein covenants and

agrees with the Company that he will not for five years after the determination from any cause whatever of his services hereunder within Twenty-five miles radius of the General Post Office Sydney directly or indirectly engage or be concerned whether as principal servant or agent in the business of insurance broking or the business of an insurance agent or solicit the custom of any person, firm or corporation who during the continuance of this agreement shall have been a customer of the Company and/or Stenhouse Holdings Limited and/or any Company associated therewith or a subsidiary thereof in competition with any such Company."

By Clause 11 of the said agreement it was provided as follows :- p.246

"The Director as a separate and independent covenant enforceable as though Clause 10 were not contained herein covenants and agrees with the Company that he will not for Five years after the determination from any cause whatever of his services hereunder directly or indirectly engaged or be concerned in the business of insurance broking or the business of an insurance agent in any town in Australia in which the Company and/or any of its associated insurance broking companies shall have at the date of termination of this agreement a recognised place of business or in any place within Australia solicit the custom of any person, firm or corporation who during the continuance of this agreement shall have been a customer of the Company and/or Stenhouse Holdings Limited and/or any Company associated therewith or a subsidiary thereof in competition with any such Company."

5. By an agreement made the 6th September 1966 between Stenhouse Scott North Australia Limited of the first part, Stenhouse Australia Limited of the second part and the Respondent of the third part it was provided, inter alia, that the Respondent thenceforth should serve and be employed by the Appellant, and that the agreement made the 11th December 1964 should be construed and should operate as though pp.251-253

it were originally entered into with the Appellant in lieu of Stenhouse Scott North Australia Limited.

p.158 pp.97-98

6. Thereafter the Respondent was employed pursuant to the agreement made the 6th September 1966 until he resigned from such employment on and from the 9th July 1971.

p.16

7. During his said employment the Respondent was Managing Director of Stenhouse Scott North Australia Limited and Stenhouse Re-Insurance

pp.11,261

Limited, both of which Companies were subsidiaries of the Appellant and members of

p.11

the Stenhouse Group of Companies. Stenhouse Scott North Australia Limited is the vehicle through which insurance is placed on the London Market for other members of the

pp.11,25

Stenhouse Group. Stenhouse Re-Insurance Limited is a re-insurance broking Company which places re-insurance between one Insurance Company and another.

pp.88-89, 119-120, 159

8. During his employment the Respondent was, as to the main part of his activities, concerned with re-insurance work for the Stenhouse Group. However, in addition, his

pp.27-30

activities included direct contact with persons seeking insurance or who obtained insurance with or through the Stenhouse Group

pp.88-91

of Companies. In such capacity he was working with Mr. Newton the Development

p.87

Director of the Appellant. It was the function of the Development Director to negotiate with the client and Insurance Companies to the stage of appointment of the Appellant as broker, whereafter the negotiations and business were assigned to a branch within the Stenhouse Group for completion. The number of clients with whom

pp.27-28, 119-120

the Respondent had direct dealings or negotiations was limited.

pp.30-31

9. The funds generated by each of the Companies within the Stenhouse Group from their activities have at all material times

pp.84-88,96, 223-224

been received by the Appellant. The business of the Stenhouse Group has at all material times been conducted under the control of, and co-ordinated by, the Appellant through its

p.223

branches, being the subsidiary companies. At all material times the senior executives of

the group were associated directly with the Appellant and were concerned in the business activities of the subsidiaries.

10. In the course of his said employment, the Respondent had negotiations with Boral Limited and its subsidiary and associated companies, which said companies, at all material times, had carried on business in diverse fields of industrial activity. Between the 1st January 1970 and 30th June 1972, the Stenhouse Group acted as Insurance Broker of some classes of insurance affecting the Boral Group.

pp.16,36, 37-41
pp.78,163
pp.15-18,33, 35-41,166

11. By a letter dated 12th May 1971 the Respondent gave to the Appellant eight weeks notice of his intention to resign.

pp.97,259

12. By a letter dated 13th May 1971, the Appellant declined to accept such notice of resignation.

pp.97,260

13. Thereafter lengthy negotiations took place between the parties, which led to the execution upon the 23rd March 1972 of the agreement under seal bearing that date hereinbefore referred to. By such agreement, the Respondent was, inter alia, released from his obligations under the agreements dated the 11th December 1964, and 6th September 1966 and in turn gave to the Appellant the benefit of the Covenants set forth. The said agreement was ratified by the Appellant on the 23rd March 1972. During the course of the said negotiations, challenge was made by the Respondent to the validity of certain restrictions contained in the earlier agreements.

pp.98,135 -138,148, 160-161
pp.254-258
p.109
p.148

14. On the 9th July 1971, the Respondent left the employment of the Appellant and immediately set up the constitution in Australia of a business in competition with the Stenhouse Group. On the 1st August 1971, the Respondent commenced to work for a Company within the group controlled by Heath & Company Limited, which ultimately led to the incorporation in New South Wales of C.E. Heath Insurance Broking (Australia) Pty. Limited.

pp.111,160
p.111

15. The Respondent continued to be so employed until the 24th November 1971 when he was

pp.108,111

appointed as Director of C.E. Heath Insurance Broking (Australia) Pty. Limited. The Respondent has since such time continued in such position and has at all material times since such time been employed and worked as an insurance broker.

pp.108,111

16. After leaving the employment of the Appellant and before execution of the agreement of the 23rd March 1972, the Respondent made contact with Mr. Hargreaves, the General Manager of Boral Insurance & Fund Management Pty. Limited. At all material times the placing of insurance for the Boral Group of Companies was under the practical control of Mr. Hargreaves, with whom the Respondent had discussions and negotiations while he was an employee of the Appellant. Boral Insurance & Fund Management Pty. Limited was a wholly owned subsidiary of Boral Limited which acted in some cases as agent or broker for the Boral Group in placing insurance and in other cases as insurer itself of the risks insured.

pp.41-48, 166-167

p.34

pp.33-34, 54-56,165

pp.16,36-111

pp.33-35, 150-151, 163-165

17. Between the 9th July 1971 and the 23rd March 1972, the negotiations and discussions continued between the Respondent and Mr. Hargreaves relating to the placement of the insurance business of the Boral Group of Companies. Such negotiations and discussions arose out of approaches made by the Respondent, and in such discussions, the initiative was taken by the Respondent. Such discussions included discussions on direct insurance for the Boral Group, and the Respondent did not expressly advise Mr. Hargreaves that he would confine his business to re-insurance of Boral Insurance & Fund Management Pty. Limited risks.

pp.41-48, 166-167

pp.42-50, 139-140, 233

pp.142;151, 227,228

18. On or about the 27th March 1972, C.E. Heath Insurance Broking (Australia) Pty. Limited submitted detailed proposals and quotations to Mr. Hargreaves in relation to substantial insurance business sought in respect of the insurance of the Boral Group. Part of the proposals were contained in an insurance manual wherein C.E. Heath Insurance Broking (Australia) Pty. Limited was described as brokers to the Boral Group. There were in addition oral discussions after the 23rd

pp.50-51, 65-66,142, 167,229-231

pp.48-50

March 1972 between the Respondent and Mr. Hargreaves relating to such insurance.

19. Later in 1972, insurance policies were effected by C.E. Heath Insurance Broking (Australia) Pty. Limited as brokers for the Boral Group in relation to Industrial All Risks, Crime, & Loss of Profits. No consent was given by the Appellant to the Respondent's dealings with the Boral Group's insurance. pp.51-54 p.108

20. By proceedings commenced by Summons, the Appellant sought declarations as to the validity of Clauses 4, 5 and 6 of the agreement under seal made the 23rd March 1972 between the Appellant of the first part and the Respondent of the second part, declarations that the Respondent had acted in breach of Clauses 4, and 6 of the said agreement, injunctions restraining future breaches of Clauses 4, and 6 of the said agreement, an order for damages in respect of such breaches, and in the alternative a declaration that the Respondent was bound to make payment to the Appellant in the manner provided by Clause 5 of the said agreement and an order for payment of the same. pp.1-3

21. The Appellant before the Supreme Court of New South Wales argued the following matters which were considered by the Trial Judge:-

(a) The Boral Group of Companies were corporations which at the 9th day of July 1971 and in the preceding month were clients of the Appellant and its Associated Companies with whom in the course of his employment by the Appellant, the Respondent had dealings or negotiations within the meaning of Clause 8 of the agreement under seal dated the 23rd March 1972. p.166

(b) The existence of Boral Insurance & Fund Management Pty. Limited and the placement by it of insurance business for or on behalf of the Boral Group did not exclude the Boral Group from the definition of client within the meaning of Clause 8 of the agreement of the 23rd March 1972. pp.228-232

RECORD

pp.166-168, 226-234

(c) The Respondent as servant or agent for C.E. Heath Insurance Broking (Australia) Pty. Limited, after the 9th July, 1971, solicited the insurance business of the Boral Group, which solicitation continued after execution of the agreement dated the 23rd March 1972 and in breach thereof, and which continued solicitation was to be viewed in the light of the events preceding the 23rd March 1972.

pp.163-165,231

(d) In the discussions and negotiations between the Respondent and Mr. Hargreaves, Mr. Hargreaves acted as servant or agent of Boral Limited and of each subsidiary or associated company within the Boral Group whose insurance business was the subject of the negotiations and discussions.

pp.227-232

(e) The business solicited by the Respondent was not confined to re-insurance of Boral Insurance & Fund Management Ppty. Limited.

(f) The business solicited was not that of an Insurance Company within the meaning of clause 8 of the agreement dated 23rd March 1972.

pp.234-236

(g) The counselling advising and negotiations of the Respondent constituted an acting by the Respondent as broker for the Boral Group within the meaning of Clauses 5 and 6 of the agreement dated the 23rd March 1972 and in breach of Clause 6 thereof.

pp.234-236

(h) The placement of the policies by the Boral Group, through the means of the Respondent and as a result of his actions, constituted an acting by him as a broker within the meaning of Clauses 5 and 6 of the agreement dated the 23rd March 1972, and in breach of Clause 6 thereof.

pp.220-222

(i) There was consideration for the restraints contained in the agreement dated the 23rd March 1972 in the release by the Appellant of the Respondent from his obligations under the two earlier agreements, and in the compromise of the disputes as to the relationships arising

under such earlier agreements, and were not restraints in gross.

(j) The Appellant was itself directly concerned with insurance broking and had a distinct and substantial interest in the business of its subsidiary and associated companies. The group enterprise was such that the Appellant had sufficient interest to support the restraints contained in the agreement dated the 23rd March 1972. pp.222-225

(k) Clause 4 was not, in the circumstances of the case, an unreasonable restraint of trade. pp.173-192

(l) Clause 5 was not a clause in restraint of trade, or a penalty clause, and, if contrary to the Appellant's submission it was to be regarded as a restraint of trade, then it was not, in the circumstances of the case, an unreasonable restraint of trade. pp.192-196

(m) Clause 6 was not, in the circumstances of the case, an unreasonable restraint of trade. pp.196-214

(n) If contrary to the Appellant's submissions, any of Clauses 4, 5 or 6 were to be regarded as being unreasonable restraints of trade, then they were mutually severable. pp.214-220

(o) In the exercise of its discretion injunctions should be granted by the Court in the event of its finding that either Clauses 4 or 6 were valid and enforceable. p.236

22. The Supreme Court of New South Wales accepted the submissions of the Appellant set forth in sub-paragraphs 21 (a) to (j), (n) and (o) above, but rejected the Appellant's submissions set forth in sub-paragraphs 21 (k) (l), and (m).

23. The basis of the holding that Clause 4 of the agreement was unreasonable was as follows:-

(a) in reference to duration, firstly, upon the

RECORD

p.178 assumption that no reliance was made by the Appellant in the presentation of its case upon matters of confidentiality; secondly, upon the finding that the personal relationship between broker and client was of little account and would not continue to have any relevant effect during the period of 5 years; thirdly, upon the affirmative finding that in relation to a significant number of clients, the influence or relationship would have ceased substantially before the end of the period of restraint; and fourthly, upon the conclusion that as the restraint in question operated beyond the point established by the evidence as the point at which the influence or relationship would not operate, the Clause should not be upheld.

pp.178-179

pp.179-189

p.189

(b) in reference to area, firstly, upon the finding that the Clause operated to prevent solicitation of clients anywhere in the world; and secondly, upon the finding that the Appellant had not satisfied the onus of proving that in this respect the covenant would not, in any practical sense, impose a significant burden upon the Respondent.

p.189

pp.190-191

(c) in relation to client, upon the finding that the Clause was not confined to aspects of insurance business of clients with which the Appellant and the Respondent had a particular relationship.

pp.191-192

24. The holding that Clause 5 was unreasonable was based upon the following findings:-

(a) that the Clause was directed to ensuring that trade with clients be restricted and accordingly fell to be considered by restraint of trade doctrines.

pp.192-194

(b) that the restriction was imposed merely by reference to the placement of insurance business and not upon solicitation or other activities relating to the exercise by the Respondent of the influence or relationship acquired from his

pp.194

employment.

(c) that the restriction applied whether or not the Respondent participated or knew of the placement of the client's business. pp.194-195

(d) that the duration was longer than could be justified. p.195

25. The basis of holding that Clause 6 was unreasonable was as follows :-

(a) upon an application of the authorities so as to extract what amounted to a proposition of law that it is essential to the reasonableness of a restraint that it be framed, according to what may, in a practical sense, be fairly anticipated at the date of the agreement as the area of influence or relationship. pp.198-207

(b) upon a finding that as the agreement was made at the termination of employment, a judgment could have been formed with a reasonable degree of certainty as to the clients and nature of the business affected by the influence and relationship, and the period and area for which such influence or relationship might respectively last and extend in relation thereto. pp.207-209

(c) upon a finding that the restraint was not framed in relation to the clients to whom it might fairly have been anticipated at the date of the agreement, in a practical sense, that the influence or relationship would extend. pp.209-210

(d) upon a finding that the restraint operated in an unlimited geographical area and that the Appellant had not shown that the covenant would not, in any practical sense, impose a significant burden on the Respondent. pp.210-212

(e) upon a finding that the restraint would seriously interfere with pp.212-213

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the occupation of the Respondent.

pp.213-214

(f) upon a finding that the balance of advantages to the Respondent in the release from the restrictions under the pre-existing agreement were outweighed by the disadvantages caused to him from the covenants in question.

SUBMISSIONS

27. The Appellant humbly submits that the decision of the Supreme Court of New South Wales is erroneous in the following respects:-

(a) in holding that the restraint imposed by Clause 4 is greater than is reasonably necessary for the protection of the legitimate interests of the Appellant and as between the Appellant and the Respondent, is, on balance, unreasonable and unenforceable.

(b) in holding that Clause 5 operates to restrain trade and falls to be considered as to its enforceability, by reference to the normal restraint of trade principles.

(c) in holding that Clause 5 operates to restrain the Respondent in his trade in respects and to an extent which are unreasonable and is unenforceable.

(d) in holding that on balance the restraint imposed by Clause 6 is wider than is reasonable and is unenforceable.

28. The Appellant humbly submits that the Judgment and order of the Supreme Court of New South Wales dismissing the Summons with costs should be reversed; that injunctions should be granted restraining the Respondent from acting in breach of the provisions contained in Clause 4 and Clause 6 of the agreement and each of them; that it should be declared that the restraints imposed by Clauses 4 and 6 of the agreement and each of them are valid and enforceable; that it should be declared that the Respondent has, in relation to insurance business of the Boral Group of Companies, solicited insurance business from a client of the

Appellant and acted as insurance broker for a client of the Appellant in breach of Clauses 4 and 6 respectively of the agreement; that it should be declared that the provisions of Clause 5 of the agreement are valid and enforceable; and that orders should be made for the payment by the Respondent to the Appellant of damages or in the alternative a one-half share of the commission received in respect of the said insurance business and for inquiry into the amount of such damages and commission respectively; for the following amongst other

REASONS

1. The restrictions contained in the agreement were not covenants in gross, the Respondent having been released from pre-existing restrictions in return for the new covenants. Spink (Bournemouth) Limited v. Spink, (1936) Ch. 544. Further they were given in compromise of disputes as to the earlier agreements.

2. The Appellant had an interest in the business carried on by the Stenhouse Group, both in its own right and in a commercial sense sufficient to justify the restrictions. Holdsworth & Co. (Wakefield) Limited v. Caddies (1955) 1 W.L.R. 352; Gilford Motor Co. Limited v. Horne (1933) Ch. 935; and Connor Bros. Limited v. Connor (1940) 4 All E.R. 179.

3. No submission was made by the Respondent that the covenants in question were unreasonable in the interests of the public and no finding to that effect was made. Accordingly the covenants in question fall to be considered only according to whether they are reasonable in the interest of the parties.

4. The Appellant concedes that the onus rested on it to prove reasonableness in the interest of the parties in respect of such of the covenants in question as were covenants in restraint of the Respondent's trade. The proper test by which such question is determined in relation to each

restraint as between employer and employee is whether it imposes a greater restraint upon the employee than is reasonably necessary for the protection of the employers business. Herbert Morris Limited v. Saxelby (1916) A.C. 688; Home Counties Dairies Limited v. Skilton (1970) 1 W.L.R. 526 at p.534.

5. It is respectfully submitted that the evidence showed that there were interests of the Appellant for which it was legitimate for the Appellant to seek protection, in relation to the confidential information available to the Respondent (including the names of its clients, information about such clients, and its business methods and know-how) and in relation to its customer connexion. It was not suggested by the Supreme Court of New South Wales that such interests were not legitimate interests meriting protection.

6. That there were in relation to matters of confidentiality substantial interests of the Appellant meriting protection is established from the evidence showing that there were available to the Respondent the names of all the clients of the Stenhouse Group, detailed information concerning their activities and their business with the Appellant, and details of the times at which and methods by which such clients should be approached. Further there was available to the Respondent information as to the methods and channels for placement of business employed by the Appellant, and its areas of strength and weakness. Although recognised to exist, it is submitted that these matters of confidentiality were given insufficient consideration by the Supreme Court of New South Wales and erroneously excluded from the consideration of reasonableness.

7. That there were interests of substance of the Appellant in relation to customer connexion meriting protection is established by the evidence showing that dealings between broker and client require frequency of contact, that the

business was of a recurring nature, that there is a close and personal relationship between the employee and client, that a detailed and intimate knowledge of the clients affairs and activities is acquired, that it is a business providing services of a complex and skilled nature, that substantial periods of time are devoted to the service provided for the client, that the needs of the client are special needs in respect of which detailed knowledge is acquired by the employee and that the work is done in conditions of confidentiality.

For the reasons hereafter appearing, it is submitted that insufficient weight was given by the Supreme Court of New South Wales to such matters.

8. The Appellant respectfully submits that the authorities establish that the onus on an employer seeking to enforce a covenant in restraint of trade is not to prove reasonableness as a fact, but to prove circumstances from which reasonableness can, as a matter of law be inferred by the trial judge.

Herbert Morris Limited v. Saxelby (1916) 1 A.C. 688 esp. at pp. 706-7. It is submitted that in failing to draw this distinction, the Supreme Court of New South Wales fell into error.

9. The Appellant further respectfully submits that the authorities establish that such inference is to be drawn by a consideration of the ambit of the restraint in the light of all relevant aspects which include, inter alia, the weight and substance of the employer's interest meriting protection, the nature of the trade and manner in which it is conducted, the nature and extent of the employers own business, the nature of the servants employment, and the circumstances in which the Contract was bargained for. It is in the light of all such aspects that the circumstances are to be found from which reasonableness is as a matter of law, to be inferred. It is submitted that the Supreme Court of

New South Wales fell into error in failing to consider the ambit of the restraints in the light of all such aspects.

CLAUSE 4

10. In particular it is submitted that in holding in relation to Clause 4 that a restriction for five years afforded a protection which was more than adequate to the interests of the Appellant meriting protection, the Supreme Court of New South Wales was in error in failing to give any consideration to the interests referred to in paragraph 6 of these reasons and in giving insufficient consideration to the interests referred to in paragraph 7 of these reasons. It is further submitted that it failed to give sufficient consideration to the aspects referred to in paragraph 9 of these reasons, in respect of which evidence was available in the respects and to the extent set forth in paragraph 26 of the Appellant's case.

11. In considering questions of duration, account is properly taken of the period necessary for the employer to place a new man on the job, and for the new employee to have a reasonable opportunity to form a relationship of knowledge and influence with the clients Middleton v. Brown (1878) 47 L.J. Ch. 411. Account is also properly taken of the period which might be estimated to elapse before the employee would lose the hold he had acquired over clients so that he could no longer take advantage of that hold in acquiring their business.

12. Such questions, however, are only part of the material from which the inference of reasonableness is drawn, and are themselves to be considered in the light of all relevant aspects. The Courts have made it clear that no hard and fast rules are to be laid down in relation to time or in relation to space, each being treated as one of all the elements by the light of which the reasonableness of the restriction is taken as a whole.

Fitch v. Dewes (1921) 2 A.C. 158 esp. at p.167.

13. It is also respectfully submitted that where restrictions in respect of one or more of the elements of space, time, or clients are limited, a considerable restriction in respect of one of the other aspects may be more acceptable than would otherwise have been the case. Fitch v. Dewes (1921) 2 A.C. 158 at 163.

14. The Supreme Court of New South Wales considered duration by an inquiry and ultimate finding as to the point of time at which the employee's detailed knowledge of clients business activities would no longer be of assistance to him, having regard to changes in their affairs. The question was not considered by inquiry into the period for replacement of the Respondent by the Appellant, nor by inquiry into the period during which the Respondent's hold arising out of matters other than knowledge of clients business activities might be expected to subsist, save that reference was made to the personal nature of the relationship to which aspect it is submitted, insufficient weight and consideration were given. Such approach was not justified by the decision in Lindner v. Murdock's Garage 83 C.L.R. 628 which is authority for consideration of the question in the light of all aspects.

15. It is further respectfully submitted that by determining the question of reasonableness by a principle that the restraint was necessarily unreasonable as it was found to extend for a period in excess of the period for which the relationship of influence or knowledge was found to subsist, the decision was in conflict with the principle expressed in Fitch v. Dewes (supra). In any event it is submitted that upon a proper understanding of the whole of the evidence there was no basis for a finding that the period of hold would cease before the period of restraint. In particular, the question was considered in relation to

part only of the clientele and was confined to knowledge of day to day business actitivies. Furthermore properly understood the restraint operated prospectively from the date of the agreement and its duration was for a period of less than five years from the date of the termination of the employment.

16. It is further respectfully submitted that the period for which a hold might be expected to subsist could not be properly answered by opinion evidence as to that period. Such period should have been determined by inference from all the facts, of which at the most such opinion evidence if admissible could only form part.

17. Alternatively it is respectfully submitted that in considering questions of duration, reasonable protection permits of a period of grace after the earliest point at which it might fairly be estimated that the client's hold would cease, and at which the employee replacing the retired servant would acquire a relationship of knowledge and influence.

18. It is submitted that by reason of the matters above set forth the Supreme Court of New South Wales was in error in failing to take into account in assessing reasonableness, inter alia, the following further matters:-

(a) the circumstances in which the covenants were given, namely at a time when the Respondent's employment had ceased, and when he had obtained fresh employment in an office at least equal to that from which he had retired. Further they were given in circumstances of equivalent bargaining power, by a senior employee, at a time when there was no anxiety on the employees part to enter the employers service, at a time when he had demonstrated his ability at least to maintain his condition, and after strenuous bargaining and in consideration of the release from pre-existing restrictions the validity of which had been challenged by him.

That the circumstances in which the covenant is entered into are an important consideration is established by M. & S. Drapers v. Reynolds (1957) 1 W.L.R. 9.

(b) that the restraint, upon its proper construction, fell into the category of employee restraint recognised to be of the narowest category, namely those directed towards the employers connexion with those clients with whom the employee actually dealt.

(c) That the number of clients affected by the restraint was limited by the requirement in Clause 8 that they be clients with whom the Respondent had dealings or negotiations and who were clients or prospective clients during a limited period. Further the clients to whom the restraint extended were by reason of the requirement that they be clients with whom the Respondent had dealt or negotiated were known with complete certainty by both the Appellant and the Respondent at the date on which the agreement was made.

Accordingly questions of duration and space might reasonably be approached more liberally.

(d) The authorities show that covenants against soliciting or canvassing customers, being activities in respect of which the employer is particularly vulnerable, are not commonly struck down for excess duration or area.

C.W. Plowman & Son Ltd. v. Ash (1964) 1 W.L.R. 568
Gilford Motor Co. Ltd. v. Horne (1933) Ch. 935
Dubowski & Sons v. Goldstein (1896) 1 Q.B. 478

19. It is submitted that the Supreme Court of New South Wales was, by reason of the matters set forth in paragraph 17, in error in holding the clause unreasonable

in relation to geographical area of operation. The restriction being limited to clients who were ascertainable and known to the parties with certainty, it was reasonable for the restriction to apply to business relating to all risks and activities wherever located of those clients with whom there was such a customer connexion. Furthermore inquiries as to international movement of clients and the employee involved a consideration of improbable and extraneous contingencies which was not justified either having regard to the evidence as to the areas of operations of the Appellant or by the authorities.
C.W. Plowman & Son Limited v. Ash
(1964) 1 W.L.R. 568.

20. Further in placing upon the Appellant an onus of showing positively that operation of the clause outside Australia would not impose any significant burden upon the Respondent, the Supreme Court of New South Wales placed upon the employer an onus not justified by the authorities. The correct inquiry was whether the legitimate interests of the Appellant were such that in all the circumstances protection against soliciting clients in respect of risks or activities outside Australia was reasonable. The approach of the Supreme Court of New South Wales required a weighing up of advantages and disadvantages which was not justified on the authorities, Herbert Morris Ltd. v. Saxelby (1916) 1 A.C. 688 at 707.

21. It is further submitted that the Supreme Court of New South Wales was in error, for the reasons set forth in paragraph 17, in treating the clause as unreasonable in that it extended to all aspects of insurance business of clients whereas the Respondent's dealings with certain clients might have been confined to some only of the aspects. The evidence showed that a division of the business of insurance broker into separate aspects of insurance is not a commercially justifiable division for the purpose of restraint of trade doctrine, such industry being clearly distinguishable from these

industries where there is no carrying over of skills and knowledge from one department to another and no difference in substance between the services and products supplied. Similar services and skills are provided and employed in each aspect of insurance broking. The skills and services are supplied in relation to the one client, knowledge of the client and its activities must, or may reasonably be expected to, be of assistance for each risk with which the broker is concerned, and the existence of a relationship in one facet of the client's insurance business must, or may reasonably be expected to, confer an advantage in relation to the acquisition of business for other insurance business.

22. It is further submitted that upon a proper view of the evidence the Respondent did not have dealings or negotiations with clients within the meaning of clause 8 when engaged in re-insurance activities and that the Supreme Court of New South Wales was in error in taking into account any company or person in respect of whose insurance the Respondent's sole concern was in the field of re-insurance. Any dealings or negotiations by the Respondent concerning the same was in the context of broker acting between insurer and re-insurer. Clause 8 should be read in the light of such surrounding circumstances and client limited accordingly.

CLAUSE 5

23. It is respectfully submitted that Clause 5 does not fall to be considered as to its efficacy by reference to the restraint of trade principles. It is not in its terms a restraint of trade and it does not require the Respondent to give up the freedom in the future to carry on a trade with other persons not parties to the contract. Petrofina (Gt. Britain) Limited v. Martin (1966) Ch. 146, Esso Petroleum Co. Limited -v- Harpers Garage (1968) A.C. 269. In treating the contract as one restricting competition by way of financial impost or inducement, and thereby being in restraint of trade, the

Supreme Court of New South Wales was in error. Tool Metal Manufacturing Co. Limited -v- Tungsten Electric Co. Limited (1955) 1 W.L.R. 761 (H.L.).

24. In the alternative, if contrary to the Appellant's submissions, the clause is properly to be considered by reference to the restraint of trade principles, it is respectfully submitted that the Supreme Court of New South Wales was in error in drawing a distinction between a restraint imposed by reference to the placement of insurance business, and a restraint imposed upon activities, which in terms relate to the exercise by the employee of the influence or relationship acquired by virtue of his former employment. Such distinction is entirely illusory and does not exist in substance, for the placement of business by a client, in the manner provided by the clause, is nothing but the acceptance of business by the Respondent in competition with the Appellant, which competition an employer may restrict, where it is reasonable to do so, in order to protect the employer's legitimate interests. Lindner -v- Murdock's Garage 83 C.L.R. 628.

For the reasons elsewhere herein set out it is respectfully submitted that a restriction upon competition in the terms of the agreement was reasonable.

25. Further in the alternative, it is respectfully submitted that the Supreme Court of New South Wales fell into error by failing to take into account, firstly, the seniority of the Respondent at the date of the agreement, with the consequence that he might reasonably, and in a practical sense, be expected to be at least aware of placements of the business by clients in the circumstances and within the meaning of the agreement; and, secondly, the fact that upon a proper view of the authorities knowledge of breach is of little importance. Such breach may be avoided by inquiry, and any apparent hardship is avoided by

breach being followed by an award of nominal damages and not by injunction. Dubowski & Sons -v- Goldstein (1896) 1 Q.B.478; Gilford Motor Co. -v- Horne (1933) 1 Ch 935; G.W. Plowman & Son Limited -v- Ash (1964) 1 W.L.R. 568

26. Further in the alternative, it is respectfully submitted for the reasons set out in relation to Clause 4 that the period for which the clause operates is a period which, in the circumstances, is justified.

CLAUSE 6

27. It is respectfully submitted that the Supreme Court of New South Wales was in error in applying, as an essential condition of reasonableness, the requirement that the clause be framed according to what might, in a practical sense, be fairly anticipated, as at the date of the agreement, as the area in which the influence or relationship acquired from the earlier employment would apply.

The application of such a requirement is not supported by the authorities and is an unwarranted restriction of the doctrine.. G.W. Plowman & Son Limited -v- Ash (1964) 1 W.L.R. 568; Home Counties Dairies Limited -v- Skilton (1970) 1 W.L.R. 526. The principle by which the Clause should have been considered was simply whether it imposed a greater restraint upon the Respondent than was reasonably necessary for the protection of the legitimate interests of the Appellant, such question being determined by inference as to reasonableness drawn, from all the circumstances, in the light of the precise extent and consequences of the restriction ascertained objectively as a matter of construction and from the facts. Herbert Morris Limited -v- Saxelby (1916) A.C. 688; Home Counties Dairies Limited v. Skilton (1970) 1 W.L.R. 526 at p.534. The question asked should properly have been is the clause, in all the circumstances and as presently framed, reasonable ?

28. Considered in such manner, it is submitted that the Supreme Court of New South Wales should have held the restriction in its application confined to a limited number of clients and also confined to a period of less than three years, to be reasonable, in the light of all the circumstances elsewhere herein referred to and for all the reasons elsewhere herein referred to.

29. In any event it is submitted in relation to the clients to which the clause extended, that they were for the reasons elsewhere herein set forth a numerically small group, known by each party with certainty at the time of the agreement, and chosen by reference to criteria which were reasonable, being clients with whom the Respondent had relevant connexion while employed by the Appellant.

30. It is further submitted that the Supreme Court of New South Wales was in error in its assessment of the reasonableness of the clause in relation to the inclusion of protective clients within the class of clients whose business was sought to be protected. An employer's interest in such clients is properly the subject of protection. Gledhow Autoparts Limited -v- Delany (1965) 1 W.L.R. 1366. There was here the relevant connexion between the Respondent and each such prospective client, it being a condition of their inclusion within the definition of client that their business be the subject of negotiation with the Appellant through the services or agency of the Respondent. It is further submitted that the reasons set forth in sub-paragraphs 21 and 22 of these reasons that a dissection of the business into classes of insurance for the purpose of restraint of trade principles is commercially unwarranted. Further the employer might fairly be regarded as especially vulnerable in relation to those prospective clients with whom the employee was dealing prior to his retirement, the employee's advantage in respect thereof having been acquired by virtue of his employment.

31. It is further submitted that the Supreme Court of New South Wales was, for the reasons herein set forth, particularly in sub-paragraphs 13, 20 and 21, in error as to its assessment of the reasonableness of the clause in relation to the geographical area of the restraint. Further the approach adopted ignored the division of corporate structures by which, as a matter of commercial reality and necessity, international groups carry on their business, and in respect of which judicial notice should have been taken. The evidence established that the clients of the Appellant were companies incorporated within the geographical locality of the risks placed, and the testing of the restraint by reference to possible international movement of the parties to the agreement and such clients, or by reference to activities of other companies within the international group involved an unwarranted consideration of improbable and extraneous considerations.

32. It is further respectfully submitted that for the reasons set forth, in sub-paragraph 21 of these reasons, the Supreme Court of New South Wales was in error in imposing upon the Appellant an onus in respect of the effect of the restriction upon the future employment and occupation of the employee within the period of the restraint and by requiring that the restraint be reasonable in the interests of the employee. Mason -v- Provident Clothing and Supply Co. Limited (1913) A.C. 724. If contrary to the Appellant's submissions there is such an onus then it was satisfied by the evidence establishing that the Respondent had acquired employment as a senior executive of a company within an insurance broking group based in the United Kingdom. It is further submitted in the alternative, that having regard to the extent and nature of the restriction it did not, for the reasons elsewhere herein set forth, seriously interfere

with the occupation of the Respondent.

33. It is further submitted that the Supreme Court of New South Wales was in error assessing the reasonableness of the restraint by an investigation into the adequacy of the consideration for the restraint, which amounted to an investigation whether the clause was reasonable in the interests of the employee rather than in that of the employer. Herbert Morris Limited -v- Saxelby (1916) 1 A.C.688 at p.707. In the alternative if contrary to the Appellant's submission an inquiry into such adequacy was permissible it should not have been confined to a consideration of the extent to which doubts existed in relation to the earlier agreement. In particular consideration should have been given to the circumstances in which the new agreement was made and to the worth to the Respondent of a final and immediate release from the earlier agreements without litigation.

J.R.T. WOOD

J.A.D. HOPE

No. 4 of 1973

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF
NEW SOUTH WALES

B E T W E E N :

STENHOUSE AUSTRALIA LIMITED
(Plaintiff)
Appellant

- AND -

MARSHALL WILLIAM DAVIDSON PHILLIPS
(Defendant)
Respondent

CASE FOR THE APPELLANT

WILKINSON KIMBERS & STADDON,
Hale Court,
Lincoln's Inn,
LONDON W.C.2.

Solicitors for the Appellant.