Restrictive Covenants Among Solicitors In England

By Stephen E. Kalish*

Will the courts enforce an employment or partnership agreement between lawyers in which one covenants that on termination she will not work in a particular area, for a specified length of time, and/or for a designated class of clients? Recent American courts have answered never.[1] They have based their opinions on the "ethics" of the profession.

This conclusion is unsound. There is no good reason to treat the practice of law differently from other businesses. I have argued this point elsewhere.[2] The purpose of this article is to expose the American audience to three English cases reported in 1984.[3] The Privy Council, in enforcing a restrictive covenant, rejected the American "ethics" approach as "unjustified in principle." The Council articulated the proper test in such cases: to balance competing interests.

A second purpose of this article is to criticize the Privy Council for incorrectly applying the proper test it articulated. A careful reading of the case supports the conclusion that the Council did not in fact balance competing interests, but merely concluded that the agreement was enforceable because it was fairly agreed to by the law partners. This approach, as the American approach, does not advance the public interest. A final purpose of the article will be to examine the Privy Council's principal authority, a 1921 House of Lords' opinion, and suggest that although the House of Lords articulated a concern with a fair agreement between solicitors, in fact it enforced an agreement in which one of the parties

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1. *See* Dwyer v. Young, 133 N.J. Super. 343, 336 A.2d 498 (Sup. Ct. of N.J. 1975), *noted in* 4 FORDHAM URBAN L.J. 195 (1976); Gray v. Martin, 63 Or. App. 173, 663 P.2d 1285; *In re* Silverberg, 75 A.D.2d 817, 427 N.Y.S.2d 480 (Sup. Ct. 1980).

2. Kalish, *Covenants Not to Compete and the Legal Profession*, 29 ST. LOUIS U.L.J. 423 (1985).

3. Bowers, *Restrictive Clauses and Solicitors*, 1984 NEW L.J. 720.

was "pressured" into signing. The end result may be that in England the courts will unduly emphasize the mere fact that an agreement was made in deciding to enforce a restrictive covenant.

As a general principle of law, the courts, both in the United States and in England, will not enforce a restrictive covenant, ancillary to a partnership or employment agreement, unless the covenant is reasonable.[4] There is a bias against enforcement. The law in both countries favors free competition and mobility. Nevertheless, the courts of both countries recognize that in some circumstances the enforcement of noncompetition covenants is not only fair among the parties, but also promotes the public interest.

The Restatement of Contracts (Second), Section 189, states the elements to be balanced in determining reasonableness: the promissee's legitimate interests, the hardship to the promisor and the likely injury to the public.[5] The courts should apply this balancing test to the business of law practice. The law firm has legitimate interests to protect, such as client relationships and, in some cases, trade information. Unless the firm can protect itself, it may not provide institutional continuity for its clients, and it may be reluctant to entrust clients to particular partners or associates. It is not evident that competing factors will always outweigh these firm interests.

Recent American courts have rejected the common law test of reasonableness.[6] They have argued that the Code of Professional Responsibility makes it per se unprofessional to enter into such a covenant,[7] and, therefore, they will not enforce any restrictive agreement. The Code, as do the new Model Rules of Professional Conduct,[8] reflects the Opinions of the American Bar Association's Committee on Professional Ethics. Beginning in 1960, the Committee decided a series of opinions in which they held such covenants per se unprofessional.[9] The Committee believed that it was beneath the professional status of the lawyer to enter into such an

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4. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960); 47 Halsbury's Laws of England, Trade & Labor, ¶ 9 (4th ed.).

5. Restatement (Second) Contracts § 188 (1981).

6. *See supra* note 1.

7. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-108(a) (1979).

8. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 5.6(a) (1981).

9. ABA Comm. on Ethics & Professional Responsibility, Formal Op. 300 (1961); Informal Op. 521 (1961); Informal Op. 1072 (1968); Informal Op. 1171 (1971); Informal Op. 1417 (1978).

agreement. These agreements were too obviously commercial. They were also redundant. Other provisions of the Code protected such legitimate interests as client confidences. Second, such a provision would be an unwarranted restriction on a lawyer's ability to practice wherever, and for whomever, she wished. Third, and most importantly, the restriction would interfere with a future client's "right" to choose whomever he wished as his attorney.

In 1982, there was a brief hint that the English courts might adopt the American approach. Lord Denning, in *Oswald Hickson Collier & Co. v. Carter-Ruck*, decided a case by interpreting the language of the partnership agreement.[10] His dictum suggested that the English had adopted the *per se* rule.

In 1941, after the death of his partners, Mr. Oswald Hickson continued a thriving practice. On December 30, 1943, Mr. Carter-Ruck joined him in partnership. On January 9, 1944, Mr. Hickson died. Mr. Carter-Ruck purchased his interest in January 9, 1944, and operated it as a sole practice until August, 1944, when he began to bring partners into the practice. The practice always operated under the name of Oswald, Hickson Collier and Co. The articles of partnership provided that "for a period of two years from such retirement . . . [the solicitor would not] approach, solicit, or act for any clients of the firm except . . . any client introduced to the firm by such partner. . . ."[11]

The narrow issue before the court was whether Mr. Carter-Ruck's clients during 1944, clients who had first engaged Mr. Hickson and his firm, were introduced by Mr. Carter-Ruck "to the firm." Lord Denning concluded that they had been.[12] "Firm" meant partnership and the firm/partnership at issue was the one which began in 1944. Therefore, the court would not enjoin him from dealing with these clients. At this point, Lord Denning gratuitously stated:

> It would be contrary to public policy that he should be precluded from acting for a client when that client wanted him to act for him, especially in pending litigation. It seems to me that the submission is right. I cannot see that it would be proper for a clause to be inserted in a partnership deed preventing one of the partners from acting for a client in the

10. Oswald Hickson Collier & Co. v. Carter-Ruck [1984] 2 WLR 847.
11. *Id.*, 2 All ER at ____.
12. *Id.* at 848, 2 All ER at ____.

> future. It is contrary to public policy because there is a fiduciary relationship between them. The client ought reasonably to be entitled to the services of such solicitor as he wishes. That solicitor no doubt has a great deal of confidential information available to him. It would be contrary to public policy if the solicitor were prevented from acting for him by a clause of this kind.[13]

What this meant is unclear. On the one hand, it may have meant that an individual lawyer cannot be precluded from completing litigation once begun. This is certainly true if the firm is unable to continue adequate representation. On the other hand, if the statement meant that a solicitor cannot be precluded from representing a client in situations in which the firm can adequately represent the client, or with respect to future work, Lord Denning had taken a substantial step towards the American rule of per se unenforceability. The leading English Legal Encyclopedia interpreted Lord Denning this way. The Encyclopedia stated:

> However, an injunction to restrain a retiring partner from acting for clients of the firm in alleged breach of a term in the partnership deed will not be granted so as to prevent a solicitor from acting for a client who wishes him to act, on the ground that the fiduciary relationship between a solicitor and his client makes it contrary to public policy to prevent a person from retaining the solicitor of his choice.[14]

Lord Denning's suggestion, however, was short-lived. In 1983, in *Edwards & Others v. Worboys*, the English Court of Appeal (Civil Division) rejected the suggestion that restrictive covenants among solicitors were automatically contrary to public policy, and therefore unenforceable.[15] On the contrary, the Court was receptive to the enforceability of a broad restrictive covenant in a situation in which legitimate employer interests were not jeopardized.

Neve Son & Co. was an old, established law firm, with branch offices in four locations. Mr. Worboys had joined it as a salaried solicitor in 1965 and had been a partner since 1969. He had been a senior partner in charge of the Harpenden office for several years.[16]

In 1983, Mr. Worboys gave notice that he wished to leave the

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13. *Id.* at 849, 2 All ER at ____.
14. 44 Halsbury's Laws of England, Solicitors ¶ 277 n.3 (4th ed.).
15. [1984] 2 WLR 850.
16. *Id.* at 851.

firm. This law suit was initiated to test the validity of a restrictive covenant in the articles of partnership which would have prohibited Mr. Worboys, for a five year period, from practicing law within a five mile radius of any of the firm's branches, from representing any client that lived within a five mile radius of any of the firm's branches, or from representing any person who had been a client of the firm, at any of its branches, within the last five years.[17]

The only issue before the Court of Appeals was whether the trial judge had been correct in issuing a preliminary injunction pending a trial on the reasonableness of the restriction. Thus the issue was a narrow one. The Appeal Court agreed that the injunction was appropriate and that there was a reasonableness issue to be tried.[18] It rejected Lord Denning's suggestion that the covenant might be per se unenforceable.[19] At most, his dictum was relevant to cases of pending litigation.[20]

From an American perspective, there are two interesting features of the Court's opinion. First, in rejecting the per se approach, the Court addressed none of the arguments which have informed the Committee of Ethics of the American Bar Association. It was as if these arguments were frivolous. Second, although the court refused to speculate on hypothetical possibilities, it seemed open to the enforcement of the covenant even in circumstances in which the firm had no legitimate interest to protect. For example, what interest would the firm have in preventing Mr. Worboys, who had worked at Harpenden, from representing a client of the Luton office, who Mr. Worboys had never met, in a case several miles from Luton. The firm had not entrusted Mr. Worboys with an introduction and a relationship. The firm had not permitted Mr. Worboys to learn information about the client. The firm did not even need time to hire a replacement in the Luton office. Regardless, the Court, although not concluding that the agreement was reasonable as a matter of law, seemed open to the enforcement of the restriction.

In 1984, in *Bridge v. Deacons*, the Privy Council, applying English law, enforced a restrictive covenant in a case from Hong

17. *Id.*
18. *Id.* at 853.
19. *Id.* at 852.
20. *Id.*

Kong.[21] Lord Fraser of Tullybelton "emphatically" rejected the suggestion that restrictive covenants were generally unenforceable as a matter of public policy. Such a per se rule would be "unjustified in principle."[22] The underlying premise of his argument was that a solicitor was entitled to refuse to act for a particular person.[23] Given this right, Lord Fraser could not see why a solicitor could not bind himself not to act in the future for a particular group of would-be clients.[24] Unlike the American Bar Association Committee, Lord Fraser placed no emphasis on a future client's alleged right to choose the attorney of his choice.

Lord Fraser suggested that the public interest encouraged the use of reasonable restrictive covenants in the legal profession. The covenants facilitated the hiring of young persons by established law firms. This benefited clients by tending to secure the institutional continuity of their institutional solicitors.[25] Moreover, in balance, the Lord believed that it aided young solicitors by encouraging their entry into the profession.[26]

The Lord repeated the usual rule that covenants in restraint of trade are unenforceable unless they can be shown to be reasonable,[27] and he repeated the law's bias in favor of permitting each person to use her skill and training as she wished.[28] He wrote that only "legitimate interests" of the firm would be protected by the restraint. However, in this case, there were no legitimate interests beyond the obvious interest in enforcing the agreement.

Deacons, the law firm, was a large, highly departmentalized Hong Kong firm. Mr. Bridge was a full partner. He was in charge of the industrial property department, which was physically separated from the rest of the firm. Mr. Bridge had responsibility for about 10% of the firm's files, and he "had no connection or dealings with the great majority (over 90 percent) of the (firm's) clients."[29] The restrictive covenant, signed by Mr. Bridge when he

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21. [1984] 2 WLR 837.
22. *Id.* at 846.
23. *Id.*
24. *Id.*
25. *Id.* at 845.
26. *Id.*
27. *Id.* at 839.
28. *Id.* at 840 (quoting Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., 1894 A.C. 535, 565).
29. [1984] WLR at 842.

became a partner, prohibited him from acting as a solicitor in Hong Kong for any client of the firm's for a five year period.[30]

The firm's legitimate interest is in protecting its client base from unfair competition. The firm could rightfully have objected to Mr. Bridge working for clients that the firm had introduced him to or entrusted to his care. Without this protection, the firm might have argued that there would have been no introduction or entrusting in the first instance. The firm might have argued that if Mr. Bridge had learned anything about a client while working for the firm, this was information that belonged to the firm and could not be used by Mr. Bridge to the firm's disadvantage. The firm might even have argued that it had a legitimate interest in hiring a replacement for Mr. Bridge so as to allow it a chance to continue to serve its clients. These would all be legitimate interests entitled to reasonable protection, if Mr. Bridge intended to compete for those 10% of the firm's clients for whom he worked and to whom he was known.

Lord Fraser, however, insisted that the restriction was reasonable as to all the firm's clients, even those 90% which Mr. Bridge had never worked for, had never known, and had no competitive advantage over any other Hong Kong solicitor.[31] In other words, the Court enforced the covenant even though the firm had no legitimate interest to protect.

What is left is the obvious interest each partner had in holding his fellow partners to an originally fair agreement. The Lord stated that all the partners were subject to the same restriction.[32] This mutuality, even the apparent disadvantage from the perspective of the more powerful senior partners, convinced the court that the agreement was fair among the partners. Lord Fraser also argued that the firm's good will, which the covenant was designed to protect, had been sold by Mr. Bridge when he first signed the partnership agreement, not when he received a payment on leaving the firm.[33] All this means, however, is that Mr. Bridge agreed to give up his future "rights" to compete when he entered the original employment agreement. In substance, then, the Court is suggesting that a fair agreement among the parties is by definition a reasona-

30. *Id.* at 839.
31. *Id.* at 843.
32. *Id.*
33. *Id.* at 845.

ble restriction.

In reaching this conclusion, the Lords relied on the 1921 House of Lords' opinion in *Fitch v. Dewes*.[34] The case is instructive on three counts. First, the House of Lords applied the test which the Privy Council claimed to follow. The House of Lords held that the firm had legitimate interests to protect. Second, the House of Lords asserted, as had the Privy Council, that the public interest, in certain circumstances, encouraged covenants not to compete.[35] Third, the House of Lords stated that there was no over-reaching and that the covantantee, in that case, had voluntarily entered into the agreement.[36] The actual facts of the case make this assertion suspect.

In 1899, Thomas Birch Fitch, a boy of 15 years, became a junior clerk for the solicitor, John Hunt Dewes, in the town of Tamworth. Fitch agreed that if his employment should terminate, he would not practice within 7 miles of Tamworth for an uncertain period of years. In 1903, Fitch entered into Articles with Dewes. He committed himself to a similar agreement. After being admitted as a solicitor, in 1908, and again in 1912, Fitch agreed to serve as a managing clerk for Dewes. Fitch drafted both these agreements, and in both, he agreed not to practice as a solicitor within 7 miles of Tamworth for life.[37]

In deciding to enforce the agreement, Lord Birkenhead articulated the reasonableness test as follows:

> [F]irst, is it against the public interest? and, second, does that which has been stipulated far exceed what is required for the protection of the covenantee?[38]

As to the second question, Lord Birkenhead believe that Dewes had a legitimate interest to protect. Dewes had entrusted his managing clerk with his clients. Over the course of years, Fitch had done an increasing amount of work directly for these clients. In these circumstances, Lord Birkenhead believed that it would be unfair to permit Fitch to compete.[39]

Lord Birkenhead also had no problem with the lifetime re-

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34. [1921] 2 A.C. 158.
35. *Id.* at 165.
36. *Id.* at 167.
37. *Id.* at 161-62.
38. *Id.* at 163.
39. *Id.* at 165.

striction. Any time period was arbitrary. Since the parties agreed to a restriction for life, this period was as reasonable as any other. Moreover, what Dewes was trying to secure was his goodwill and a lifetime restriction was probably necessary to secure it. Without this restriction, Dewes might have had a smaller practice to pass to his successors.[40]

Lord Birkenhead also argued that it was in the public interest to permit enforcement of clauses like this. As was repeated by the Privy Council in 1984, without such restrictions, partners might not take young persons into their offices and entrust them with "the confidential knowledge to be derived by frequenting those office."[41]

Finally, Lord Birkenhead believed that the agreement was fair between the parties. In his judgment, there was no overreaching. The Lord believed that it was only necessary to focus on the agreement of 1012. At that time, Fitch, who was 27 years of age, "was a young man alert and very competent both to understand and to safeguard his own interest."[42] Therefore, the Lord concluded, the agreement was a fair one.

The alleged equal bargaining situation, however, is suspect. Concededly, Fitch was 27 years old, but he had only worked for Dewes, and, most importantly, he had entered into prior restrictive covenants which would limit his ability to compete if he had not signed the 1912 agreement. By ignoring these agreements which Fitch had first signed when he was merely 15, Lord Birkenhead only focused on a part of the situation. Although Fitch might have been a mature 27 years in 1912, he was in fact in a position in which he would have had considerable trouble in finding another job if he had not signed the agreement with Dewes.

In conclusion, the English courts articulate a better rule than do the American courts. There is no good reason to treat the practice of law differently from other businesses. However, the English courts do not apply the general rule correctly. Rather than focusing on the employer's legitimate interests, and then balancing them against the hardship to the promisor and the likely injury to

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40. In England, contrary to the rule in America, solo practitioners are permitted to sell their law practice as going concerns. *See* Halsbury's Laws of England, Solicitors ¶ 277 (4th ed.); Kalish, *The Sale of a Law Practice: Model Rules of Professional Conduct Point in a New Direction*, 39 U. Miami L.J. 471 (1985).

41. [1921] 2 A.C. at 165.

42. *Id.* at 162.

the public, the English courts give an undue weight to the mere fact of a fair agreement among solicitors. This error is compounded in that in determining what is a fair agreement, the English courts may be insensitive to the covenantee's real bargaining position.