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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 9/2/2018

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

PENINSULA SECURITIES LIMITED

Appellant;

and

DUNNES STORES (BANGOR) LIMITED

Respondent.

**Before: STEPHENS LJ, SIR RONALD WEATHERUP and
SIR RICHARD McLAUGHLIN**

STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] This appeal concerns the question as to whether the doctrine of restraint of trade applies to a restrictive covenant contained in a lease dated 2 February 1981 ("the restrictive covenant") relating to adjoining land retained by the lessor. The enforcement of contractual terms or of restrictive covenants, if they restrain trade, are in certain circumstances subject to the doctrine so that they are enforceable only if reasonable with reference to the interests of the parties concerned and of the public. The learned trial judge ("the judge") in a carefully considered reserved judgment held that the doctrine did not apply to the restrictive covenant and this appeal is from that order. There is also a respondent's notice seeking to uphold the order on grounds not relied on by the judge.

[2] The lessor, Mr Patrick Shortall, a property developer, was the freehold owner of some 5½ acres of land contained in folio 25992 Co Londonderry ("the folio") which lands he wished to develop as a shopping centre and for which proposed development he secured Dunnes Stores (Bangor) Limited as an anchor tenant in order to draw shoppers and therefore other potential tenants to the centre. The lease to Dunnes Stores (Bangor) Limited, which demised some 1.05 acres for a term of 999 years, contained the restrictive covenant that for that term any development on the lessor's remaining lands which comprised some 4 ½ acres "shall not contain a unit in size measuring 3,000 sq ft or more for the ... purpose of trading in textiles, provisions or groceries in one or more units." On 27 April 1983 ownership of the freehold in the folio was conveyed by Mr Shortall to Peninsula Securities Limited a

company in which he owned 99% and his wife 1% of the issued share capital. By virtue of that assignment, which included the landlord's interest in the lease, there is privity of estate as between Peninsula Securities Limited as landlord and Dunnes Stores (Bangor) Limited as tenant, though there still remains privity of contract as between Mr Shortall and Dunnes Stores (Bangor) Limited. It can be seen from this description that there are three distinct areas of land, namely

- (a) The total area contained in the folio which extended to some 5 ½ acres ("the total area") of which Mr Shortall was the freehold owner until he conveyed ownership of the lands in the folio to Peninsula Securities Limited on 27 April 1983.
- (b) The part of the lands in the folio which is subject to the lease to Dunnes Stores (Bangor) Limited which part extends to approximately 1.05 acres ("the area subject to the lease").
- (c) The remaining part of the lands in the folio which was not subject to the lease from Mr Shortall to Dunnes Stores (Bangor) Limited which part extends to some 4 ½ acres ("the remaining lands"). It was this part which was subject to the restrictive covenant.

[3] On the remaining lands Peninsula Securities Limited has constructed a number of units some of which we assume measure 3,000 sq. ft. or more and it wishes to grant a lease of one or more of those units for "the purpose of trading in textiles, provisions or groceries." On 29 January 2014 Peninsula Securities Limited commenced an action in the Queen's Bench Division against Dunnes Stores (Bangor) Limited seeking, amongst other remedies, a declaration that the restrictive covenant was an unlawful restraint of trade. That issue having been determined in favour of Dunnes Stores (Bangor) Limited, Peninsula Securities Limited brings this appeal. For its part Dunnes Stores (Bangor) Limited by a respondent's notice contends that the order of the High Court should be affirmed on grounds other than those relied on by that court.

[4] In this judgment we will refer to Peninsula Securities Limited as "the appellant" and to Dunnes Stores Bangor Limited as "the respondent."

[5] Mr David Dunlop appeared on behalf of the appellant and Mr Shaw QC and Ms Margaret Gray appeared on behalf of the respondent. We are grateful to counsel for their assistance.

The terms of the lease

[6] The lease was for a term of 999 years from 1 February 1981. The respondent paid a premium of £50,000 and agreed to pay rent of £100 per annum together with rates and taxes in relation to its unit. Within a two-year period the respondent was to construct and to pay for the construction costs of a retail unit the ground floor

area of which was to measure at least 15,000 sq. ft. The respondent also covenanted that the west gable wall of this building should be on the western boundary of the area subject to the lease and that the respondent would allow Mr Shortall the right of support for shop buildings to be erected by him on the remaining lands. Also the respondent was to pay a one third share of the cost incurred by Mr Shortall in the construction of ancillary matters such as a car park. The lease contained a number of covenants on the part of Mr Shortall including a covenant to construct a minimum of 6 shop units in an enclosed mall adjoining the western end of the area subject to the lease.

[7] In summary the scheme of the lease was that the respondent was to construct a large anchor unit at its own expense and Mr Shortall was to construct at his own expense at least 6 other units as a shopping mall leading to the respondent's unit. Both Mr Shortall and the respondent would share in the costs of the construction of, amongst other ancillary matters, the car park.

[8] The restrictive covenant was in the following terms:

“That any development on the lessor's lands comprised in the lessor's folio and on his other lands adjoining the premises shall not contain a unit in size measuring 3,000 sq ft or more for the purpose of trading in textiles, provisions or groceries in one or more units.”

[9] The lease also contained a further covenant on the part of the lessor that if for instance he assigned his interest in the remaining lands which were subject to the restrictive covenant then he would enter into an agreement with the assignee, that in effect the assignee would observe all the covenants on the part of the lessor which would include the restrictive covenant. That further covenant was in the following terms:

“In case the said shop units or any other premises on the lessor's adjoining lands or any part thereof shall be sold, conveyed, demised, licenced or otherwise disposed of by the lessor or become vested in any other person or persons whomsoever the lessor will so deal with the said premises or part thereof only on condition that the purchaser or lessee or other person to whom any interest or licence respecting the said premises shall be disposed shall enter into a covenant for the benefit of the lessee that he or any person deriving title under him shall observe the covenants on the part of the lessor and conditions herein contained and the lessor further covenants that he will at the request of the lessee join as plaintiff in any

action by the lessee to enforce these covenants and the conditions.”

[10] The lease did not contain any obligation on the respondent to trade from its unit. There was nothing in the lease preventing the respondent from opening up an entrance to its unit from the car park thereby avoiding the mall.

Background Facts

[11] In the early 1970s Mr Shortall carried on business as a private housing developer in Londonderry. In or around 1979 he entered into a contract to purchase for £73,000 the total area extending to some 5½ acres contained in the folio. That area had been zoned for retail development. He intended to develop the land as a retail shopping centre. The purchase completed on 1 August 1980.

[12] Mr Shortall wished to secure an anchor tenant for the proposed development and he contacted the respondent. In January 1980 Mr Shortall met Mr Ben Dunne in Dublin. In or around May/June 1980 there was another meeting between Mr Shortall and Mr Ben Dunne on site and then in the offices of John Doherty, Estate Agent, in Ferryquay Street, Londonderry. At this meeting Mr Dunne offered on behalf of the respondent to take the land by way of a long lease at a premium of £50,000 and a nominal rent. At Mr Dunne’s request Mr Shortall agreed to the inclusion of a negative covenant in the lease, on the basis that it was necessary to attract the respondent to Londonderry, which Mr Shortall described as “an economic and political wasteland” at that time.

[13] After this meeting Mr Shortall instructed Mr Hasson of Hasson & Co, solicitors, to prepare a lease and the respondent instructed Mr Faris of Cleaver Fulton Rankin, solicitors, to represent its interests.

[14] On 18 June 1980 Mr Shortall obtained planning permission for the development of “Springtown Shopping Centre.”

[15] On 2 February 1981 Mr Shortall and the respondent entered into the lease.

[16] On 3 March 1981 the lease was registered as a burden on the folio with the entry stating that:

“Part of the land herein is subject to a lease made on 2 February 1981 from P Shortall to Dunnes Stores (Bangor) Limited for 999 years from 1 February 1981...”

[17] Springtown Shopping Centre was constructed by Peninsula Construction Company Limited. The respondent paid for the cost of building its unit and contributed to other ancillary costs such as the costs of the carpark.

[18] Springtown Shopping Centre opened for trading in October 1982. At that time it comprised the respondent's anchor store which was about 20,000 sq. ft., together with a number of retail units and 250 carpark spaces. The retail units were situated along a mall which gave access to the respondent's unit. The retail units included an off-licence, a post office, a chemist shop, a bureau de change and a fashion store.

[19] In or around 1983 the respondent opened a direct entrance to its store thus enabling its customers to bypass the mall.

[20] By instrument number 6828/33/11, which was registered on 27 April 1983 Mr Shortall transferred the total area so that the appellant not only became the freehold owner of the total area but also became the successor in title to Mr Shortall's lessor's interest in the area subject to the lease.

[21] On 14 November 2001 the plaintiff applied for planning permission to develop part of the remaining lands which adjoin the Springfield Shopping Centre. Planning permission was granted for this new development in April 2002 and by in or around 2006 a new shopping centre was built on the remaining lands which were subject to the restrictive covenant.

[22] The newly constructed shopping centre is in a shell finish and is largely vacant. The appellant considers that this is a result of the adverse impact of the restrictive covenant.

[23] The defendant continues to occupy the area subject to the lease and to trade from its unit in the shopping centre.

The proceedings

[24] On 22 February 2010 and as a result of the appellant's perception of not being able to attract tenants to the shopping centre by virtue of the restrictive covenant it applied to the Lands Tribunal seeking relief pursuant to the Property (Northern Ireland) Order 1978 which included relief on the basis that the covenant was an unlawful restraint of trade. However the Lands Tribunal does not have jurisdiction to determine whether the covenant is an unlawful restraint of trade so on 29 January 2014 the appellant issued the present proceedings.

[25] The pleadings in this action have been much amended. Amongst the claims made by the appellant in its first amended statement of claim was a claim that the restrictive covenant was void pursuant to section 2(4) of the Competition Act 1998. That claim was abandoned in its statement of claim served on 17 February 2014 which is the most recent of the amended statements of claim. In its present pleadings the appellant seeks a declaration that the restrictive covenant is unenforceable and ought to be severed from the lease. In the alternative if the restrictive covenant is enforceable the appellant seeks an order pursuant to Article

6(2) of the Property (Northern Ireland) Order 1978 modifying or extinguishing the restrictive covenant on the grounds that it is an impediment which unreasonably impedes the enjoyment of the appellant's land or, if not modified or extinguished, would do so, pursuant to Article 5 of the Property (Northern Ireland) Order 1978.

[26] By way of counterclaim and if in the event the court finds that the restrictive covenant constitutes an "impediment" to the enjoyment of the appellant's land the respondent seeks an order under Article 6(2)(a) of the Property (Northern Ireland) Order 1978 for: (i) the modification of the restrictive covenant so that it does not unreasonably impede the appellant; and (ii) a sum to compensate the respondent for loss and damage arising from such modification.

[27] At a review hearing the parties made a request that the issues arising under the Property (Northern Ireland) 1978 be adjourned until after the determination of the appellant's claim for a declaration that the restrictive covenant was unenforceable as an unreasonable restraint of trade. The judge acceded to that request thereby in effect dealing with the restraint of trade issue as a preliminary issue. The judge heard evidence and submissions only on the restrictive covenant claim and not on either of the parties' cases under the Property (Northern Ireland) Order 1978.

[28] There was a degree of confusion as to whether the Property (Northern Ireland) Order application was still the subject of an arbitration agreement or whether the parties now sensibly agreed that those issues should be determined in the High Court to avoid a multiplicity of hearings. The respondent agreed at the hearing and by e mail dated 24 January 2018 that those issues should be determined in the High Court. The appellant by a note dated 24 January 2018 has also agreed that those issues should be determined in the High Court though expressing a preference that the remaining issues in this case are disposed of sequentially.

The first instance judgment

[29] The judge stated that the facts were "not too much in dispute" and that "the dispute essentially turned upon the application of the law to the facts." She identified the question as being whether the appellant could rely on the doctrine of restraint of trade as applying to the restrictive covenant. To this question she identified three sub-questions:

- (a) Does the restraint of trade doctrine apply to this type of long lease?
- (b) Did the transfer of the freehold from Mr Shortall to the (appellant) make a covenant which was void and (unenforceable) against Mr Shortall enforceable against the (appellant)?
- (c) Does the Competition Act 1998 exclude the application of the restraint of trade doctrine?"

The last sub-question arose as it was submitted on behalf of the respondent that in accordance with its analysis of the decision in Days Medical Aids v Pihsiang [2004] EWHC 44, once the appellant abandoned its claim under the Competition Act 1998 the court was precluded from ruling that the covenant was unreasonable under the common law doctrine of restraint of trade.

[30] In relation to the first sub-question the judge identified that whether the doctrine applied to the restrictive covenant required a careful analysis of the seminal House of Lords decision in Esso Petroleum v Harper's Garage [1968] AC 269. The judge rejected the respondent's submission "that Esso was fact specific and dealt only with solus agreements." Rather the judge found "that Esso establishes principles relating to when the doctrine of restraint of trade applies to covenants affecting freehold and leasehold lands." The judge then set out what she considered to be three principles to be taken from Esso Petroleum which were

- (a) **Principle 1** – The doctrine of restraint of trade applies to a person who gives up a "pre-existing freedom" when he enters into the covenant.
- (b) **Principle 2** - The doctrine of restraint of trade does not apply to either a lessee who accepts a negative covenant in a lease or a purchaser of freehold land who accepts a negative covenant in respect of the land he purchases.
- (c) **Principle 3** – The doctrine of restraint of trade, in respect of both freehold and leasehold land, does not extend to successors in title of the original covenantee and covenantor.

[31] The respondent had submitted to the judge that Mr Shortall gave up no pre-existing freedom when he entered into the negative covenant because he gained commercially as a result of the lease. The judge rejected that submission finding that "Mr Shortall by agreeing to enter into a covenant restricting the trade he could carry on his own lands was, ..., giving up a pre-existing freedom, as before he entered into the agreement he was not so restricted in respect of the trade he could carry out on his lands." On that basis the judge found that the doctrine applied to the restrictive covenant *as between Mr Shortall and the respondent*.

[32] In relation to principle 3 the judge considered that none of the Law Lords in Esso Petroleum stated that the doctrine should extend to successors in title of the original covenantor. The judge went on to find "that the doctrine does not apply to successors in title," on which basis the judge found that the doctrine did not apply to the restrictive covenant *as between the appellant and the respondent* as the appellant was the successor in title to Mr Shortall. Furthermore the judge considered that as Mr Shortall always abided by the covenant it was at the date of transfer of the leasehold and freehold lands to the appellant "*a lawful covenant*" and that it was not "now open to the (appellant), to retrospectively argue that, in some way, the covenant was unenforceable and void when it was entered into" (emphasis added). This finding

was sufficient to dispose of the preliminary issue but in addition the judge found that

“... there is authority that the doctrine does not apply to Tulk v Moxhay type covenants. This is shorthand for saying the doctrine does not apply to successors in title of freehold land burdened by a restrictive covenant.”

[33] Finally the judge found that there are public policy reasons why the doctrine does not apply to original lessee/covenantors and purchasers and why it also does not apply to successors in title of covenantors. The judge considered that the restrictive covenant was typical of restrictive covenants which apply to both leasehold and freehold lands which have been in existence and enforced for hundreds of years. She also considered that even though such covenants restrict trade if the court were to overrule such long established principles, it would cause much uncertainty and would adversely impact commercial dealings with land where certainty is required.

[34] For those reasons the judge found that the doctrine of restraint of trade did not apply to the restrictive covenant *as between the appellant and the respondent*. The judge stated that it was unnecessary to consider whether, if the doctrine of restraint of trade had applied, the restrictive covenant was justified as reasonable. Furthermore the judge made no findings in relation to the issue as to whether the judgment in Days Medical Aids v Pihsiang [2004] EWHC 44 precluded any relief for the appellant in circumstances where the appellant's claim that the restrictive covenant was void pursuant to section 2(4) of the Competition Act 1998 had been abandoned. The judge held that the only questions which remained related to the application under the Property Order (Northern Ireland) 1978.

The submissions of the parties

[35] In summary the appellant's submissions on appeal were that the restrictive covenant is a leasehold covenant. That the first question to be addressed is whether the doctrine of restraint of trade was engaged at the time the restrictive covenant was entered into by Mr Shortall and that the subsequent issue is whether the appellant (as successor to Mr Shortall) can rely upon the doctrine to challenge the restrictive covenant. In relation to the first question the appellant submitted that all three principles set out by the judge cannot easily be extracted from the speeches in Esso Petroleum nor could those principles be placed into such hermetically sealed boxes. However principle 1 concerned the question of whether Mr Shortall gave up a “pre-existing freedom” and the appellant did not consider that this principle could be seriously disputed. Further it was submitted that the speeches in Esso make clear that there are not clear bright lines marking the limits of those covenants subject to the doctrine and those which are not. The appellant contended that there was scope for a more general principle depending on exceptionality. On the facts Mr Shortall

fell within principle 1 and therefore the doctrine applied as between him and the respondent. The appellant contended that the subsequent assignment from Mr Shortall to it did not affect the application of the doctrine. In relation to the respondent's submission as to the effect of the abandonment of the appellant's claim under the Competition Act Mr Dunlop contended that properly analysed this was a submission that the court was precluded from ruling that the covenant was unreasonable under the common law doctrine of restraint of trade if it was reasonable under the Competition Act 1998. The respondent's submission did not go to the anterior question as to whether the doctrine of restraint of trade applied. Mr Dunlop suggested and Mr Shaw agreed that as the judge had made no finding in relation to this issue and if the court allowed the appeal on the basis that the doctrine of restraint of trade applied to the restrictive covenant then this issue under the Competition Act should be determined by the judge. In effect both parties agreed that this issue went to the question of reasonableness and not to the anterior question as to whether the doctrine of restraint of trade applied.

[36] In summary the respondent's submissions on appeal were that the doctrine of restraint of trade neither applies to a purchaser of freehold land who accepts a negative covenant in respect of the land he purchases, nor extends to successors in title of an original covenantee and/or covenantor. That on the facts of this case in circumstances where the appellant had freely purchased the folio from Mr Shortall of which the remaining lands contained in the folio were subject to the restrictive covenant between Mr Shortall and the respondent no feature of public policy required that the appellant "should be excused from honouring [its] contract" (Lord Morris in *Esso* at p.309). The respondent submitted that, to find otherwise and accept the appellant's case, would be to take an unwarranted step unsupported by legal principles, and to drive a coach-and-four through basic principles of contract and land law. Further, the respondent submitted that the order could be upheld on other grounds as follows:

- (a) Esso Petroleum is confined to its facts and does not extend beyond solus agreements;
- (b) The High Court did not indicate the form of restraint required to satisfy the doctrine of restraint of trade;
- (c) The judge erred in holding that Mr Shortall gave up a pre-existing freedom when granting the lease and making the restrictive covenant, and failed to consider the commercial benefits accruing to him from the bargain;
- (d) The judge erred in concluding that Esso applies to a vendor who when selling or leasing part of his land agrees to enter into a restrictive covenant on his retained land; and

- (e) The judge failed to apply the judgment in Days Medical Aids v Pihsiang [2004] EWHC 44. In relation to this ground the respondent stated that since the judge made no express finding on the parties' submissions, the issue ought to fall to be considered expressly by the High Court should the appeal succeed and the proceedings be remitted as the "remaining issues of reasonableness and justification will have to be determined by the Court at first instance."

Legal principles

[37] The doctrine of restraint of trade is based on public policy and the protection of the public interest. The "public have an interest in every person's carrying on his trade freely: so has the individual" see Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd [1894] AC 535 at 565 and Esso Petroleum Company Limited v Harper's Garage (Stourport) Ltd [1968] AC 269 at for instance 298 A and 318 B-C. On that basis we consider that the dividing line between freedom to contract and freedom to trade is dictated by public policy.

[38] In Esso Petroleum consideration was given to the principles to be applied when determining whether a restraint fell within the doctrine of restraint of trade. If it fell within the doctrine then the party imposing the restraint has to establish that it is reasonable, that is reasonable in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, see the speech of Lord Macnaghten in the Nordenfelt case. The anterior question is whether the doctrine applies.

[39] We acknowledge that in Esso Petroleum a degree of caution was expressed as to the criteria for application of the doctrine. Lord Reid stated that he "would not attempt to define the dividing line between contracts which are and which are not in restraint of trade ..." (298 G - 299 A). Lord Morris referred to "helpful expositions, provided they are used rationally and not too literally" (307 F). Lord Hodson stated that it was "difficult to devise a formula relating to land which covers all cases in which the doctrine should be excluded" (317 B). Lord Pearce stated that "... since the rule must be a compromise, it is difficult to define its limits under any logical basis" (page 324 E). Lord Wilberforce stated that "(the) common law has often (if sometimes unconsciously) thrived on ambiguity and it would be mistaken, even if it were possible, to try to crystallise the rules of this, or any, aspect of public policy into neat propositions" (331 F-G).

[40] Subject to those reservations we consider that the principle for the application of the doctrine contained in the speeches of the majority in Esso Petroleum is whether the covenantor was a person with no previous right to be on the land. If so, then the covenant cannot fall within the doctrine of restraint of trade. The doctrine applies if "a man contracts to give up some freedom which otherwise he would have had" (Lord Reid at 298C, Lord Morris at 309D, Lord Hodson at 316G-317A and Lord Pearce at 325F).

[41] Lord Wilberforce set out a different approach so that if “in any individual case one finds a deviation from accepted standards, some greater restriction of an individual’s right to ‘trade’ or some artificial use of an accepted legal technique, it is right that this should be examined in the light of public policy” (335 D). He also stated that the doctrine of restraint of trade was “one to be applied to factual situations with a broad and flexible rule of reason” (331 G). However as we have indicated in cases of this nature the principle to be applied is that set out by the majority in Esso Petroleum.

[42] It was contended by the respondent before the judge and again in this court that the principles set out in Esso Petroleum were fact specific and should not be applied beyond solus agreements affecting land. The judge rejected that contention as does this court. Not only do we consider that Esso Petroleum establishes principles of general application which have been applied to cases which did not concern solus agreements, but also that there is no reason why it should be confined in the way suggested by the respondent. The judge referred as examples of the general application of the principles to the cases of Sibra Building Company v Ladgrove Stores [1998] 2 IR 589, Quadramain v Sevastapol Investments [1976] HCA 10, (1976) 133 CLR 390 and to Robinson v Golden Chips [1971] NZLR 257. The judge also referred to the citation of Esso Petroleum as having general application in textbooks such as Chitty on Contracts, Wylie Landlord and Tenant Law in Ireland, 3rd Edition 2004 and Hill and Redmond Law of Landlord and Tenant. We would add that further support for the generality of the principle is to be found in Pharmaceutical Society of Great Britain v Dickson [1970] A.C. 403 a case concerning whether a restraint in a proposed rule of professional conduct was subject to the doctrine. Lord Wilberforce stated at page 440 E that “(recently) this House restated this generality of principle by reference to the practical working of the restraint, irrespective of its legal form (*see Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.* and cf. White C.J. in Standard Oil Co. of New Jersey v. United States [1951] 2 Lloyd's Rep. 36 cited in the Esso case).” The judge rejected and we reject the submission of the respondent that Esso Petroleum should be confined to solus agreements affecting land. The judge considered, as do we, that Esso Petroleum establishes principles relating to the general question as to when the doctrine of restraint of trade applies to covenants affecting freehold and leasehold lands.

[43] It was contended on behalf of the respondent that if the doctrine of restraint of trade applied to the restrictive covenant *as between Mr Shortall and the respondent* then it no longer applied after the assignment from Mr Shortall to the appellant on 27 April 1983 because the appellant chose of his own free will to acquire the remaining lands which were subject to the covenant. We acknowledge that a literal application of what, subject to the reservations which have been expressed, is the principle in Esso Petroleum would lead to that conclusion as the appellant was not in possession of the lands prior to 27 April 1983 and it could not be said to have given up any freedom. Accordingly it could not be said that it was contracting to give up some freedom which otherwise it would have had.

[44] During the course of the hearing of the appeal we made a number of enquiries of Mr Shaw one of which was in relation to assignments which would occur if the original covenantor died or became bankrupt. We posed the question of Mr Shaw as to why in such circumstances should a successor in title not be able to rely on the doctrine of restraint of trade if for instance, they had merely inherited as opposed to agreeing to the situation? That question was to be seen in the context that the doctrine is a balance between the freedom to contract and the freedom to trade. The assignment from the original covenantor in such circumstances did not affect the freedom to contract and the freedom to trade was also unaffected by that assignment. Mr Shaw's initial reaction was that it would be difficult in such circumstances to exclude the doctrine of restraint of trade, though he then withdrew that concession. A second question was as to whether Mr Shortall could still rely on the doctrine in relation to any potential liabilities on foot of the covenant to the respondent given that there remained privity of contract between him and the respondent even though he had parted with the land intended to be burdened by the covenant. If he was able to do so then why should not the appellant?

[45] However we consider that public interest is a surer foundation to the correct answer to the question as to whether an assignment of the covenantor's interest means that the doctrine no longer applies. The interests of the public do not change on an assignment of the covenantor's interest and therefore should not change what was an unenforceable restraint of trade into an enforceable restraint on such an assignment. We do not accept the judge's statement that there are public policy reasons why if the doctrine of restraint of trade applies as between the original parties it should not apply to a successor in title. Rather we consider that the interests of the public are not affected by an assignment. On that basis we reject the submission that the doctrine of the restraint of trade no longer applied to the restrictive covenant on the assignment from Mr Shortall to the appellant on 27 April 1983. We are confirmed in that view by virtue of the statements in Esso Petroleum that this is not an area for a literal application of a principle in circumstances where the dividing lines are not readily apparent.

[46] We also reject that submission on the basis of the authorities as to the time at which the reasonableness or otherwise of an agreement in restraint of trade must be determined. The effect of the application of the doctrine is that the restraint is unenforceable rather than void or void ab initio, see Esso Petroleum at 297 E, Lord Denning in Shell U.K. Ltd. v Lostock Garage Ltd. [1976] 1 WLR 1187 at 1198 C - D and Sir Donald Nicholls in Boddington v Lawton and Another [1994] ICR 478 at 491. In order for the restraint to be enforceable it has to be justified as reasonable not only in the interests of the individuals but also in interests of the public, see Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd [1894] AC 535 at 565. The question of reasonableness has to be examined and judged at the time the agreement was struck see Alec Lobb (Garages) Limited and Others v Total Oil (Great Britain) Limited [1985] 1 WLR 173 so that if "at the time of making the contract, it is seen that it may in the future operate unfairly or unreasonably, the courts will not enforce it" see Shell U.K. Ltd. v Lostock Garage Ltd. Also in that case Bridge LJ approved the

trial judge's statement that the "authorities clearly show that the reasonableness or otherwise of an agreement in restraint of trade must be determined once and for all at the time when the agreement is concluded." We consider that there is no authority for an exception to this principle in circumstances where there is an assignment after the time at which the agreement was concluded.

[47] Subject to the reservations we have expressed we agree with the judge's principle 1 which we have set out at paragraph [30]. We consider that principle 2 is a reformulation of principle 1 in different language. We do not consider that principle 3 is correct.

[48] We note that the judge considered that as Mr Shortall always abided by the covenant it was at the date of transfer of the leasehold and freehold lands to the appellant "*a lawful covenant*" and that it was not "now open to the (appellant), to retrospectively argue that, in some way, the covenant was unenforceable and void when it was entered into." We do not agree that the covenant became "lawful" if by that is meant "valid" merely because Mr Shortall chose to abide by it. If the restrictive covenant was subject to the doctrine of restraint of trade it was "unenforceable" rather than "void" and remained "unenforceable" even if Mr Shortall abided by it. Its status as "unenforceable" did not change unless and until it had been established as reasonable which would involve taking into account the interests of the public.

[49] In arriving at the decision that the restrictive covenant was not subject to the doctrine of restraint of trade after the assignment to the appellant the judge referred to the fact that the restrictive covenant affected freehold land referring in that context to the rule in Tulk v Moxhay (1848) 2 Ph. 774, which rule governs the extent in equity to which the *burden* of covenants relating to land run with the land of the covenantor so as to bind successors in title of the covenantor. The judge stated that the restrictive covenant did not affect "the leasehold lands" by which was meant the area subject to the lease. Rather it was a burden on the adjoining freehold lands of the lessor by which was meant the remaining lands. The judge found that in such circumstances the restrictive covenant could only be enforced against successors in title of the remaining lands in accordance with the rules relating to enforcement of restrictive freehold covenants and that it was "therefore a Tulk v Moxhay type covenant" to which the doctrine of restraint of trade did not apply.

[50] We consider that it is important to distinguish between (a) the question as to whether the burden of a restrictive covenant can be enforced against an assignee of the covenantor which in this case depends on the Landlord and Tenant Act (Ireland) 1860 ("Deasy's Act") and in other cases may depend on the rule in Tulk v Moxhay and (b) the quite separate question as to whether freehold or leasehold restrictive covenants are subject to the doctrine of restraint of trade which depends on the application of the principle in Esso Petroleum. The impact of the principle in Esso Petroleum is that *some types of covenants* considered under the rule in Tulk v Moxhay are insulated from the doctrine of restraint of trade. However that is a feature of the

application of the principle that the doctrine does not apply when the covenantor was a person with no previous right to be on the land. Accordingly a covenant given by a purchaser of freehold land to restrict trade on the land which he is purchasing is insulated from the doctrine.

[51] In this case the answer to the first question in paragraph [50] is straightforward. Section 13 of Deasy's Act provides that the benefit of agreements in leases or tenancy agreements can be enforced against the successor in title of the landlord by the tenant. We consider that the burden of the restrictive covenant can be enforced against the appellant under section 13 of Deasy's Act.

[52] The answer to the first question in paragraph [50] in the context of the burden of a covenant affecting freehold land which restrictive covenant is not in a lease would depend on the rule in Tulk v Moxhay. However in this case the question as to whether the respondent could enforce the restrictive covenant against the appellant does not depend on the rule in Tulk v Moxhay as it can be enforced as a leasehold covenant.

[53] The answer to the second question in paragraph [50] in relation to leasehold covenants depends on whether the covenantor has contracted to give up some freedom which otherwise he would have had. A restrictive covenant imposed on a lessee when first entering into the lease would not be subject to the doctrine as the lessee would not have contracted to give up some freedom which otherwise he would have had. However a restrictive covenant affecting trade imposed on the lessor would be subject to the doctrine as the lessor would have contracted to give up some freedom which otherwise he would have had. That is not altered by the fact that the restrictive covenant imposed on the lessor affects freehold land. The principles in Esso Petroleum apply to leasehold covenants on behalf of a lessor.

[54] We note that the judge gave consideration to what the situation would have been if the appellant retained the freehold interest in the lands subject to the respondent's lease but assigned the remaining lands to a third party. In that manner the appellant would no longer own or control the remaining lands and a question would then arise as to whether the restrictive covenant could be enforced by the respondent against an assignee of the remaining lands on the basis that the burden of the restrictive covenant ran with the land under the rule in Tulk v Moxhay. If such a situation occurred not only would the first question arise as to whether the burden of the restrictive covenant had run with the land to the assignee under the rule in Tulk v Moxhay but also the second and separate question would arise as to whether the doctrine of restraint of trade applied to the restrictive covenant. In relation to the first question and in practical terms if the appellant had complied with his obligations under the further covenant in paragraph [9] there would be no need to consider the rule in Tulk v Moxhay. In relation to the second and separate question we have indicated that we do not accept the proposition as suggested by the judge that a consideration of the rule in Tulk v Moxhay "is shorthand for saying the doctrine does not apply to successors in title of freehold land burdened by a

restrictive covenant.” However we make it clear that these questions do not arise for determination on the facts of this case.

Discussion

[55] As we have indicated we agree with the judge’s conclusion that Esso Petroleum establishes principles relating to the general question as to when the doctrine of restraint of trade applies to covenants affecting freehold and leasehold lands.

[56] Prior to the lease dated 8 February 1981 Mr Shortall, as the owner of and in possession of the total area, was free to carry on any trade on any part of that area including trading in textiles, provisions or groceries or permitting others to do so. He obtained benefits for giving up that freedom such as obtaining the opportunity to operate a shopping centre on the total area by obtaining the respondent as an anchor tenant and thereby to develop complementary retailing facilities on the remaining lands. Furthermore he also received a payment of £50,000 by Dunnes which payment was in the context that he had paid £73,000 for the total area. However the question of benefits received by Mr Shortall is part of the analysis as to whether the restraint was reasonable as is the question as to whether the restraint was necessary over a period of 999 years in order to protect the respondent’s investment. Furthermore the analysis of reasonableness is not confined to the respective interests of the parties but must also take into account the public interest. Benefits received for giving up the freedom are not relevant at this stage in deciding whether the doctrine applies. The fact remains that Mr Shortall gave up a freedom he would otherwise have had on which basis the doctrine of restraint of trade applies to the restrictive covenant in the lease between him as lessor and the respondent as lessee. We agree with the judge’s conclusion that the doctrine of restraint of trade applied to the restrictive covenant as between Mr Shortall and the respondent.

[57] As we have indicated the fact that Mr Shortall assigned his interests to the appellant does not mean that the doctrine no longer applies. We consider that the doctrine of restraint of trade applies to the restrictive covenant as between the appellant and the respondent.

Conclusion

[58] We conclude that the doctrine of restraint of trade applies to the restrictive covenant as between the appellant and the respondent. We allow the appeal and remit the case to the judge for determination of *all* outstanding issues.

[59] We consider that preliminary issues have the potential to increase costs. We entertain concerns as to whether this was a case suitable for determination on that basis. We direct that *all* remaining issues in this case should now be resolved at first instance.