[2001–02 Gib LR 393]

EXCHANGE TRAVEL (GIBRALTAR) LIMITED v. CARDONA

COURT OF APPEAL (Neill, P., Clough and Staughton, JJ.A.): September 26th, 2002

Employment—restraint of competition—enticing employer's clients—defining "clients" to include future clients unreasonably wide and invalid—enticement restraint against former employee of travel agency, dependent on personal contacts with clients, reasonable and enforceable if restricted to pre-termination clients

Civil Procedure—costs—apportionment—costs not necessarily to follow event—proportional award permissible under Civil Procedure Rules, r.44.3 to reflect successful party's conduct, including loss of other issues

The appellant brought proceedings in the Supreme Court alleging breaches by the respondent of competition and enticement restraints and seeking an injunction and/or damages for breach of contract.

The respondent had been employed by the appellant, a travel agency, since 1990, initially as a travel consultant but eventually as an area manager. The appellant's business relied heavily on personal contact between employees and clients, and the respondent had therefore had direct contact, and established professional relationships, with most, if not all, of the appellant's clients.

Following a disciplinary hearing into allegations of serious financial misconduct, the appellant sought to dismiss the respondent for gross misconduct. At the respondent's request, the appellant allowed him instead to resign, subject to conditions stipulated in a letter of resignation, namely, ". . . for a period of 12 months I will not directly or indirectly compete or in any way seek to entice clients away from [the appellant]."

Within a month of his resignation, a new travel agency was incorporated in Gibraltar in which the respondent had a beneficial interest. That company offered a personalized travel service by the respondent and the recipients of its flyers included clients of the appellant. The appellant subsequently sought an injunction from the Supreme Court to prevent the continuance of the alleged breach of the competition and enticement restraints and/or damages for breach of contract.

The Chief Justice decided, first, that the invalid competition restraint was severable from the enticement restraint. He then held, however, that

the enticement restraint was nevertheless also unenforceable. Although it was reasonable for the appellant to seek to protect itself from the respondent's using his knowledge of its business and clients to its disadvantage, the enticement restraint was unreasonable as it extended to future clients of the appellant. The Chief Justice rejected numerous other issues raised by the respondent at the trial, as he did not accept the respondent's evidence and preferred that of the appellant. In addition, before the trial the respondent failed to give an undertaking which could have settled the dispute. Accordingly, he was awarded only half of his costs of the action.

The appellant appealed against the Chief Justice's decision that the enticement restraint was unenforceable and submitted that (a) he had erred in construing the enticement restraint as extending to clients acquired by it after the respondent's resignation; and (b) the enticement restraint should be construed separately from the invalid competition restraint, which should be severed from the resignation letter.

The respondent submitted in reply that the Chief Justice's decision was correct as, in the absence of any definition or qualification of "clients" in the enticement restraint, it was to be interpreted as including future clients. The respondent cross-appealed against the costs order, however, submitting that as he was the successful party he should have been awarded all of his costs.

Held, dismissing both the appeal and the cross-appeal:

(1) The appeal would be dismissed as the Chief Justice had correctly found that the enticement restraint extended to the appellant's future clients and was therefore unenforceable. A restraint of trade imposed by an employer on a former employee was *prima facie* contrary to public policy and void, but it could be enforced if it were shown to be no wider than reasonably necessary to protect the employer's trade secrets or trade connections. In light of the nature of the appellant's business, the enticement restraint would have been reasonable and enforceable if it had been confined to the appellant's existing clients at the date of the respondent's resignation. There was no such restriction, however, and, as the enticement restraint therefore extended to clients acquired by the appellant after the respondent's resignation, it was unreasonably wide and unenforceable. The terms of the letter and the circumstances at the time it was signed by the respondent did not permit an interpretation of the enticement restraint which would confine it merely to existing clients. As the enticement of an after-acquired client would not involve any exploitation by the respondent of the appellant's trade connections, it would be fair competition which could not reasonably be restrained (para. 32; para. 67; para. 71; para. 99).

(2) Moreover, when considering whether the enticement restraint could be enforced by severing the invalid competition restraint from the resignation letter, the letter should first have been construed as a whole, to ascertain the meaning of the enticement restraint, and the question of

severance should then have been considered. As the purpose of the letter was manifested by the competition restraint, which was intended to ensure that the respondent would not trade as a travel agent at all for 12 months and therefore not deal with any of the appellant's future clients during that period, the Chief Justice correctly found that the enticement restraint also applied to future clients. It would not therefore be enforceable even if the competition restraint were severed from the letter because its original meaning could not be changed by severance. In any event, even if construed separately from the competition restraint, there was no restriction on "clients" and the enticement restraint would nevertheless have been unenforceable (para. 33; paras. 38–39; paras. 45–47; paras. 103–105).

(3) The respondent's cross-appeal against the costs order would also be dismissed. The Chief Justice had discretion, under r.44.3 of the Civil Procedure Rules, to make a costs order which reflected not only that the general outcome of the proceedings was favourable to the party seeking the order but also the party's conduct of the proceedings, including the loss of particular issues. The Chief Justice was entitled to consider *inter alia* that the respondent had raised numerous issues on which he failed because his evidence was not accepted and that he had not given an undertaking to resolve the dispute. The proportional costs award was therefore within his discretion and the appeal would be dismissed (paras. 78–79; para. 95).

Cases cited:

(1) *Attwood* v. *Lamont*, [1920] 3 K.B. 571; [1920] All E.R. Rep. 55, referred to.
(2) *Baines* v. *Geary* (1887), 35 Ch. D. 154; 56 L.J. Ch. 935, not followed.
(3) *Baker* v. *Hedgecock* (1888), 39 Ch. D. 520, followed.
(4) *Budgen* v. *Andrew Gardner Partnership*, [2002] EWCA Civ. 1125, unreported, *dicta* of Simon Brown, L.J. applied.
(5) *Business Seating (Renovations) Ltd.* v. *Broad*, [1989] I.C.R. 729, considered.
(6) *Continental Tyre & Rubber (GB) Co. (Ltd.)* v. *Heath* (1913), 29 T.L.R. 308, observations of Scrutton, J. applied.
(7) *D.P.P.* v. *Hutchinson*, [1990] 2 A.C. 783; [1990] 2 Admin. L.R. 741, referred to.
(8) *G.W. Plowman & Son Ltd.* v. *Ash*, [1964] 1 W.L.R. 568; [1964] 2 All E.R. 10, referred to.
(9) *Gilford Motor Co. Ltd.* v. *Horne*, [1933] Ch. 935, referred to.
(10) *Home Counties Dairies Ltd.* v. *Skilton*, [1970] 1 W.L.R. 526; [1970] 1 All E.R. 1227, distinguished.
(11) *International Consulting Servs. (UK) Ltd.* v. *Hart*, [2000] I.R.L.R. 227, referred to.
(12) *Konski* v. *Peet*, [1915] 1 Ch. 530, applied.
(13) *Littlewoods Organisation Ltd.* v. *Harris*, [1977] 1 W.L.R. 1472; [1978] 1 All E.R. 1026, applied.

(14) *Mills* v. *Dunham*, [1891] 1 Ch. 576, referred to.
(15) *Nicholls* v. *Stretton* (1843), 7 Beav. 42; 49 E.R. 978, referred to.
(16) *Perls* v. *Saalfeld*, [1892] 2 Ch. 149, referred to.
(17) *Price* v. *Green* (1847), 16 M. & W. 346; 153 E.R. 1222, referred to.
(18) *Rex Stuart Jeffries Parker Ginsberg Ltd.* v. *Parker*, [1998] I.R.L.R. 483, considered.
(19) *Rojas* v. *Berllaque*, 2001–02 Gib LR 252, referred to.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), r.44.3: The relevant terms of this paragraph are set out at para. 76.

N.M. Feetham for the appellant;
G. Licudi for the respondent.

1 **CLOUGH, J.A.:**

Introduction

The appellant company appeals against that part of the decision of the Chief Justice, given on May 1st, 2002, in the appellant's action against the respondent in the Supreme Court as decides that the non-solicitation provision in the contract made between the appellant and the respondent on November 27th, 2001 was unenforceable and void on the ground that it amounted to an unreasonable restraint of trade. The respondent seeks to cross-appeal against the subsequent order made by the Chief Justice, on May 23rd, 2002, awarding him half the costs of the action.

2 At the trial of the action, the existence of the contract between the parties was unsuccessfully challenged by the respondent on a number of grounds. They are not in issue in this appeal, which is concerned only with the meaning and validity of the non-solicitation provision.

Background

3 The appellant carries on business in Gibraltar as a travel agent. Its chairman and shareholder is Brian Callaghan. His son, Bruno Callaghan ("Callaghan"), is not an officer of the appellant but is authorized to deal with its affairs in the absence of his father. Patricia Grech is a director of the appellant. She was based at the Caleta Hotel and was concerned with the appellant's accounts. She was not involved with the day-to-day operation of the agency and did not deal with the public. This was a matter for the respondent, who was first employed by the appellant in 1990 as a travel consultant. After successive promotions he held the position of area manager in 2001. The appellant's business comprised a business unit and a unit dealing with ordinary clients. In addition to the respondent, the appellant employed four employees who were subordinate to him and dealt with both

business and private clients. He had direct contact with most, if not all, of the appellant's clients.

4 In October and November 2001, Ms. Grech became aware of allegations of serious accounting and cash payment irregularities involving the respondent. Pending the outcome of these investigations, the respondent was suspended on full pay on November 20th, 2001 and required to attend a disciplinary hearing on November 22nd. The two main allegations against the respondent were that he (i) persisted, in spite of previous warnings from Ms. Grech, in covering loss sustained on one transaction by transferring cash to that transaction from cash received in another transaction where there had been an unexpectedly high profit, without properly recording such transfers in the accounts; and (ii) defrauded insurance companies dealing with the appellant by accepting insurance premiums from clients without notifying the relevant insurance company unless the client made a claim on his insurance policy.

5 On November 22nd, 2001, a disciplinary panel comprising Callaghan, Ms. Grech and one other member considered the explanations given by the respondent in respect of the two main and other alleged irregularities. On November 27th, Callaghan handed the respondent a letter determining his employment forthwith on the grounds of gross misconduct. This caused great distress to the respondent, who asked to be allowed to resign instead of being dismissed for misconduct. Callaghan thereupon told him to go away and return in half an hour. In that interval, Callaghan told his lawyer he did not want to dismiss the respondent and obtained advice regarding the wording of a letter of resignation containing terms which would protect the appellant as far as possible.

6 Upon the respondent's return, Callaghan told him that he would be permitted to resign on conditions. He then dictated a letter in the presence of the respondent, the terms of which the respondent accepted before signing it. The letter, dated November 27th, 2001, was in the following terms:

> "I hereby resign with immediate effect with no claim against the company, and furthermore in consideration of your accepting my resignation, I confirm that *for a period of 12 months I will not directly or indirectly compete or in any way seek to entice clients away from Exchange Travel.*" [Emphasis supplied.]

7 On December 14th, 2001, a company called Elite Travel Ltd. was incorporated. The respondent is not a shareholder but he admits to having a beneficial interest in the company and it was pleaded on his behalf in the subsequent proceedings that he intended to continue to run Elite Travel in such manner as is appropriate for a travel agency to be run in Gibraltar.

8 Shortly before Elite Travel started business, it circulated a flyer to attract clients. The flyer was headed by a photograph of the respondent seated at his desk. The respondent is not named but the text below the photograph described Elite Travel as "my very own travel agency solely directed by me for all of you." Personalized service is offered to all and the text includes the words: "I look forward to meeting you all and extend my thanks to all family, friends and clients for their belief in me." The precise number of copies of this flyer distributed by Elite Travel was not determined in the subsequent proceedings, but the respondent did not deny that recipients of the flyer included those who were clients of the appellant when he was employed by it.

9 On January 22nd, 2002, the appellant issued proceedings in the Supreme Court against the respondent alleging breaches by him of the competition and enticement restraints in the resignation letter and claiming an injunction restraining him from further such breaches. Further, or in the alternative, the appellant claimed damages for breach of contract. On the same date, the appellant applied for an interim injunction. On January 30th, 2002, the appellant abandoned its application for an interlocutory injunction in respect of the competition restraint. When the interlocutory application came before the Chief Justice, on February 1st, 2002, it was adjourned to the date fixed for trial upon the respondent undertaking by his counsel not to seek to solicit the appellant's customers' or clients' custom or business until trial or further order.

The pleaded issues

10 The issues arising on the pleadings were not confined to the question of the validity of the enticement restraint. The respondent relied unsuccessfully on a number of grounds for denying that the letter created a binding contract. Those issues are not material to this appeal save as to the cross-appeal on costs. The pleaded issues were identified by counsel below and adumbrated by the judge in his judgment. The issues material to the appeal were identified as follows:

> "(7) Are the obligations in the letter severable?
>
> (8) Is the non-soliciting part of the letter unenforceable on the grounds that it amounts to an unreasonable restraint of trade?
>
> (9) Has the defendant breached the contract?
>
> (10) Should an injunction be granted?"

The evidence at the trial

11 The trial of the action took place on March 14th and 15th, 2002. The witnesses for the appellant were Ms. Grech and Callaghan. The

respondent also gave evidence. Callaghan's evidence was directed to the circumstances and manner in which the disciplinary hearing was convened and conducted; and the circumstances in which he decided not to dismiss the respondent but to offer him the "lifeboat" alternative of resignation subject to the restraints contained in the letter.

12 The evidence of Ms. Grech also dealt with the disciplinary hearing and the serious nature of the alleged accounting irregularities of the respondent which resulted in the convening of the disciplinary panel. In addition, she stressed that the appellant offered a personalized service to clients and that personal contact between client and employee was of paramount importance to the appellant's business. Therefore, the risk of solicitation of clients by a former employee was a very serious matter for the appellant. The appellant had, in the course of the respondent's 11 years of employment, spent considerable resources in exposing him to its clients and giving him the opportunity to go on familiarization trips to many top resorts all over the world. As the respondent held a senior post in the appellant's organization, it was easy for him to seek to entice its clients away. It would take time for someone else to collate the necessary level of knowledge about clients to develop the type of relationship and trust which the respondent enjoyed with them by reason of his position.

13 Ms. Grech identified 13 clients of the appellant who, she said, had been approached by the respondent to entice them away from the appellant. Six of these clients had received Elite Travel's flyer, one had received a fax and the remainder had been approached personally by the respondent.

14 The respondent's evidence was almost entirely directed to show that he had been ill-used by the appellant, both in relation to the disciplinary hearing, at which he was not legally represented, and in the manner and circumstances of his resignation. There was serious conflict between the evidence of Ms. Grech and Callaghan on the one hand and the evidence of the respondent on the other on these matters. However, the respondent did not differ from Ms. Grech regarding the nature of the appellant's business. He agreed under cross-examination that he was the most senior person in the office (reporting to Ms. Grech), that the relationship between a travel agent and a client was like a bond and that it was a business which relied to a high degree on personal contact. He said that the agent strives to develop a personalized relationship with a client. He got to know his clients very well and it is the development of this relationship which, to a certain extent, makes the agent successful.

The decision of the Chief Justice

15 Having disposed of the factual issues, the Chief Justice went on to consider whether the enticement restraint was enforceable. He first

addressed the question (issue (7) above) whether the restraints contained in the letter were severable. Rejecting the arguments advanced on behalf of the respondent against severance, he held that the two restraints were "two distinct covenants" and that the competition restraint, which could not be upheld, could be severed by deleting the words "directly or indirectly compete or" from the letter without affecting the meaning of the remaining enticement restraint. This finding is not challenged by the respondent in this appeal. At this stage of the judgment, the Chief Justice had not addressed the question of the meaning and ambit of the enticement restraint. He did so immediately thereafter, when he considered the question (issue (8)) whether the enticement restraint was unenforceable as being an unreasonable restraint of trade.

16 As to the circumstances relevant to the interpretations of the enticement restraint, the Chief Justice accepted the evidence of Ms. Grech regarding the nature of the appellant's business and the importance of the respondent's role in that business. He observed:

> "Mrs. Grech has testified that the defendant oversaw the four agents who dealt with business and private clients and that he would have direct contact with most, if not all, of Exchange Travel's clients. The personal contact between client and agent is of paramount importance to the business. The agents will get to know the clients' requirements, and often get to know the clients, extremely well. In order to obtain and retain the business it is necessary to cultivate and accumulate knowledge of the client's requirements and the nurturing of the client relationship is crucial to Exchange Travel's business. The defendant had been with Exchange Travel for many years and held a senior position. The defendant did not demur from any of these contentions in his own evidence. He told the court that the relationship between a travel agent and his client is like a bond. He said a travel agency business relies to a high degree on personal contact and an agent strives to develop a personalized relationship with his client. It is the development of his relationship which to a certain extent makes an agent successful."

He went on to conclude:

> "In all the circumstances, it seems to me entirely reasonable for Exchange Travel to wish to protect itself from the defendant seeking to use his knowledge of Exchange Travel's business, and its clients, to his former employers' detriment."

17 Having rejected counsel for the respondent's contention that the enticement restraint was not reasonable because it was unlimited in terms of geographical area, the Chief Justice summarized, in the following terms, counsel's second point, that the restraint was too wide in its terms to be reasonable:

> "The defendant further contends that the contract is too wide, in that it related to all clients of Exchange Travel, whether the defendant could or did come into contact with them, whether the clients had only one dealing with Exchange Travel or more, and whether they became clients of Exchange Travel before, during or after the defendant's employment with the company and that Exchange Travel has not satisfied the court that the covenant is no wider, in this regard, than is reasonably necessary for its protection."

18 Distinguishing *Home Counties Dairies Ltd.* v. *Skilton* (10), upon which counsel for the appellant relied, the Chief Justice gave the following reasons for holding that the enticement restraint was not reasonable:

> "I have given careful consideration to whether it was in the contemplation of the parties that the word 'clients' in the covenant under review had a restricted meaning. If the clause is restricted to clients with whom the defendant came into contact, or with whom he could have come into contact, during the course of his employment with Exchange Travel, I would have no hesitation in finding it reasonable. If it is considered to have, and has, an unrestricted meaning, then it covers any client of Exchange Travel, even a client who, having had no previous dealing with the company, purchased a single air ticket from it after the defendant left its employment and to that extent it must be an unreasonable non-competition covenant. In those circumstances, it could not be said to be a valid protection of Exchange Travel's client base. *I have come to the conclusion that it cannot have been in the parties' contemplation that the covenant had a restricted meaning because if one reads the letter of November 27th, 2001 as a whole it contains what is clearly a non-competition clause. True it is that the non-competition clause may be severed from the rest of the contract, but it is only possible to turn the non-solicitation covenant into a reasonably narrow covenant by adding words to it. I cannot redraft the clause to bring it into that which is reasonable particularly where that is not what was in the contemplation of the parties.* I have considered whether, if I left the clause as it stands, the problem would be resolved in the enforcement of the covenant, because a court would be loathe to enforce the covenant if the defendant merely sought to entice from Exchange Travel clients who came to that company after his resignation therefrom. But there is no indication that such a result was in the contemplation of the parties when the letter was written and the defendant should not be put at risk of being injuncted in respect of a covenant which, on any interpretation, is too wide to be a reasonable restraint of trade.

> Whilst I have sympathy with Exchange Travel's position and what it was trying to achieve, and appreciate that the letter of November 27th, 2001 was drafted hastily and with the intention of assisting the defendant as much as protecting the company, I am driven to the conclusion that the parties did not intend to restrict the non-solicitation clause to clients with whom the defendant had or could have had dealings in the course of his employment and therefore was drafted too widely to be reasonable." [Emphasis supplied.]

19 In arriving at this conclusion (albeit somewhat reluctantly), the Chief Justice derived fortification from the authority of *Rex Stuart Jeffries Parker Ginsberg Ltd.* v. *Parker* (18), where the English Court of Appeal was concerned with an issue of severance but, in his view, did not demur from the view of the judge below that a restraint, expressed in terms to extend to persons who might become customers of the plaintiff employers subsequent to the determination of the defendant employee's employment, was unreasonable.

The appeal

The appellant's arguments on appeal

20 For the appellant, Mr. Feetham contended that the Chief Justice erred in construing the enticement restraint as extending to clients (future clients) acquired by the appellant after the respondent's resignation. He contended further that even if the restraint did extend to such clients it was reasonable and enforceable. He encapsulated the grounds of appeal and his written submissions in the following five propositions relating to the enticement restraint:

(1) The restraint was to be construed in the light of the relevant factual matrix as containing self-limiting features and intended to extend only to the appellant's existing client base.

(2) Even if there were possible alternative interpretations of the restraint, one resulting in an enforceable restraint and the other being unenforceable, it would be reasonable for the court to "read down" the restraint in favour of the interpretation resulting in an enforceable restraint.

(3) Even if the restraint were ambiguous, the ambiguity should be resolved in favour of enforceability.

(4) All the matters relied upon by the Chief Justice as militating against the enforceability of the restraint did not stand up to close scrutiny.

(5) Even if the restraint were to be construed as extending to future clients of the appellant, the restraint should be held, in all the circumstances, to be reasonable and enforceable.

21 In support of proposition (1), it was emphasized that the enticement restraint was much narrower than the competition restraint. It was contended that a crucial finding of fact by the Chief Justice was his finding as to the personal nature of the appellant's business and client base and the connection of the respondent with almost all the clients, giving rise to a high risk to the business of solicitation by him of the clients after determination of his employment. Immediately before the respondent resigned, he was about to be dismissed from a senior position for dishonesty. It was therefore reasonable to infer, having regard to the circumstances at the time of the respondent's resignation, that the intention of the parties was to restrain the respondent from interfering with the appellant's then existing clients and not future clients with whom the respondent would not have had a connection.

22 It was further contended, in relation to the words "to *entice* clients *away from*," that the words emphasized were clearly intended to protect the appellant's existing client base and nothing else. The argument was that enticement "away from Exchange Travel" implied a conscious act to lure away clients from the appellant. It followed that the respondent could not entice a client away from the appellant if he did not know that the client in question was the appellant's client. Accordingly, if knowledge were an implied requirement to establish a breach of the enticement restraint, it must be knowledge of the appellant's existing client base.

23 In support of proposition (2) and the interpretation of "clients" as meaning only the appellant's clients at the termination of the respondent's employment, Mr. Feetham cited a line of authorities illustrating circumstances where courts, having construed a restraint clause with regard to its object and intent and concluded that it was intrinsically just and reasonable, have either limited wide words so as to make the clause reasonable and enforceable; or, in appropriate circumstances, have declined to give a literal meaning to such a clause where its terms were so wide that on a strict construction it would cover improbable and unlikely events: these authorities were helpfully considered by Lord Denning, M.R. in *Littlewoods Organisation Ltd.* v. *Harris* (13) ([1977] 1 W.L.R. at 1481).

24 Proposition (3) hardly requires authority, but for good measure Mr. Feetham cited the *dictum* of Kay, L.J. in *Mills* v. *Dunham* (14) ([1891] 1 Ch. at 589–590) as an illustration of the application of the doctrine *ut res magis valeat* to qualify and thereby cut down the meaning of the word "business" in a restraint clause where the context and circumstances justified such a course.

25 As to proposition (4), it was contended that the Chief Justice erred in relying on *Rex Stewart Jeffries Parker Ginsberg Ltd.* v. *Parker* (18), because the restraint clause in that case was in different terms from the

restraints contained in the letter in the present case. It was argued that in the *Parker* case the restraint clause related to ". . . any person . . . who . . . is or has been a customer . . ." and did not give rise to the questions of interpretation which have arisen in the present case.

26 It was submitted that the Chief Justice was wrong to conclude that it cannot have been the intention of the parties that the enticement restraint was to be given a restricted meaning because, if the letter is read as a whole, it contains what is clearly a non-competition clause. Having decided to sever the competition restraint from the enticement restraint, it was wholly irrational and wrong, it was said, to conclude that there was an intention to prevent competition in gross. The argument was that on an ordinary interpretation of the agreement (comprised in the letter) as at the date it was made, the enticement restraint applied only to the appellant's existing clients and on this view the wording and existence of the wide competition restraint added nothing to the meaning of the enticement restraint.

27 In support of proposition (5), Mr. Feetham cited *Gilford Motor Co. Ltd.* v. *Horne* (9) and *G.W. Plowman & Son Ltd.* v. *Ash* (8), where restraints extending to customers with whom the employees had no contact were held to be reasonable. He also relied on *International Consulting Servs. (UK) Ltd.* v. *Hart* (11), where a restraint extending to prospective employees was upheld.

28 It was submitted that, applying common sense in the light of the public policy considerations relevant to restraints of trade, in the exceptional circumstances of this case the enticement restraint was reasonable. It was not a restraint on dealing but was only designed to protect the client base of the appellant, which was an established business in the extremely small city of Gibraltar with a very limited market, had a very high level of customer connection and thrived on repeat customers. Reliance was also placed on the circumstances under which the restraints contained in the letter were agreed. At the time, the respondent was about to be dismissed for serious misconduct involving dishonesty which the appellant was minded to report to the police. Instead, at the respondent's request, he was permitted the "lifeboat" of resignation on terms which he immediately proceeded to breach in a cynical manner. In all the circumstances, the restraint which was confined to enticing clients away from the appellant was not onerous or unreasonable.

The respondent's arguments on appeal

29 Mr. Licudi for the respondent supported the reasoning of the Chief Justice in all respects. He had, Mr. Licudi submitted, properly applied an objective test in determining the intentions of the parties, having regard to the terms of the letter as a whole and the circumstances generally when

deciding that the enticement restraint extended to the appellant's future clients. Counsel contended that none of the authorities cited by Mr. Feetham supported the narrower construction of the enticement restraint sought on behalf of the appellant, not did any of those authorities hold that a restraint affecting future clients or customers was valid.

30 In the absence of any definition or qualification of the expression "clients" in the enticement restraint, it was, Mr. Licudi contended, to be interpreted as including future clients. This interpretation was required whether or not the severed competition restraint was taken into account, but, he submitted, the Chief Justice was right to take that restraint into account because the whole context of the letter should be considered in order to ascertain the objective intention of the parties. As to the argument of the appellant that the words "entice . . . away from" the appellant imported a requirement of knowledge, Mr. Licudi contended that the words in question were to be given the same meaning as "solicit" and cited *Konski* v. *Peet* (12), where Neville, J. ([1915] 1 Ch. at 539) treated a covenant not to ". . . solicit, interfere with, or entice away from" as one complete covenant not to solicit any customer and others.

31 On the question of validity, Mr. Licudi relied on the standard non-solicitation form in 14(1) *The Encyclopaedia of Forms & Precedents*, 5th ed., Form 21, para. 18, at 178 and the non-solicitation forms in the reported cases which are expressed in terms limiting the operation of the restraint to customers or clients of the covenantee during a stated period immediately preceding the termination of the covenantor's employment. He also relied on the *Parker* case (18), *Konski* v. *Peet* and on the passages in *Chitty on Contracts*, 28th ed., para. 17–109, at 894 (1999) expressing the editors' view that, where an employee's covenant not to interfere with customers of the employer is so construed that *customers* includes persons becoming customers after the termination of the service, the covenant will in ordinary circumstances be regarded as a single covenant and will not be severed to permit its enforcement in respect of those who were customers during the service.

The principles of law applicable to the consideration of the validity of an employee's covenant in restraint of trade

32 I gratefully adopt (as did the Chief Justice below) the following helpful statement of the relevant principles by Glidewell, L.J. in the *Parker* case ([1998] I.R.L.R. 483, at para. 37):

> "(a) The restriction being in restraint of trade, it is prima facie contrary to public policy and will be void unless it is shown to be no wider than is reasonably necessary for the protection of the employer's legitimate interests;

(b) the burden of proof of reasonableness is on the party seeking to enforce the restriction;

(c) in the case of an employer/employee covenant, the employer is not entitled to protect himself against competition per se but only against unfair exploitation of the employer's trade secrets or—as here—trade connection;

(d) the reasonableness of the restriction is to be judged as at the date of the contract."

I also adopt the following cautionary observations of Harman, L.J. in *G.W. Plowman & Son Ltd.* v. *Ash* (8) ([1964] 1 W.L.R. at 571):

> "In most of the cases it is quite obvious that the covenant is so wide that nobody could reasonably support it, unless upon the footing that a man ought to be bound to complete his engagements. But the limits of the doctrine are very widely set out and differ a good deal, as it seems to me, from case to case, so that no one is a binding authority for any other because the circumstances differ."

The interpretation of an employee's covenant which may be invalid but may nevertheless be saved in part by the application of the doctrine of severance

33 In all cases where the court is considering the possibility that a covenant may be illegal but may nevertheless be saved in part by the application of the doctrine of severance, it is first necessary to construe the provision or covenant as a whole. At this stage, the court is concerned (as in a case where no question of severance arises) with the meaning of the covenant and not with the question whether, because of its meaning, the covenant is unreasonable and invalid. Having decided the question of the meaning of the covenant, the court then considers whether the covenant, though invalid if read as a whole, may nevertheless be saved in part by the doctrine of severance, but without creating a new agreement for the parties.

34 These principles are fundamental. They were clearly enunciated by Chitty, J. in the following observations in *Mills* v. *Dunham* (14) ([1891] 1 Ch. at 580) before determining the meaning of an employee's covenant:

> "There are two principal or general rules applicable to cases of the kind now before me. The first is, when a covenant or agreement is impeached on the ground that it contains an unreasonable restraint of trade, the duty of the Court is, first to interpret the covenant or agreement itself, and to ascertain according to the ordinary rules of construction what is the fair meaning of the parties, and then to apply the rule as to reasonableness with reference to the extent of

> the impeached covenant, and to see whether it goes too far; in other words, to adopt the modern rule with reference to perpetuities, a cognate subject, where, when a limitation is impeached on the ground of being too remote, the right way is to consider the instrument without reference to the rule of perpetuity, and then, having ascertained the true meaning of the parties, to apply the rule.
>
> The second principal or general rule which I think applies is this, that where there is a question of severing the good from the bad part of a covenant or agreement of this kind, the Court must find in the agreement itself sufficient ground for making the severance; the Court must take great care not to create a new agreement for the parties, nor carve out of an unreasonable agreement, something which would be reasonable, for the sake of upholding what would be otherwise void."

On appeal, Lindley, L.J. observed (*ibid.*, at 586): "Now, the first thing we have to do is to ascertain the real meaning of the parties by construing the agreement without any leaning either way." He said (*ibid.*, at 587): "You are to construe the contract, and then see whether it is legal."

Lopes, L.J. observed (*ibid.*, at 588):

> "An agreement of this kind must be construed like any other agreement—that is, you must without any bias on one side or the other extract the intention of the parties from their words. I agree that if clause 5 stood alone it would be difficult to escape from Mr. *Levett's* conclusion. But in construing one clause of an agreement the whole of the agreement must be looked to."

35 Before construing an employee's covenant in *Konski* v. *Peet* (12), Neville, J. observed ([1915] 1 Ch. at 538):

> "Now with regard to the construction of the covenant my duty is to construe it in the first instance with my mind as free as possible from the question whether it is a valid or an invalid contract, and having come to the conclusion if I can as to what the meaning is, then to see how that is affected by the law. I do not think the cases cited as to the application of the legal doctrine 'ut res magis valeat' applies unless you have in the first instance a real ambiguity to deal with. If the contract is reasonably plain, then you must give effect to the expressed intention of the parties, whatever the effect of that may be."

36 A subsequent statement of the principles generally applicable to the construction of an employee's covenant is to be found in *Littlewoods Organisation Ltd.* v. *Harris* (13), in the judgment of Megaw, L.J., where he said ([1977] 1 W.L.R. at 1486):

"The principles of interpretation of a covenant which is alleged to be in restraint of trade as between employer and employee has been considered in many cases. In *Home Counties Dairies Ltd.* v. *Skilton* [1970] 1 W.L.R. 526, 535 Salmon, L.J. said: 'The clause must be construed according to its manifest intention.' I think guidance is obtained from the judgments of Lindley and Lopes, L.JJ. in the much earlier case, *Moenich* v. *Fenestre*, 67 L.T. 602, to which Lord Denning, M.R. has already referred. Lindley, L.J. said, at p. 604:

'The true principle to be applied in construing agreements in restraint of trade is that stated in *Mills* v. *Dunham* [1891] 1 Ch. 576, viz., that the agreement must be approached without reference to the question of its legality or illegality.'

And Lopes, L.J. said at p. 605:

'I think that the construction of this agreement is difficult. There are two canons of construction to be considered when questions of this kind arise. One is, that you must examine whether the restraint, having regard to the circumstances of the case, the business of the employer, and the nature of the employment, is greater than is reasonably required for the protection of the employer in his trade or business. The other is, you must construe the agreement according to the reasonable meaning of the words used, without regard to what may be the effect of such construction.'"

Megaw, L.J. went on as follows (*ibid*., at 1486–1487):

"The onus is of course on the employer, here the plaintiffs, to show that this covenant contained in clause 8(i) is not too wide. For that purpose the meaning of the covenant has to be ascertained. I would have no hesitation in saying that if, in order to prevent the covenant from being too wide, it would be necessary that it be re-written, so as to give it a different meaning from the meaning which attaches to it on its proper construction, that is something which the court may not and will not do. So here if, on the true construction of this clause, it could only be rendered a reasonable protection by the writing in of words or by the deleting of words (other than in accordance with what is sometimes known as the 'blue pencil test') the clause could not stand. Chitty, J. made that clear in *Mills* v. *Dunham* [1891] 1 Ch. 576, where he said, at p. 580:

'The second principal or general rule which I think applies is this, that where there is a question of severing the good from the bad part of a covenant or agreement of this kind, the court must find in the agreement itself sufficient ground for making the severance; the court must take great care not to create a

> new agreement for the parties, nor carve out of an unreasonable agreement, something which would be reasonable, for the sake of upholding what would be otherwise void.'

> It is true that in that passage Chitty, J. is dealing with the question of severing part of an agreement; but in my judgment the principle applies equally where it is not a question of severance, but it is a question of construction. So if it were necessary, in order to render this restrictive covenant reasonable, to add to or vary the words used in the covenant, I would hold that the claim to enforce the covenant must fail."

37 The problem of illegality can often be solved in part by the doctrine of severance and the application of the "blue pencil rule." But this rule, though it enables textual severance to be achieved, is not a complete answer. Thus there may be cases (*e.g. Attwood* v. *Lamont* (1)) where a covenant, though textually severable, is to be construed as a single covenant. Similar questions arise and similar principles of the doctrine of severance are applied when the court is considering whether a provision in subordinate legislation can be enforced in part. There the court is concerned not only with textual severability but also with substantial severability: see *D.P.P.* v. *Hutchinson* (7), recently applied by Neill, P. in *Rojas* v. *Berllaque* (19) in this court.

38 These limitations on the use of the doctrine of severance reinforce the guidance of Chitty, J. and Megaw, L.J. to the effect that the task of construction of the whole precedes the task of considering the legality of the provision and the possibility of severance. Put simply, where there is a question of severing the good from the bad part of a covenant or agreement, the court cannot decide which is the good and which is the bad until it has construed the whole covenant or agreement. If, as happened in the present case (albeit after severance), the court decides that both parts of the covenant are invalid, there can be no basis for severance.

39 Accordingly, although the Chief Justice did not determine the meaning of the enticement restraint until after deciding the severance issue, he was clearly right, when construing that restraint, to have regard to the whole of the agreement contained in the letter which included the competition restraint.

The meaning of the enticement restraint

40 A number of authorities were cited in support of the appellant's proposition (2), which was never in dispute. I imply no criticism of Mr. Feetham's able argument for the appellant when I abstain from citing the authorities in question because they do no more than provide examples of

the application of proposition (2) (set out in para. 20 above) by the courts and do not assist the court in construing the terms of the enticement restraint. I confine myself to citing the following relevant *dicta* of Lord Denning, M.R. in *Littlewoods Organisation Ltd.* v. *Harris* (13) [1977] 1 W.L.R. at 1481–1482):

> "There are many instances in which the courts have limited wide words so as to make the clause reasonable and therefore enforceable, such as in earlier times *Moenich* v. *Fenestre* (1892) 67 L.T. 602, *E. Underwood & Son Ltd.* v. *Barker* [1899] 1 Ch. 300; *Haynes* v. *Doman* [1899] 2 Ch. 13, and in modern times *G.W. Plowman & Son Ltd.* v. *Ash* [1964] 1 W.L.R. 568 and *Home Counties Dairies Ltd.* v. *Skilton* [1970] 1 W.L.R. 526. In all those cases the courts construed the clauses in relation to the object to be attained. They limited them to that object. They refused to hold them to be bad because of unskilful drafting in which the draftsman inserted rather too wide words.
>
> So that is one way of upholding a covenant which is intrinsically just and reasonable. It is by a process of interpretation so as to cut down wide words to words of more limited scope. But there is another way. This is where the words are so wide that on a strict construction they cover improbable and unlikely events. In such cases the courts should not apply the strict construction so far as to make the whole clause void or invalid or unenforceable. All that should be done is that, if that improbable and unlikely event takes place, the courts should decline to enforce it."

41 In construing the enticement restraint, I bear in mind the basic principles applied by Harman, L.J. in the following passages of his judgment in *Home Counties Dairies Ltd.* v. *Skilton* (10) ([1970] 1 All E.R. at 1231):

> "It is the first principle in construing written documents, whether wills or any other documents in writing, to consider the circumstances at the time they were made and the position of the parties to them . . .
>
> If the authority be needed for the proposition that covenants of this sort must be limited to circumstances which the court considers the parties had in their contemplation, it will be found in Sir Nathaniel Lindley, M.R.'s judgment in *Haynes v Doman*. That was a restraint of trade case, but not a milk round. Sir Nathaniel Lindley, M.R. said:
>
> > 'Another matter which requires attention is whether a restriction on trade must be treated as wholly void because it is so worded as to cover cases which may possibly arise, and to

> which it cannot be reasonably applied . . . Agreements in restraint of trade, like other agreements, must be construed with reference to the object sought to be attained by them. In cases such as the one before us, the object is the protection of one of the parties against rivalry in trade. Such agreements cannot be properly held to apply to cases which, although covered by the words of the agreement, cannot be reasonably supposed ever to have been contemplated by the parties, and which on a rational view of the agreement are excluded from its operation by falling, in truth, outside, and not within, its real scope.'

Then he went on to say that even in extreme cases where one might find words that would suit, one could exclude such effects because they were not within the contemplation of the parties."

42 At the time the respondent resigned and signed the letter, he had been in the appellant's employ for about 11 years and held a senior supervisory position in the business which had involved him in personal connection with most if not all of the appellant's clients. The appellant's business as travel agent relied heavily on personal relationships with its clients. The business was conducted in the restricted area of Gibraltar, in competition with others. It must have been apparent to both parties that it would take time for any replacement of the respondent to build up the degree of client connection which the respondent had achieved over the years.

43 The respondent had been the subject of a disciplinary inquiry into alleged misconduct which involved not only allegations of serious accounting irregularities but allegations of fraud against insurance companies who had provided travel insurance for the appellant's clients. The appellant was satisfied that these allegations had been established in the disciplinary inquiry and decided to dismiss him for gross misconduct. He was so informed by a letter, dated November 27th, 2001, but on the same day the appellant, acting by Callaghan (who had taken prior legal advice), agreed to afford him the "lifeboat" of resignation on terms contained in the letter.

44 It must have been in the contemplation of the parties that upon termination of his employment with the appellant it would have been open to him, unless subject to contractual restraint, to start up business in Gibraltar in competition with the appellant (and others) and that any such competition would constitute a threat to the appellant's business, which would be aggravated by the respondent's previous connection with all or most of the appellant's clients.

45 It is in the light of these circumstances that the objective purpose of the enticement restraint is to be ascertained in the context of the

constraint contained in the letter, including the competition restraint. It seems to me to be inescapable that the overriding purpose of the letter is manifested by the competition restraint, which is intended to ensure that the respondent shall not trade at all as a travel agent for 12 months after his resignation. If the competition restraint were valid, any dealing with or enticement of any client of the appellant (whether a client at or before November 27th, 2001 or a future client acquired during the 12 months' restraint period) would be a breach of the restraint.

46 In the light of the comprehensive effect of the competition restraint (on the hypothesis that it was contemplated to be legally effective) the enticement restraint is not, however, mere surplusage because it could be of practical value where the respondent might obtain employment with a competitor of the appellant and seek to entice a client away from the appellant. In such a situation there could be difficulty in proving a breach of the competition restraint but there would be a clear breach of the enticement restraint.

47 The doctrine of severance cannot apply to the single word "clients." I can find nothing in the terms of the letter or in the circumstances at the time it was agreed by the parties and signed by the respondent to justify the cutting down of the enticement provision so as to confine its application to clients of the appellant at the date of the letter. To do so would, in my judgment, be fanciful and imply the unrealistic result that, whilst the clear intention of the parties manifested in the competition clause was *inter alia* to restrain the respondent from dealing at all with any future clients of the appellant during the 12-month period, nevertheless the purpose of the enticement clause was to confine the enticement restraint to clients of the appellant on November 27th, 2001 and exclude future clients from the restraint.

48 In written submissions which were admitted after the conclusion of the hearing of the appeal, it was contended on behalf of the appellant that a prohibition against *enticing* (*i.e.* the luring of) *clients away* from the appellant implied a conscious act to lure away clients from the appellant. It was said that you cannot entice a client *away from* someone, and in turn to you, if you do not know that that person is someone else's client. On this basis, it was argued that if knowledge is implied then it must refer to knowledge of the existing (*i.e*. pre-termination) client base, of which the respondent had intimate knowledge.

49 In my judgment, the ingenious proposition, that a covenant not to *entice clients away from* an employer is intended to imply that the obligation is limited to situations where the covenantor knows that the person enticed by him is a client of the covenantee, is not sustainable. It seems to me that the covenant is to be construed objectively. If a person who is a client of the covenantee is in fact enticed away by the

covenantor it matters not that the covenantor did not know that person was a client of the covenantee. The restraint is expressed to relate to the act of enticing a client of the appellant. There is no express requirement of knowledge that the person is such a client. Moreover, the canvassing of a person to obtain his business is an enticement or allurement; and if the person so canvassed happens to be a client or customer of another the canvassing is an enticement away from that other, whether or not the canvasser is aware of the fact.

50 In further written submissions, Mr. Feetham rightly accepted that it was possible to solicit another's client without knowing him to be a client of that other. It seems to me that this concession is in any event fatal to his argument on this issue because, as Mr. Licudi contended, there is no real difference in the relevant circumstances between soliciting and enticing away. I am fortified in this view by the approach of Neville, J. when considering one of the restraint clauses before him in *Konski* v. *Peet* (12). The terms of the clause were ([1915] 1 Ch. at 531):

> ". . . [N]ot at any time during or after the determination of the said employment . . . to *solicit interfere with or endeavour to entice away from* the master any customer of or any person or persons in the habit of dealing with the master." [Emphasis supplied.]

Neville, J. observed (*ibid*., at 539) (when considering the question of severability): "The covenant seems to me to be one complete covenant not to *solicit* any customer of, or any person or persons in the habit of dealing with, the master." [Emphasis supplied.] Although there was no argument on this point, I derive fortification from Neville, J.'s comment because I apprehend that his words were chosen with the precision of an equity judge.

51 As a result of being invited by the court (after the hearing of the appeal) to consider *Konski* v. *Peet*, Mr. Feetham relied on *Baines* v. *Geary* (2), a decision of North, J. In that case, the employee (of a dairyman employer) agreed that during service or after termination he would not *inter alia* serve milk or dairy produce or interfere with any *customers* served or belonging *at any time* to the employer or his assigns. It was contended for the plaintiffs (the employer and his assignee) that in the context the words *at any time* meant at any time during the continuance of the service of the employee.

52 North, J. appears to have decided the matter in reliance on two authorities (*Nicholls* v. *Stretton* (15) and *Price* v. *Green* (17)) where restraints imposed on solicitors' articled clerks, in respect of persons who were at any time clients of the plaintiffs, were held to be separable and enforceable in respect of clients of the plaintiff solicitors at the time the defendants were serving articles with the plaintiffs. These authorities

were evidently the fruits of North, J.'s own researches. After referring to them he held (35 Ch. D. at 159):

> "Whatever may be the true construction of the agreement—whether it extends or not to persons who might become customers of the Plaintiff *Baines* and his successors after the Defendant had quitted his employment—it would at any rate be good as regards persons who became customers before he left. I must, therefore, grant an injunction, but limited to restraining the Defendant from . . . interfering with any persons who were customers of the Plaintiff *Baines* at any time during the Defendant's employment by him."

53 Mr. Feetham submitted that in *Baines* v. *Geary* (2) the court severed the covenant so that it was restricted to existing customers (*i.e.* pre-termination customers). It was contended that the words severed were "at any time, leaving any of the customers served or belonging to . . . the said Clement Baines his successors and assigns." It was further contended that if the covenant in *Baines* v. *Geary* could be construed as being limited to existing customers, so could the enticement restraint in the present case.

54 Mr. Licudi argued that *Baines* v. *Geary* was wrongly decided. It is not reconcilable with the subsequent decision of Chitty, J. in *Baker* v. *Hedgecock* (3) and was disapproved in *obiter dicta* of Scrutton, J. in *Continental Tyre & Rubber (GB) Co. Ltd.* v. *Heath* (6) (29 T.L.R. at 310) where Scrutton, J. expressed the view that *Baker* v. *Hedgecock* was the correct decision.

55 In *Baker* v. *Hedgecock*, the employee (of a tailor) was precluded from carrying on *any business whatsoever* within the distance of one mile from . . . during the continuance of the term of his employment or afterwards during the further period of two years. It was argued for the employer that, although the words "any business whatsoever" were so wide as to be unreasonable and incapable of being enforced, the court should treat the covenant as divisible and enforce it to the extent it was reasonable while declining to enforce such part of it as was unreasonable. In support of this argument, counsel for the employer relied on *Baines* v. *Geary* (2) and a number of earlier authorities. Chitty, J. rejected this argument as an attempt to carve out a new covenant for the sake of validating an instrument which would otherwise be void.

56 In the course of his judgment, Chitty, J. distinguished all the authorities relied on by the employer's counsel. He evidently had some difficulty in determining the *ratio* of North, J.'s decision in *Baines* v. *Geary* but he distinguished the decision in the following terms (39 Ch. D. at 523):

> "In *Baines* v. *Geary*, as it appears to me—though I am not quite sure whether I read the judgment aright—it was quite possible to divide

> the covenant into two parts and to enforce it to the extent to which it was reasonable, while declining to enforce such part of it as was unreasonable. The principle of Mr. Justice North's decision was that which I have stated, for he refers to and discusses *Price* v. *Green* and *Nicholls* v. *Stretton*, and in fact bases his decision upon those cases. I do not think that he intended to lay down any such principle as that which has been contended for, viz., that the Court can create or carve out a new covenant for the sake of validating an instrument which would otherwise be void."

For my part, I respectfully agree with the opinion of Scrutton, J. that *Baines* v. *Geary* (2) was wrongly decided and I therefore reject Mr. Feetham's argument based on that decision and his attempted analysis of it.

57 I accordingly conclude that the Chief Justice was right to hold that the enticement restraint is to be construed as extending to future clients of the appellant acquired during the 12-month duration of the restraint. Whether or not he wrongly relied on the *Parker* case (18) for fortification on this issue is therefore of no practical significance, but, in fairness to the Chief Justice's careful judgment, I mention that, for my part, I consider that he was deriving fortification from the *Parker* case on the issue of validity. That issue had been argued before Judge Hawser (as well as the interpretation issue) at first instance and decided by him in favour of the employee: see the judgment of Glidewell, L.J. ([1998] I.R.L.R. 483, at paras. 44, 45 and 47).

58 I add that, in my judgment, *Konski* v. *Peet* (12) is authority for holding that the enticement restraint, even if it were to be construed in isolation and separately from the competition restraint, extends to future clients of the appellant as well as pre-termination clients. The material terms of the relevant clause in that case are set out at para. 50 above.

59 The employee had been employed as a saleswoman in the employer's business of ladies' tailor and furrier. In the proceedings against the employee it was alleged *inter alia* that she was in breach of the non-solicitation clause. Leading counsel for the employee did not argue that the covenant in question was severable. He contended ([1915] 1 Ch. at 536) that on the true construction it ought to be confined to customers during the time of employment, relying on the construction adopted by Chitty, J. and the Court of Appeal in *Mills* v. *Dunham* (14), where a restraint against transacting "business" with pre-termination customers of the employers was cut down by interpretation to the narrower meaning of business of a similar kind to that carried on by the employers. Leading counsel also relied on the judgments of the Court of Appeal in *Perls* v. *Saalfeld* (16), which he said showed that the doctrine of construing a document *ut res magis valeat* might be applied in such cases.

60 Neville, J. rejected these argument, saying ([1915] 1 Ch. at 538–539):

> "Here it seems to me that it would be an unreasonable construction of the agreement to hold it to apply only to those customers or persons in the habit of dealing with Mr. Konski who were so during the time of the employment of the defendant, Miss Peet. The covenant is entirely unlimited in time, and, in my opinion, it extends to all those who either at the date of the contract or at the date of its determination, or at any time thereafter, may be customers or in the habit of dealing with the master."

The judge went on to consider whether the covenant, as so construed, was too wide. He said (*ibid.*, at 539):

> "Opinions have differed as to whether such a contract relating to all future customers is, or is not, reasonable, and I have had to consider the dicta of several judges with regard to that matter . . . It appears to me to place the covenantor in an exceedingly awkward position, because he might at any time be quite innocently offending against the terms of the contract that he entered into. In this case I do not think there is any serious ground for suggesting that the question of severability arises. The covenant seems to me to be one complete covenant not to solicit any customer of, or any person or persons in the habit of dealing with, the master. I think that applies as much to any such person in the future as to any person who, during the employment, was, or had been, a customer of the master. In my opinion, therefore, the covenant here is too wide, and it is not severable, and consequently it is bad."

61 Mr. Licudi relied on *Konski* v. *Peet* (12) to support the respondent's case both as to interpretation and validity of the enticement restraint. He contended that the only distinction between the restraint clause in *Konski* v. *Peet* and the enticement restraint was that the restraint was unlimited in time in *Konski* v. *Peet*, whereas the duration of the enticement restraint was 12 months from the resignation of the respondent. That distinction was, he contended, immaterial.

62 Mr. Feetham for the appellant emphasized that the covenant in *Konski* v. *Peet* was wider than the terms of the enticement restraint in respect of which he had raised his "knowledge" argument in relation to enticement of clients away from the appellant. That argument I have rejected above. Mr. Feetham's second argument relied on *Baines* v. *Geary* (2), which I have rejected as a cornerstone for his submissions.

63 The rest of his argument was directed to support the proposition that the parties could not have contemplated that the enticement restraint would extend to future clients of the appellant. He suggested the hypothesis that a

person might have become a client of the respondent in February 2002 and thereafter switched to being a client of the appellant. It would, counsel said, be absurd to suggest that the parties intended that the respondent would not be able to approach his own former client. I am unable to give any significant weight to such an argument which begs the question put to counsel by Neill, P. in the course of argument to the effect that the enticement restraint might reasonably be considered to have been intended by the parties to cover the situation where the appellant acquired a new client in February 2002 and the respondent enticed that client to do business with him.

64 I add that, in relation to the earlier construction of the enticement restraint having regard to the competition restraint, the parties clearly did not contemplate that the respondent would have any future clients because he would have been precluded by the competition restraint from trading at all as a travel agent in Gibraltar.

65 I am not therefore persuaded by any of Mr. Feetham's arguments that *Konski* v. *Peet* (12) is materially distinguishable from the situation that has arisen in the present case. The duration of the enticement restraint is defined as 12 months instead of the indefinite restraint in *Konski* v. *Peet*. This seems to me to be merely a matter of degree. The terms of the enticement restraint lack the prolixity of the clause in *Konski* v. *Peet* but, as Neville, J. indicated, the restraint was really one restraint against solicitation. I am unable to accept that there is any material distinguishing factor between the circumstances relevant to *Konski* v. *Peet* and those relevant to the enticement restraint. In *Konski* v. *Peet* the duration of the employee's employment was only one year, but her employer had required her and other employees (soon after her employment began) to enter into the agreement which included the relevant restraint against solicitation because two former employees had started a business in competition with the employer and advertised themselves as "late with Konski." As in the present case, the restriction imposed in *Konski* v. *Peet* was of great importance to the employer.

66 The decision of Neville, J. in *Konski* v. *Peet* seems to have stood the test of time. It is, I think, significant that Neville, J. was not asked by leading counsel to apply the doctrine of severance (which was clearly inapplicable) but to cut down the ambit of the restraint by adopting a narrow construction of "customer." This course he refused to adopt because he considered it unreasonable. I would adopt the same approach in the present case and hold that the enticement restraint, even if construed in isolation, extends to future clients of the appellant.

The validity (or otherwise) of the enticement restraint

67 As indicated in principle (c) in para. 32 above, it is well settled that an employer is not entitled to protect himself against competition *per se*

but only against unfair exploitation of the employer's trade secrets or trade connection. This principle is reflected in the restraint clauses in the precedent forms and most of the reported cases contain clauses restraining employees from soliciting persons who were customers or clients of the employer during the employee's employment or during a defined period prior to the termination of the employee's service. The employee has no connection (derived from his former service) with customers or clients acquired by his former employer after termination of the employee's service. Any solicitation by the former employee of a post-termination customer or client of the former employer does not therefore in itself (and in the absence of previous or potential contact with the former employee) involve any exploitation of any connection with that customer or client which the former employee has acquired when in the service of his former employer. Such solicitation cannot therefore be said to be unfair, it is nothing more than fair competition.

68 It is hardly surprising, therefore, that there is scant reported authority for the proposition that a restraint of trade covenant by an employee which extends to post-termination customers or clients of his employer is unreasonable and therefore invalid. In this appeal, the only two authorities cited were *Konski* v. *Peet* (12) and the *Parker* case (18) (where the decision of Judge Hawser was not in issue on appeal). On the other hand, the industry of counsel for the appellant could not produce any authority going beyond the proposition that a non-solicitation clause is not unreasonable if it is wide enough to include (a) prospective clients, or (b) clients with whom the employee has had no contact, in each case during the employee's service: see *International Consulting Servs. (UK) Ltd.* v. *Hart* (11) (prospective customers with whom there had been negotiations); *Gilford Motor Co. Ltd.* v. *Horne* (9) and *G.W. Plowman & Son Ltd.* v. *Ash* (8) (clients with whom the employee had had no contact).

69 In *Business Seating (Renovations) Ltd.* v. *Broad* (5), an employer company sought to enforce *inter alia* an employee's covenant restraining him for one year after termination of his employment from *inter alia* soliciting the business of any customers or clients of an associated company of the employee company who had been customers or clients of the associated company during the period of one year immediately preceding the termination of the employment.

70 Millett, J. (as he then was) held that this covenant (which was part of a wider agreement) was void. He observed ([1989] I.C.R. at 734):

> "So far as the plaintiff company is concerned, its only interest in customers of Manufacturing was as potential customers of its own. I would regard it as an unwarranted further extension of *G.W. Plowman & Son Ltd. v. Ash* [1964] 1 W.L.R. 568 to uphold the validity of a non-solicitation covenant which prohibits solicitation of

potential customers of the plaintiff company, notwithstanding that they are defined as existing customers of some other connected business. In my judgment therefore this covenant is void in so far as it extends to customers of the associated employer."

71 In this state of the authorities, it seems to me that the unavoidable conclusion must be that the enticement restraint which extends to future clients of the appellant is unreasonable and therefore void. The aggravating circumstances leading to the respondent's resignation and his cynical disregard of the terms of the letter (albeit after obtaining legal advice) are matters which reflect no credit on the respondent but these matters cannot justify any relaxation in the appellant's favour of the principles of public policy which govern the law concerning contracts in restraint of trade. I would therefore dismiss this appeal.

The cross-appeal

72 The appellant took the point that there was no valid cross-appeal because under r.59(1) of the Court of Appeal Rules the notice of cross-appeal should have been served on the appellant on July 11th, 2002, but was not served until August 15th, 2002. However, the respondent had given the appellant notice as long ago as May 27th, 2002 of its intention to cross-appeal on costs. Under the circumstances, the court exercised its discretion under r.59(3) to hear the cross-appeal.

73 The Chief Justice heard counsel for the parties on the costs of the action on May 23rd, 2002. A transcript of the proceedings was before this court. The successful respondent applied for the costs of the action. The appellant submitted that there should be no order for costs. It appears from the transcript that the Chief Justice expressed concern regarding a number of matters. These were (1) the respondent had refused to confine the action to the issue of the validity of the restraints and had introduced numerous additional issues into the action and had failed on all of them on the evidence; and (2) the conduct of the parties in failing to settle the action at the interlocutory stage when they were bickering over the terms of an undertaking offered by the respondent.

74 At the conclusion of the hearing, the Chief Justice delivered a short *extempore* decision saying:

"I do find the question of costs a very troublesome one in this case, and doing the best I can and having regard to the conduct of the parties and having regard to my judgment in which I find substantially against the successful defendant, I award half costs to be taxed if not agreed."

75 The respondent now contends by way of cross-appeal that the Chief Justice should have awarded him all his costs of the action and that he

misdirected himself and took into account irrelevant considerations when exercising his discretion in making his order as to costs. In substance, the grounds of cross-appeal and supporting argument are that the Chief Justice erred in awarding the respondent only half the costs of the action because—

(1) The respondent having succeeded in getting the action dismissed, it was wrong to depart from the general rule that costs follow the event.

(2) As to the conduct of the respondent, as he was ultimately the successful party, it was wrong to take into consideration his failure to settle the action at the interlocutory stage by failing to agree terms for an undertaking. It was also wrong to fail to take into consideration the offer made on January 31st, 2002 by the respondent to settle the action on terms which offered the appellant the entire relief then claimed by the appellant in the action.

(3) In deciding the issue of costs partly on the basis that he had found substantially against the respondent on a number of issues, the Chief Justice failed to give sufficient weight to the fact that the respondent was the successful party, not on a mere technicality, but on the central issue in the case.

The court's discretion to award costs

76 By virtue of rr. 1(2) and 6(1) of the Supreme Court Rules 2000 the discretion of the court to award costs is now regulated by r.44.3 of the English Civil Procedure Rules. The most directly relevant provisions of r.44.3 are:

"44.3(2) If the court decides to make an order about costs—

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

. . .

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).

(Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part.)

(5) The conduct of the parties includes—

(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

(6) The orders which the court may make under this rule include an order that a party must pay—

(a) a proportion of another party's costs . . ."

77 In the recent case of *Budgen* v. *Andrew Gardner Partnership* (4), cited by Mr. Feetham, the court had occasion to consider the impact of the new r.44.3. In his judgment, Simon Brown, L.J. set out the following passages from Lord Woolf's final report, *Access to Justice* ([2002] EWCA Civ. 1125, at para. 23):

"24 Orders for costs should reflect not only whether the general outcome of the proceedings is favourable to the party seeking an order in his favour but also how the proceedings have been conducted on his behalf . . . Judges must therefore be prepared to make more detailed orders than they are accustomed to do now. The general order in favour of one party or another will less frequently be appropriate. Different orders will need to be made on different issues, eg, where . . . an offer to settle that issue has been unreasonably refused.

. . .

26 Unless the court is prepared to take the time necessary to elevate decisions as to costs above the conventional approach adopted at present, the parties will not take as seriously as they should the obligations which a managed system will place on them . . ."

Simon Brown, L.J. went on as follows (*ibid*., at paras. 24–26):

"In *AEI Rediffusion* Lord Woolf said at pp 1522–1523:

> ‘The most significant change of emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues.’

Brooke, L.J.’s judgment in the unreported case of *Winter v. Winter* was to similar effect:

> ‘. . . before the Civil Procedure Rules came into effect . . . if a claimant substantially succeeded he was likely to be awarded an order for costs even though he failed on certain issues. The new Rules provide a break from that tradition and enable a court to do greater justice if a party has caused court costs to be expended on an issue on which he ultimately fails.’

For my part I have no doubt whatever that judges nowadays should be altogether readier than in times past to make costs orders which reflect not merely the overall outcome of proceedings but also the loss of particular issues. If, moreover, the ‘winning’ party has not merely lost on an issue but has pursued an issue when clearly he should not have done, then there are two good reasons why that should be reflected in the costs order: first, as a sanction to deter such conduct in future; secondly, to relieve the ‘losing’ party of at least part of his costs liability. It is one thing for the losing party to have to pay the costs of issues properly before the court, another that he should have to pay also for fighting issues which were hopeless and ought never to have been pursued.”

The judge’s departure from the general rule

78 In the circumstances under consideration by the judge, where the respondent had raised, and failed on, numerous issues of fact and failed because the Chief Justice did not believe him, it was clearly within the discretion of the Chief Justice to depart from the general rule and make a proportional order for costs pursuant to r.44.3(6)(a) after having regard to the conduct of the respondent, including the factors set out in r.44.3(5). Whatever may have been the position under the previous rules and practice, it seems to me that in the light of the new approach manifested by r.44.3 there is no merit in this ground of appeal.

The conduct of the respondent

79 It appears from the transcript that the Chief Justice had in mind that by the time the appellant’s application for an interlocutory injunction came before him on February 1st, 2002, counsel for the parties had failed to agree the terms of an undertaking by the respondent to dispose of the action. The impasse between the parties came about in this way. On January 31st, 2002 (by which time the appellant had indicated that at the

pending hearing on February 1st it would not be seeking an injunction to enforce the competition restraint), the respondent's solicitors sent an open letter to the appellant's solicitors raising numerous reasons why the appellant had no case but concluding by offering to settle the entire action by the respondent's undertaking (in the terms sought in the appellant's application notice) that he would not, until November 27th, 2002, seek to entice clients away from the appellants. The letter continued as follows:

> "This offer is made on our client's understanding that these words mean that he will not knowingly specifically target or personally approach your client's customers with a view to persuading them to obtain travel services from him rather than from your client. In other words, he will not say to any of your client's customers words to the effect of: 'Do not go to Exchange Travel, come to me.'
>
> Our client's undertaking, if accepted, would not, naturally, prevent Elite Travel Ltd. from advertising its services or from issuing leaflets for general distribution in Gibraltar. It would also not prevent our client from providing travel services to any of your client's customers who themselves approach our client or Elite Travel."

80 This offer was refused in the appellant's solicitors' letter of the same date. The appellant's solicitors were not prepared to accept the gloss which the respondent sought to put on the undertaking. They disagreed with the respondent's interpretation of that gloss and insisted on an unqualified undertaking. The respondent's solicitors countered by inquiring in their letter dated February 1st, 2002 if the appellants were contending that the words "seek to entice away" were synonymous with "solicit," adding:

> "We repeat, without prejudice to our client's position as set out in our letter of January 31st, 2002, that our client is willing to undertake that he will not knowingly specifically target or personally approach your client's customers with a view to persuading them to obtain travel services from him rather than from your client. Please confirm by return whether this is acceptable to your client. Alternatively, please let us know what your clients wish to restrain our client from doing."

81 The appellant's solicitors accepted this invitation in their letter of the same date, saying:

> "Our client is willing to accept an undertaking that your client will not 'in any way seek to entice clients away from Exchange Travel.' In our view there is no useful distinction to be drawn between the word 'entice' and the word 'solicit' in the context of this case.

> Our client is however prepared to accept this undertaking without any further gloss. The meaning of the word 'entice' is clear and you cannot attempt to define the circumstances in which your client will or will not be in breach."

The letter went on to give these reasons for the appellant's attitude:

> "The problem for our client is this: your client will no doubt draft the adverts for Elite, he will draft the flyers in the name of Elite, he will use either a mental or real database of the claimant's clients to send those flyers and he then says that the undertaking does not prevent him from serving those clients. This in circumstances where by the very nature of the business the enticement may commence with the flyer but continues and indeed, becomes even more important, on personal contact at the office. For you to contend that if one of the claimant's clients comes to Elite Travel's offices as a consequence, for instance, of seeing a flyer and that your client can provide holiday quotes for him, drives a coach and horses through the undertaking. What is your client doing when he provides the claimant's customers with quotes or details of holidays if he is not attempting to entice clients to do business with Elite Travel and therefore entice them away from the claimant?"

82 There was thus a complete deadlock between the parties because they disagreed on the meaning of "entice" and the respondent was not prepared to offer an undertaking in the terms sought by the appellant except with the gloss which, if accepted by the appellant, would drive a coach and horses through the enticement restraint.

83 It was in these circumstances that the Chief Justice, on February 1st, 2002, felt displeased with the unyielding attitude of the parties and pressed Mr. Feetham to agree to the appellant accepting the undertaking in the terms embodied in the interlocutory order: "[T]hat the defendant will not seek to solicit the claimant's customers' clients or custom or business until trial or further order."

84 When considering the question of costs, the Chief Justice pointed out that, if an undertaking effective to November 27th, 2002 could have been agreed at the interlocutory stage in February, a two-day trial would have been avoided. He blamed both sides for the deadlock and indicated that he thought counsel had been too pernickety—it had been a case of six of one and half a dozen of the other. Mr. Licudi for the respondents now complains about this. He says the correspondence shows that the respondent conducted himself properly throughout in his attempts to avoid the action and that this was not possible as a result of the appellant's solicitors ascribing to "the non-solicitation clause" a meaning it did not have.

85 At the time he prepared his written submissions, Mr. Licudi cannot have envisaged that by the end of the hearing of the appeal he would be arguing successfully that (as Mr. Feetham contended in February but not on appeal) the enticement restraint was in effect synonymous with a solicitation restraint and that knowledge that a covenantee's client was being solicited was not a prerequisite to establish a breach of the restraint.

86 Be that as it may, there was in February a genuine and important issue between the parties as to the meaning of enticement. Under the circumstances, it seems to me that Mr. Feetham could not properly have advised the appellant to accept an undertaking (effective to November 27th, 2002) with a gloss that he considered (rightly) to be not only erroneous in law but calculated to render the enticement restraint ineffective to prevent the respondent canvassing the appellant's clients. He had no alternative but to insist on an ungarnished undertaking and he no doubt had no qualms about accepting the interlocutory undertaking contained in the Chief Justice's order. The respondent was not, in my judgment, entitled to insist on giving an undertaking with the added qualification contained in the gloss when the appellant had made it clear by its solicitors that it would only accept the undertaking offered on the footing that the gloss was not agreed and the parties should be left to assert their own respective interpretations of the word "entice."

87 With due respect to the Chief Justice, I consider that his exasperation should not have extended to the appellant but to the respondent in this matter. In so far as the Chief Justice regarded both parties as being at fault, the respondent cannot therefore be heard to complain. It was his conduct which prevented the settlement of the action in February 2002. This was a factor which the Chief Justice was entitled to take into account.

88 There are other relevant matters concerning conduct. In making his order on costs and having regard to the conduct of the parties, the Chief Justice must have had regard to the failure of the respondent to accept the proposal put forward in the appellant's solicitors' letter, dated March 1st, 2002, suggesting that the case be dealt with by way of written submissions or exchange of skeleton arguments before the hearing on March 14th and that counsel confine themselves to submissions on the affidavit evidence without calling live evidence. The Chief Justice made the point to Mr. Licudi and he had no convincing answer.

89 Furthermore, although it was not specifically mentioned at the hearing or in the Chief Justice's brief oral decision, it seems to me that, having tried the case and seen and heard the respondent giving evidence, he must, when referring to the conduct of the parties, have had in mind (among other matters) the fact that the respondent had given evidence which the Chief Justice found to be untruthful.

90 Thus he stated in his judgment that he did not believe the respondent's evidence that he did not appreciate the seriousness of the situation when he attended the final meeting with Callaghan on November 27th, 2001. The Chief Justice observed, with regard to the respondent's admitted fraud on travel insurance companies, that the respondent's explanations, that he did not think it was a deceit on the insurance company at the time, and only realized the seriousness of it now that he had been told, did not have the ring of truth about them. With regard to the circumstances of the respondent's resignation, the Chief Justice did not believe that the respondent felt he was being treated unfairly or unjustly. The Chief Justice said he did not believe the respondent when he said he did not read the resignation letter in its entirety before he signed it. The Chief Justice clearly regarded him as a lying witness. It was the rejection of his evidence which resulted in the respondent's failure to establish the numerous factual issues raised in his defence.

The unsubstantiated issues raised by the respondent

91 This ground seems to have been advanced without regard to the wide provisions of r.44.3(5)(a), (b) and (c). The issues raised by the respondent on the pleadings were adumbrated in the judgment of the Chief Justice in the action as follows:

> "(1) Did the defendant sign the letter of resignation voluntarily?
>
> (2) Did the defendant appreciate what he was signing?
>
> (3) Did the letter constitute a true accord and satisfaction?
>
> (4) As a matter of contract, could the claimant withdraw the termination letter and allow the defendant to resign?
>
> (5) Was the letter obtained by duress or undue influence?
>
> (6) Is the contract supported by consideration?"

92 Paragraphs 1 and 7 of the respondent's defence in the action were formal admissions. Paragraph 15 was a general denial of liability. Eight of the remaining 12 paragraphs contained averments in support of the six issues specified above. There was no reply.

93 In paras. 11–14, I have outlined the matters dealt with by the witnesses. The additional issues raised in the respondent's defence resulted in a substantial body of evidence directed to the circumstances under which the disciplinary proceedings inquiring into the allegations of misconduct were convened and conducted, the nature and strength of those allegations and the circumstances of the respondent's resignation. Most of the evidence was directed to these matters. Ms. Grech's evidence

regarding the importance of personal connection between the appellant and its clients was not contradicted by the respondent.

94 The trial took up the best part of two days. The evidence was not concluded until the end of the first day. In his judgment, the Chief Justice was obliged to deal with the nature and strength of the allegations of misconduct alleged against the respondent and the circumstances of his resignation before dealing with the additional issues raised by the respondent. None of those issues was resolved in the respondent's favour because his evidence was rejected as being untruthful.

95 The Chief Justice, who was the trial judge, was the best person to assess the time taken and the volume of evidence and argument taken up with those issues. In all the circumstances, I am unable to fault his order as to costs and it comes as no surprise that the submissions of Mr. Feetham in support of that order were short and dismissive. I would therefore dismiss the cross-appeal.

96 **STAUGHTON, J.A.** concurred.

97 **NEILL, P.:** I also agree. I only add a few words of my own because the appeal involved the construction of a restrictive covenant in the field of employment and the possible application of the doctrine of severance.

98 The facts of the case and the main authorities in this branch of the law have been set out in the masterly judgment of Clough, J.A., which I have had the privilege of reading in draft. I can therefore state my reasons for my concurrence very shortly.

99 It is common ground that, in the present day, a restriction imposed by an employer on the future activities of an employee after he has left the employment of the employer is *prima facie* void as being contrary to public policy. It is possible, however, for an employer to show that the restriction is reasonably necessary for the protection of his legitimate interests. The burden of showing that the restriction is reasonably necessary is on the employer, but if he can discharge that burden the restriction will be upheld. A classic example of a restriction that is capable of being upheld is where the restriction is directed to the improper disclosure of trade secrets of which the employee has gained knowledge while in the employment of the employer. However, restrictions that do not involve trade secrets are the source of greater difficulty.

100 When faced with a restrictive covenant, the first task of the court is to discover its meaning, using the ordinary rules of construction. This will involve construing the words of the covenant in the context in which they were used and construing them as a whole. At this stage, the court is

concerned only with ascertaining the meaning of the words used and not with their legal effect or any question of legality or illegality: see *Konski* v. *Peet* (12) ([1915] 1 Ch. at 538, *per* Neville, J.); and *Littlewoods Organisation Ltd.* v. *Harris* (13) ([1977] 1 W.L.R. at 1486, *per* Megaw, L.J.).

101 In the present case, the relevant words used in the letter dated November 27th, 2001 were: ". . . I confirm that for a period of 12 months I will not directly or indirectly compete or in any way seek to entice clients away from Exchange Travel."

102 If one applies the ordinary rules of construction to these words it is clear that they were intended by the parties to restrict the activities of the respondent for the following 12 months and to protect the business of the appellant during that period.

103 It is accepted on behalf of the appellant that a simple restriction on future competition by an employee after his employment has ended is void, but it is argued that the appellant is not seeking to rely on the words "directly or indirectly compete," but on the much more limited restriction against enticing clients. It is further argued that the offending words can be excised by the use of the doctrine of severance.

104 However, the doctrine of severance cannot be used to create a new agreement for the parties or to change from their original meaning the words that would remain after a suggested excision.

105 In the present case, the words in the letter have to be read as a whole. So read, they relate to the conduct of the respondent, including acts of enticement, during the following 12 months. But, as Chitty, J. said in *Mills* v. *Dunham* (14) ([1891] 1 Ch. at 580) (in a passage cited by my Lord in para. 36 of his judgment), the court must find in the agreement itself sufficient ground for making the severance. There is nothing in the words used in the letter dated November 27th, 2001 that introduces a temporal element into the use of the word "clients" or that is capable of drawing a distinction between existing and future clients. *Prima facie*, the word "clients" can embrace past, present and future clients. In my view, it is quite clear that a restriction on enticing *future* clients is too wide.

106 Accordingly, for these reasons and for the reasons much more fully explained by my Lord, I too would dismiss this appeal.

Appeal dismissed.