IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2014-404-000044
[2014] NZHC 1560

UNDER THE	Declaratory Judgments Act 1908 and the Judicature Act 1908
BETWEEN	BYOF HOLDINGS PTY LIMITED First Plaintiff
	PACIFIC OPTICS PTY LIMITED Second Plaintiff
	CHRIS BISSIOTIS Third Plaintiff
AND	BENCHO LIMITED Defendant

Hearing: 10-12 June 2014

Appearances: G J Kohler QC for Plaintiffs
K Quinn and M Tushingham for Defendant

Judgment: 4 July 2014

JUDGMENT OF GILBERT J

This judgment is delivered by me on 4 July 2014 at 3pm pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Introduction

[1] This case concerns the enforceability of a deed of restraint of trade entered into in the context of the sale of a 33 per cent shareholding in a company that distributes low price sunglasses and other merchandise throughout New Zealand, primarily to service stations and convenience stores.

[2] The deed purports to restrain, forever, the vendor of the shares, BYOF Holdings Pty Limited (BYOF), its current and future directors and shareholders, Pacific Optics Pty Limited (POPL), a company that operates a similar business in Australia, its past, present and future directors and shareholders, and Chris Bissiotis, a director and shareholder of BYOF and POPL, from having any direct or indirect involvement anywhere in New Zealand in any business similar to that operated by Pacific Optics Limited (PONZ), the company in which the shares were sold.

[3] The plaintiffs contend that the restraint is void for uncertainty. Alternatively, they argue that the restraint is unenforceable because it is overly broad in terms of the parties restrained, the activity restrained, the geographic area covered by the restraint, and the duration of the restraint. They seek a declaration that the restraint is void and unenforceable.

[4] The defendant, Bencho Limited, which purchased the shares, claims that the restraint was negotiated at arm's length and freely agreed; substantial consideration was paid for it; both parties received legal advice before it was executed; and it was needed to protect the goodwill of PONZ's business. Bencho argues that the restraint is therefore reasonable and should be enforced. However, if the Court concludes that the restraint is unreasonable and unenforceable, Bencho asks the Court to modify it pursuant to s 8(1)(b) of the Illegal Contracts Act 1970.

[5] The issues requiring determination are therefore:

(a) Is the restraint void for uncertainty?

(b) Is the restraint unreasonable and unenforceable?

(c) If so, should relief be given under the Illegal Contracts Act?

Is the restraint void for uncertainty?

[6] The operative clause in the deed of restraint of trade is as follows:

> In consideration of the purchase price under the Agreement for Sale and Purchase entered into between the Vendor and the Purchaser:
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> (a) The Vendor [BYOF] hereby covenants with the Purchaser [Bencho] that the Vendor, or its present or future directors or shareholders will not either directly or indirectly, carry on or be interested either alone or in partnership with or as manager, agent, director, shareholder or employee of any other person in any business similar to that operated by Pacific Optics Limited within the whole of New Zealand.
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> (b) The Shareholder [Mr Bissiotis] covenants with the Purchaser that he will not either directly or indirectly, carry on or be interested either alone or in partnership with or as manager, agent, director, shareholder or employee of any other person in any business similar to that sold under the Agreement within New Zealand.
>
> (c) POPL covenants with the Purchaser that POPL, or its former, present or future directors or shareholders will not either directly or indirectly, carry on or be interested either alone or in partnership with or as manager, agent, director, shareholder or employee of any other person in any business similar to that sold under the Agreement within New Zealand.

[7] The plaintiffs claim that the restraints in clause 1(b) and (c) are void for uncertainty. This submission focuses on the words "any business similar to that sold under the Agreement". This wording is different from the wording of the restraint in clause 1(a) which refers to "any business similar to that operated by Pacific Optics Limited". Mr Kohler QC submits that, because different wording has been used, a different meaning must have been intended. He argues that the "business" "sold under the agreement" was a minority shareholding in PONZ and intellectual property rights and that this cannot be interpreted as PONZ's business.

[8] While the drafting may be inelegant, the deed must be construed as a whole in the light of the background circumstances to determine objectively what the parties must have intended. I do not consider that there is any significance in the difference in the wording. It seems to me quite plain that the "business" referred to in clauses 1(b) and 1(c) is the business conducted by PONZ; there is no other

sensible interpretation. I reject the plaintiffs' contention that the deed of restraint of trade is void for uncertainty.

Is the restraint unreasonable and unenforceable?

Background circumstances

[9] The reasonableness of the deed of restraint of trade must be considered in the context of the background circumstances in which it was entered into. It is therefore necessary to trace the history of PONZ, including Mr Bissiotis' involvement with that company and the circumstances that led to the sale of POPL's shares in PONZ through BYOF.

[10] Mr Bissiotis was 21years of age when he developed the 'Aerial Vision' brand in 1994. He achieved considerable success distributing sunglasses marketed under this brand in Queensland, Canberra, Victoria and South Australia through POPL. He then decided to expand into the New Zealand market. He approached David Living who had a similar business in New Zealand distributing sunglasses to service stations. Mr Living was initially not interested in becoming involved in distributing Aerial sunglasses. However, he reconsidered his position following a very successful trial of Aerial sunglasses arranged by Mr Bissiotis with Caltex.

[11] PONZ was incorporated by Mr Living in 1997 to act as the New Zealand distributor of Aerial brand sunglasses for POPL. An exclusive licensing agreement was entered into between POPL and PONZ for an initial term of 10 years and PONZ was given a right of renewal for a further period of 10 years.

[12] Mr Living subsequently brought in two business partners, Aaron Ghee and William Susanto. It appears that the partnership soon became dysfunctional which led to Mr Living leaving the company.

[13] The relationship between Mr Ghee and Mr Susanto also subsequently soured as a result of disagreements between them over how the business should be operated. This was when Mr Bissiotis and Po-Ling Liu became involved as shareholders in the company. Mr Liu owns the factories in China where the Aerial sunglasses are

manufactured. Agreement was eventually reached that Mr Ghee would sell his shares and the company would be recapitalised with Mr Liu, POPL and David Eades becoming shareholders with Mr Susanto. At that time, Mr Eades had his own business distributing merchandise to service stations north of the Auckland Harbour Bridge, including Aerial branded products pursuant to a contract with PONZ. Following this restructuring, which was completed on 1 September 2001, Mr Susanto, Mr Liu and POPL each held 60,000 shares in PONZ and the remaining 20,000 shares were held by Mr Eades, who became the sales manager.

[14] Although Mr Bissiotis was living in Australia and running POPL, he assumed the role of general manager of PONZ. As sales manager, Mr Eades dealt with all day to day issues arising with the key accounts and supervised the sales staff who reported to him. Mr Susanto looked after finance and administration. Mr Liu continued to run his manufacturing businesses in China.

[15] PONZ prospered under its new ownership and management. From the time Mr Bissiotis became involved with the company in September 2001, to the time of his exit in August 2008, the annual turnover of the business increased from approximately $3 million to approximately $6 million. It appears that Mr Bissiotis is entitled to much of the credit for this success. Although Mr Eades was the company's sales manager, he described Mr Bissiotis as the driving force behind sales. Throughout this period, Mr Bissiotis travelled to New Zealand frequently to meet with senior executives of the major oil companies and other key customers and negotiated the key contracts. He attended dealer conferences and frequently visited many of the retail outlets to ensure that stands were being re-stocked appropriately and to address any concerns that the retailers had. Mr Bissiotis was able to draw successfully on the experience he had gained in Australia to increase PONZ's sales in the New Zealand market.

[16] Mr Eades remained with PONZ until March 2006. He says that conflicts were starting to develop between the business owners by that stage and he took the opportunity to sell his shares and leave. He negotiated an agreement with Mr Bissiotis whereby PONZ would re-acquire his 10 per cent shareholding for $500,000.

[17] By 2008, Mr Bissiotis was finding it increasingly difficult to work with Mr Susanto. The conflict between the two of them escalated to the point where Mr Bissiotis felt that one or other would have to leave. Although he was then only 35 years of age, Mr Bissiotis was suffering from serious heart problems that required surgery. He was reluctant to leave the company because he had been instrumental in its development but he needed to free himself of the conflict with Mr Susanto. Mr Bissiotis approached Mr Liu and asked him to join him in acquiring Mr Susanto's shares. However, Mr Susanto was not willing to sell and Mr Liu decided to support him in buying POPL out and removing Mr Bissiotis from the business.

[18] Mr Bissiotis set the purchase price at $3 million. Messrs Susanto and Liu agreed to this on three conditions. First, the intellectual property rights for Aerial sunglasses in New Zealand had to be transferred by POPL to PONZ. Second, POPL and Mr Bissiotis had to agree to a restraint of trade preventing them from ever competing with PONZ anywhere in New Zealand. Third, the purchase price was to be paid in instalments over two and a half years without interest. Mr Liu regarded the restraint of trade as critical because he considered that POPL and Mr Bissiotis posed a unique threat to PONZ's business in New Zealand as a result of their long-standing success in the same market in Australia and the intimate knowledge of PONZ's business and customers gained by Mr Bissiotis in his role as general manager of the company over the past seven years.

[19] Mr Liu acted as the intermediary between Mr Bissiotis and Mr Susanto in the initial stage of the negotiations. The parties reached agreement on the key commercial terms in a series of meetings held over a two or three day period in late February 2008. Solicitors were then engaged to negotiate the detailed terms of the transaction. These negotiations continued for several months before the documents were eventually signed.

[20] Bencho was the vehicle used by Messrs Liu and Susanto to acquire the shares. The restraint was drafted by its solicitors. POPL's solicitors suggested that the restraint should be limited as to time and they proposed that it should be for one year from the completion date. Bencho's solicitors replied that their firm

instructions were that the restraint was to remain as drafted; an unlimited term was said to be non-negotiable. In these circumstances, Mr Bissiotis accepted the restraint in the form tendered although he doubted at the time that it would be enforceable.

[21] For commercial reasons, POPL transferred its New Zealand intellectual property rights in the Aerial brand and its shares in PONZ to BYOF. The following documents were then executed on 1 August 2008:

(a) An agreement for sale and purchase of BYOF's 60,000 shares in PONZ for $2,333,333.34 and the New Zealand intellectual property rights for $500,000. This agreement was signed by BYOF as vendor, Bencho as purchaser, and PONZ as guarantor of Bencho's obligations.

(b) An agreement for sale and purchase between Mr Bissiotis and Anthony Owen as vendors and Bencho as purchaser of the shares in Pacific Optics Property Limited, the property owning company, for $166,666.66.

(c) The deed of restraint of trade between BYOF as vendor, Bencho as purchaser, Mr Bissiotis as shareholder, and POPL.

[22] Nearly five years later, in early 2013, POPL purchased a company that distributes Black Ice branded sunglasses in Australia. POPL wanted to distribute these sunglasses in New Zealand and Mr Bissiotis therefore approached Mr Liu to discuss the possibility of them jointly pursuing this opportunity. However, Mr Liu decided not to become involved. This development brought the issue over the enforceability of the restraint to a head.

[23] In October 2013, the plaintiffs' solicitors wrote to Bencho asserting that the restraint was unreasonable and unenforceable and claiming that no restraint beyond five years could be justified. They confirmed the plaintiffs' intention to re-enter the New Zealand market selling consumable goods. They sought a meeting of the parties in accordance with the dispute resolution provisions in the share sale agreement. These require that the parties meet and attempt to resolve any dispute

arising out of the agreement. Failing agreement through discussions in good faith, the agreement required the parties to engage in a mediation conducted by a single mediator. If the parties could not agree on the appointment, the mediator was to be nominated by the President of the Auckland District Law Society.

[24] Mr Liu and Mr Bissiotis were unable to reach agreement when they met to discuss the matter in late October 2013. The plaintiffs therefore sought to mediate the dispute but Bencho declined to participate. The plaintiffs accordingly issued the present proceeding seeking a declaration as to enforceability of the restraint. The particular question posed in the statement of claim is as follows:

> To what extent and in respect of what activity, if any, do the restraints set out in the deed of 1 August 2008 bind or continue to bind the plaintiffs or any of them?

Legal principles

[25] A restraint of trade is void and unenforceable unless it is no wider than is reasonably necessary to protect the legitimate interests of the party seeking to enforce it. The reasonableness of a restraint must be determined on the basis of all relevant circumstances at the time it was entered into, not on the basis of subsequent events.

[26] The leading New Zealand authority on the enforceability of a restraint of trade in connection with the sale and purchase of shares in a business is the Court of Appeal's decision in *Brown v Brown*, a case with some similarities to the present.[1] In that case, two brothers, Robert and Leonard Brown, each held 49 per cent of the shares in Brown Bros (NZ) Ltd, a successful well drilling company. Robert attended to matters of administration, management and sales while Leonard took responsibility for the practical side of the business and worked in the field. The business prospered but the relationship between Robert and Leonard deteriorated to the point where they could not continue in business together. Robert agreed to buy Leonard's shares and in return Leonard and all members of his family entered into a covenant in restraint of trade for 20 years. This effectively prevented Leonard from

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1 *Brown v Brown* [1980] 1 NZLR 484 (CA).

participating in the same industry for the rest of his working life because he was 48 years of age when he signed the covenant in April 1968.

[27] In the High Court, Somers J concluded that the covenant was unenforceable against anyone other than Leonard and should have been restricted to the northern part of New Zealand. Accordingly, the Judge found that the covenant was void at common law. However, Somers J modified the covenant pursuant to s 8 of the Illegal Contracts Act by restricting the area and limiting its scope to Leonard. The Court of Appeal agreed that the covenant was unreasonable and unenforceable and unanimously upheld the modifications made by Somers J. However, the Court was not satisfied that a 20 year restraint was reasonable and it accordingly further modified the restraint by limiting its duration to 12 years, which, by then, had already passed.

[28] Cooke J confirmed the basic rule that the party seeking the benefit of a covenant in restraint of trade has the onus of satisfying the Court that it is reasonable:[2]

> It is elementary that a covenant such as we are concerned with is subject to the restraint of trade doctrine and hence requires justification and that the onus of justifying it as reasonable between the parties lies on the covenantee; but that the law looks more favourably on a covenant intended to protect the goodwill of a purchased business than on a covenant limiting the freedom of a former employee after the contract of service has ended.

[29] His Honour noted that the consideration paid for a covenant in restraint of trade is an important factor to be taken into account in assessing whether the restraint is reasonable:[3]

> The modern tendency is to treat the consideration received by the covenantor in return for the restraint as relevant to reasonableness … The value of a covenant cannot be nicely weighed, nor can a purchase price for a share in a business as a going concern be precisely apportioned. Still, it seems to me safe to say that in general the higher the price that is attributable to goodwill, the slower the Court will be to release the covenantor from his side of the bargain.

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2 At 488.
3 At 490.

[30] The Court was not persuaded that a restraint longer than 12 years could be justified. Since that time had already passed, Cooke J preferred to leave open the question of what period would have been reasonable when the matter was determined by the trial Judge in 1976:[4]

> The Court would be speculating if we attempted to arrive with any useful degree of accuracy on the proportion of the $122,000 attributable to goodwill. As to connection and reputation, it is true that Leonard had an intimate knowledge of the business and was moreover the field man. So for some period he would be an especially dangerous commercial competitor for the company. On the other hand the drilling industry has been an expanding one in New Zealand, with new or changing avenues of activity and developing techniques. And in the various organisations that were clients or potential clients of the business, the responsible personnel would be likely to have changed very considerably between, say, 1968 and 1980. On the evidence there is no firm basis for asserting that if Leonard were to start a competing business in 1980 he would be a significantly greater threat as a competitor because of his association with the company until 1968. This, although not necessarily an exhaustive test must be an important factor in deciding the time for which Robert was reasonably entitled in 1968 to stipulate for protection.

[31] Richardson J emphasised that the reasonableness of a covenant in restraint of trade depends on all of the circumstances affecting the business and the parties at the time the covenant is entered into:[5]

> Any decision as to the reasonableness of a covenant in one or more respects involves an assessment of all the circumstances affecting the particular business and the parties in the position they were in at the time the covenant was entered into. So it involves a weighing, so far as the evidence permits, of such matters as the type of business protected by the covenant, the strength and value of the customer connection, the type of business carried on by the parties, its size, the extent of competition in the fields in which it is carrying on business, and the respective roles and skills of the outgoing shareholder and continuing shareholder in the business and their relationships and standing with the clientele. […] the end decision may well not be susceptible to any extended analysis or elaborate reasoning.

Analysis

[32] Plainly, Bencho had a legitimate interest capable of protection by a reasonable restraint. Indeed, it would be surprising if a sale of shares of this nature did not include some form of restraint and Mr Kohler did not contend otherwise. The critical issue is whether the restraint goes further than was reasonably required

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4 At 490.
5 At 497.

to protect Bencho's interests under the agreement. For the reasons that follow, I have no doubt that it did and it is accordingly void and unenforceable.

[33] The restraint extends to future directors and shareholders of BYOF and former and future directors of POPL. Mr Quinn was unable to advance any argument as to why these parties needed to be restrained to protect Bencho's legitimate interests under the agreement. The deed goes beyond what is reasonably required by restraining these parties from any form of competition with PONZ at any time in the future, anywhere in New Zealand.

[34] Further, a permanent restraint, unlimited as to time, cannot be justified in this case. While Mr Quinn was not authorised to concede the point, he was also not able to offer any cogent explanation as to why such an unlimited restraint was required to protect Bencho's legitimate interests. Instead, he submitted that a 20 year restraint commencing on 1 August 2008 would have been justified. I can understand why Mr Liu would prefer not to face competition from POPL or any past, present or future director or shareholder of POPL, including Mr Bissiotis, at any time in the future. However, that is not a sufficient reason to justify an unlimited restraint.

[35] The plaintiffs pleaded that the restraint was also unreasonable because of the breadth of the activity restrained and the geographical area covered, being the whole of New Zealand. Mr Kohler, quite properly in my view, did not pursue these aspects in his closing submissions. A restraint covering the whole of New Zealand was appropriate in this case because PONZ's business is, and always has been, conducted nationwide. Further, the restraint is appropriately restricted to any business similar to that carried on by PONZ.

[36] For the reasons given, I consider that the restraint was not reasonable. It follows that it is void at common law.

Should relief be given under the Illegal Contracts Act?

[37] Bencho seeks an order from the Court modifying the deed of restraint of trade pursuant to s 8(1)(b) of the Illegal Contracts Act:

> **8 Restraints of trade**
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> (1) Where any provision of any contract constitutes an unreasonable restraint of trade, the court may—
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> […]
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> (b) so modify the provision that at the time the contract was entered into the provision as modified would have been reasonable, and give effect to the contract as so modified;

[38] The plaintiffs accept that it is appropriate for the Court to exercise its power to modify the covenant pursuant to this provision. However, the parties cannot agree on all of the required modifications.

[39] Bencho concedes that the restraint should not have extended to BYOF's future directors or shareholders. Similarly, it accepts that the restraint should not have extended to POPL's former or future directors or shareholders. However, it maintains that the restraint should cover the directors and shareholders of BYOF and POPL as at 1 August 2008, the date of the deed. The plaintiffs do not accept this. They contend that, apart from Mr Bissiotis, only BYOF and POPL should be subjected to the restraint, not their directors and shareholders.

[40] The second area of dispute concerns the period of the restraint. As noted, Bencho contends for a period of 20 years commencing on 1 August 2008. The plaintiffs argue that five years is the limit of what could have been justified.

[41] Finally, Mr Quinn invites the Court to modify the wording of clause 1(b) and (c) so that it mirrors the wording of clause 1(a) and removes any doubt that the restrained activity extends to any business similar to that operated by PONZ. I consider that this is beyond the scope of the Court's power under the Illegal Contracts Act, which is limited to modifying a covenant so that it is reasonable. It is not appropriate to exercise that power to improve the drafting of inoffensive provisions. In any event, I have already determined the correct interpretation of this aspect of the deed and it is therefore not necessary to modify the wording.

Directors and shareholders

[42] It is clear that the restraint drafted by Bencho's solicitors was couched in the broadest possible terms without any thought being given to what might be reasonably required to protect Bencho's legitimate interests as a purchaser of shares in PONZ. This explains why the restraint extended to former, present and future directors and shareholders of POPL, and present and future directors and shareholders of BYOF.

[43] At the time the transaction was entered into, BYOF was a corporate trustee for a partnership of discretionary trusts associated with the shareholders of POPL, including Mr Bissiotis. BYOF was simply used as the vehicle for the transfer to Bencho of the shares and the intellectual property rights. No attention was given at the trial to the position of the directors and shareholders of BYOF or POPL, other than Mr Bissiotis. Understandably, the evidence was all directed to the threat posed to PONZ's business by Mr Bissiotis and POPL. There was no evidence to justify extending the restraint to these other parties, who appeared to have had no involvement in PONZ's business. I consider that the restraint should have been restricted to the covenanting parties, BYOF, POPL and Mr Bissiotis.

Duration

[44] In asserting that the restraint was reasonable, Bencho pleaded in its statement of defence that Mr Bissiotis was closely involved in all aspects of PONZ's business prior to the sale, including ordering and supplying merchandise. There is no dispute that Mr Bissiotis developed important relationships with PONZ's key customers during the period from September 2001 to August 2008 in his capacity as general manager of the company. This is an important factor in considering what period of restraint would have been reasonably required to secure the goodwill at least partly represented by these relationships. However, there was no evidence that Mr Bissiotis or POPL gained any commercially sensitive information on the supply side of the business through their involvement with PONZ. Sunglasses manufactured by Mr Liu's company in China represented close to 70 per cent of all products sold by PONZ at the relevant time.

[45] It is clear that significant consideration was paid for the restraint to protect the goodwill of the business. Mr Hussey, a chartered accountant with considerable experience in carrying out business valuations, assessed the value of all of the shares in PONZ at $4 million as at February 2008. Net tangible assets were approximately $2.250 million and accordingly he assessed the value of the goodwill of the business as being $1.75 million at that time.

[46] As noted, of the total purchase price of $3 million, approximately $2.33 million was allocated to the shares in PONZ. The balance was allocated to the intellectual property rights and the shares in the property owning company. Given that the sale was of a 33 per cent shareholding, the price paid indicated that the value of all of the shares in PONZ was approximately $7 million, assuming no minority discount. Mr Hussey considers that the difference between his valuation of the shares in PONZ and the price paid indicates that over $1 million was paid for the restraint.

[47] The difficulty with this analysis is that the parties did not attempt to value the business at the time they reached their agreement. Nor did they attempt to value the restraint or allocate any part of the consideration for it. Further, Mr Hussey's valuation of PONZ at $4 million, which was as at February 2008, is not consistent with the price paid to Mr Eades in March 2006 of $500,000 for his 10 per cent shareholding, allowing for the increase in PONZ's turnover during the intervening period. It could be argued that the price negotiated with Mr Eades, which valued the company at $5 million in March 2006, was broadly consistent with the price paid to BYOF in August 2008, valuing the company at $7 million. However, the validity of this comparison is confounded by a number of factors including the uncertainty as to whether Mr Eades agreed to a restraint when he sold his shares. None of the witnesses was able to confirm the correct position but, when asked about this in cross-examination, Mr Eades accepted the possibility that he did agree to a 10 year restraint, having sold his distribution to PONZ at the same time for an additional $400,000.

[48] It is not possible on the evidence to determine accurately what consideration was paid to BYOF for the restraint. I accept Mr Hussey's evidence that it was

substantial although I doubt it was at the level he suggested. What is clear is that all parties understood that the restraint was a critically important element of the transaction to protect the goodwill of PONZ's business. I take this into account in assessing the period of restraint that would have been reasonable.

[49] At the time the transaction was entered into, PONZ had been operating for over 10 years. It had established a strong position in its particular market. Mr Bissiotis had played a key role in developing the business and had forged important relationships with key customers over the seven year period he was general manager. Bencho had a legitimate interest in securing a restraint of trade from Mr Bissiotis for a sufficient period to allow it to obtain the full benefit of the goodwill it was acquiring.

[50] However, the market in which PONZ was operating was constantly changing and developing. It was characterised by the frequent introduction of new products, short-term contracts with customers, and continual changes in key personnel. This is demonstrated by the fact that most of PONZ's key customers today are different to those it had in 2008. Its major customers are no longer the oil companies; they have largely withdrawn from retailing merchandise and those operations have been substantially restructured.

[51] Mr Eades was PONZ's sales manager at the time the restraint was entered into. He had been involved in this type of business for over 10 years at that stage and had been working for PONZ as sales manager since September 2001. He had a thorough understanding of how the business operated and he had established good relationships with the key customers. Mr Eades was supported by a number of sales staff including key account managers. This was not a case of a third party buying a business with no prior industry knowledge or customer connections. Nor was it a case that involved the sale of a business with trade secrets or unusual or sophisticated business systems or knowhow. The barriers to entry were comparatively low.

[52] Evidence of industry practice is relevant in determining the length of a covenant in restraint of trade. The only evidence in this case as to what might be

regarded as industry practice came from Mr Hussey. He considered that a five year restraint in a sale of shares in a business like PONZ would be normal and he was not challenged on this evidence.

[53] The only justification for a restraint in this case was to protect the goodwill by securing a reasonable opportunity to maintain and develop the business, particularly the customer relationships, free from any competition from POPL and Mr Bissiotis. Again, no thought was given when the restraint was drafted as to what might have been a reasonable period of restraint to achieve this. Although negotiations continued for an extended period, Bencho was not negotiable about the term and insisted that it had to be for an unlimited period. Bencho cannot say that the term arrived at was the product of careful consideration or negotiation.

[54] Nearly six years have passed since the restraint was entered into. In my view, taking into account all relevant circumstances, six years would have been regarded as a sufficient time to protect Bencho's legitimate interests under the agreement had the parties addressed this issue appropriately at the time. Accordingly, in exercise of the Court's power pursuant to s 8(1)(b) of the Illegal Contracts Act, the deed of restraint of trade should be modified by restricting it to the covenanting parties and limiting the term to six years from 1 August 2008.

Result

[55] The deed of restraint of trade is modified by restricting it to the covenanting parties and limiting the term to six years from 1 August 2008.

[56] Costs are reserved.

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M A Gilbert J