Neutral Citation Number: [2022] EWCA Civ 889

Case No: CA-2021-000638

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch)
INSOLVENCY AND COMPANIES COURT JUDGE JONES SITTING AS A JUDGE OF THE HIGH COURT
BL-2020-001411

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2022

Before :

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
LORD JUSTICE ARNOLD
and
LADY JUSTICE WHIPPLE

- -

Between :

DWYER (UK FRNCHISING) LIMITED	**Appellant/ Claimant**
- and -	
(1) FREDBAR LIMITED **(2) SHAUN ROWLAND BARTLETT**	**Respondents/ Defendants**

- -
- -

Nigel Jones QC and Paul Strelitz (instructed by **Owen White Limited**) for the **Appellant**
David E Grant QC and Anson Cheung (instructed by **direct access**) for the **Respondents**

Hearing dates : 24 and 25 May 2022

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Approved Judgment

Sir Julian Flaux C:

Introduction

1. This appeal concerns the enforceability of post-termination restrictive covenants in a ten year franchise agreement between the claimant (to which I will refer as "Dwyer") and one of its former franchisees, the first defendant (to which I will refer as "Fredbar"). The second defendant (to whom I will refer as "Mr Bartlett") was a director and shareholder of Fredbar and guarantor of its obligations under the franchise agreement.

2. Dwyer appeals, with the permission of Lewison LJ, against paragraph 3 of the Order dated 17 May 2021 of Insolvency and Companies Court Judge Jones, sitting as a Judge of High Court in the Business List, declaring that the restrictive covenants in the franchise agreement are unenforceable between Dwyer and Fredbar and Mr Bartlett.

Factual and procedural background

3. There were a number of matters in issue at the trial before the judge, but since the appeal is limited to the issue of the enforceability of the restrictive covenants, I will only set out in summary the facts relevant to that issue. Dwyer is a substantial company with more than thirty "Drain Doctor" franchises covering over sixty territories. It describes itself as the UK's largest full-service emergency plumbing and drainage company operating in commercial and domestic sectors, and its ultimate parent in Waco, Texas is described by Dwyer as the world's largest home service franchise business.

4. In contrast, Fredbar was incorporated on 24 September 2018 by Mr Bartlett with the intention of it becoming one of Dwyer's franchisees in parts of Cardiff, operating under the "Drain Doctor" name. He had no previous experience of plumbing and drainage work or of being a company director, although in December 2018 he did complete a course in plumbing provided by Dwyer.

5. Prior to entering the franchise agreement, Mr Bartlett completed a self-assessment report for Dwyer which the judge found was potentially relevant to the construction and application of the agreement. The information disclosed that the franchise would be his sole source of income once he left his current employment where he was earning £38,000 a year. He had a £134,000 mortgage on the family home. His partner had a relatively small income and his available assets of £20,000 subject to a £5,000 loan would inevitably be tied up in the business. The judge found at [86] of his judgment that it would have been obvious to anyone at the time the agreement was concluded that the reality was that the family home would be at risk if the business failed. This was a major decision for Mr Bartlett, giving up the security of his current employment for the purposes of achieving the benefits for franchisees promoted by Dwyer.

6. Mr Bartlett received a series of projections from Dwyer during the negotiations leading up to the agreement which set out a list of start-up costs, profit and loss accounts for months 0-12, 13-24 and 25-36 with cash flows for the same periods. Turnover was calculated using averages obtained from data regularly submitted by Dwyer's franchisees. There was no research specific to the Cardiff area where Dwyer did not have an existing franchise nor was there any filtering out to take account of how long a franchise had been in existence. We were informed during the appeal hearing that the nearest existing Drain Doctor franchise was at Avonmouth.

7. Originally, on 6 September 2018, Mr Bartlett decided not to proceed, so further projections were provided by Dwyer. He sought a loan from his bank, producing a business plan. As already noted, he incorporated Fredbar on 24 September 2018. On the same day, he was sent a copy of Dwyer's standard form franchise agreement, which ran to some 100 pages. His evidence was that he did not examine its terms, but, as the judge found at [107], he could have studied its contents and taken legal advice on it, although he did not do so.

8. Mr Bartlett attended an orientation or induction day at the end of September 2018. At [108] of his judgment the judge referred to the evidence of Mr Jeannes, the "managing director" (although not on the board of directors) of Dwyer, that having met Mr Bartlett before and at that event he: *"knew … he required more support and hand holding than any other franchisee in getting set up, including help with quite simple tasks … he struck [him] as someone who was overactive and tended to be easily agitated … he was needy, prone to agitation and had had difficulty in building relationships, including [subsequently] with customers"*. As the judge said, on the basis of that assessment, one might have expected him to be rejected as a franchisee and that is plainly what Mr Jeannes thought, since he found it necessary to justify his acceptance of Mr Bartlett on the basis that: *"everybody deserves a chance".*

9. After that event, the agreement in a form to be signed, together with a side letter concerning a contribution by Dwyer to the purchase of vans by Fredbar, were emailed to Mr Bartlett on 3 October 2018. On 4 October 2018 Mr Barton of Dwyer went to Mr Bartlett's house with the original agreement which Mr Bartlett signed. There was controversy at trial about this meeting, Mr Bartlett saying he was put under pressure and told that it was a *"take it or leave it"* decision. The judge found at [128] that the terms of the agreement made clear that the franchisee should seek legal advice, but Mr Bartlett had not done so. He did not accept Mr Bartlett's evidence that he told Mr Barton he wanted to consult a solicitor. The judge found at [129] that Mr Bartlett had only received the agreement the day before which would not have given him time to study it properly or seek advice, but it was in the same form as the draft sent on 24 September 2018 which he could have studied and taken advice upon since then. The judge rejected any suggestion that there was improper pressure or coercion.

10. The relevant restrictive covenants were in clause 18.2.1 of the franchise agreement and provided as follows:

> *"Post termination restrictions on the Franchisee*
>
> *18.2.1 Following termination or expiration of this Agreement, the Franchisee will not for a period of one (1) year thereafter directly or indirectly:*
>
> *18.2.1.1 be engaged concerned or interested in a business similar to or competitive with the Drain Doctor Business within the Exclusive Marketing Territory (save for a financial interest which does not allow the Franchisee to influence the economic conduct of such a business);*
>
> *18.2.1.2 be engaged concerned or interested in a business similar to or competitive with the Drain Doctor Business which*

> *operates within a radius of five (5) miles from the Exclusive Marketing Territory;"*

11. The franchise agreement became effective on 22 October 2018 after payment of the franchise fee of £35,000 plus VAT, although Mr Bartlett had started preparation before then. Trading began in January 2019. In the first year of trading the net profit was some £35,000 on a turnover of £81,816 in contrast with the projected turnover of £147,913 plus National Account work (accounts which Dwyer had nationally such as JD Wetherspoons). The judge made detailed findings to the effect that the business was nothing like as profitable as anticipated and Mr Bartlett could not afford a second van and employee (projected to be taken on after eight months). By March 2020 he was looking to sell the franchise.

12. The pandemic then intervened. On 24 April 2020 Mr Bartlett notified Dwyer that he would be self-isolating for three months on his doctor's advice (and in accordance with government Covid-19 advice) because his son was vulnerable. Dwyer then suspended any payments due from Fredbar and Mr Bartlett on the basis that the business was not operating during this period.

13. On 16 July 2020, Mr Bartlett emailed Dwyer purporting to terminate the agreement. The email alleged conduct by Dwyer including misrepresentation and undue influence at the time of entering the agreement and subsequent breach (misapplying "MAP" funds and failing to comply with the force majeure clause when he needed to self-isolate) said to justify termination. He also asserted that, even if he was not entitled to terminate the agreement, he no longer intended to be bound by its terms.

14. At around the same time in July 2020, Mr Bartlett ceased operating the Drain Doctor business and began to operate a competing business, "Daily Drains", offering materially the same services as the Drain Doctor franchise within the territory specified in the franchise agreement and elsewhere.

15. On 19 August 2020, Dwyer wrote to Mr Bartlett saying that his purported termination of the agreement was ineffective and constituted a repudiatory breach of the agreement, which it accepted as terminating the agreement.

16. On 4 September 2020 Dwyer then issued a Part 7 claim form and sought an interim injunction restraining the defendants from carrying on the competing business. On 17 September 2020, Nugee J (as he then was) declined to grant an injunction, but ordered an expedited trial which took place before ICC Judge Jones on 18, 19, 22, 26 and 30 March 2021.

The judgment below

17. In his judgment dated 11 May 2021, the judge held that Dwyer had committed repudiatory breaches of the franchise agreement including failure to comply with the force majeure clause, but that the defendants had affirmed the agreement in April and May 2020. As a consequence, Mr Bartlett's email of 16 July 2020 purporting to terminate the agreement was itself a repudiatory breach and Dwyer had validly terminated the agreement by its 19 August 2020 letter. A trial of the quantum of damages suffered by Dwyer has yet to take place.

18. Of relevance to this appeal is the section of the judgment (section I7) dealing with the enforceability of the restrictive covenants. Having set out the provisions, at [293] the judge noted that restraint of trade covenants are on their face contrary to public policy and that it is for the party seeking enforcement to satisfy the Court that the provisions are designed to protect their legitimate interests and extend no further than is reasonably necessary to achieve that purpose. He accepted the submission on behalf of Dwyer that the approach to be taken in this case is more akin to the treatment of clauses in contracts of sale than in employment contracts and said that he would approach the test of reasonableness accordingly.

19. At [294] the judge dealt with the evidence put forward by Dwyer through Mr Jeannes on the need for the application of the restrictive covenants. Given that Mr Nigel Jones QC on behalf of Dwyer placed some reliance on this evidence in his submissions to this Court, it is worth setting out what the judge said in full, since it is clear he was unimpressed and placed no weight upon it:

> "I have considered the evidence of Mr Jeannes at paragraph 47 of his third witness statement dealing with the need for their application. There is no evidence, however, dealing with the intentions of the parties concerning the restraint of trade covenants either during negotiations or upon completion of the Agreement. There is no factual evidence to link the Claimant's inability to recruit a new franchisee to the continued trading of Fredbar Limited in its new business. There are no facts stated to establish the general proposition that continued operation of a former franchisee within the Claimant's territory makes recruitment difficult or prejudices the success of the future franchisee. The whole paragraph is short of evidence to support the statements made and appears more to be lawyer than witness led in its drafting."

20. The judge then set out in summary each side's submissions and at [301] he turned to his decision on enforceability. He referred to the decision of the Court of Appeal in *ChipsAway International Ltd v Kerr* [2009] EWCA Civ 320, which considered restraint of trade provisions in a franchise agreement prohibiting the former franchisee from engaging for a period of 12 months in any business within the former territory which would compete with the type of business carried on pursuant to the franchise agreement, without the franchisor's prior written consent. The Court of Appeal noted that the purpose of the provisions was to avoid competition and thereby allow the franchisor to exploit the goodwill that had accrued when recruiting another franchisee. The exploitation included the ability to sell a franchise with the protection of the covenants.

21. The judge noted at [303] that the Court of Appeal referred to the decision of Neuberger J, as he then was, in *Dyno-Rod plc v Reeve* [1999] FSR 148 at 155:

> "It is obvious that the plaintiff will be likely, and one would have to judge this at the date of the agreement, to have far greater difficulty in attracting a new franchisee if the ex-franchisee is known as a Dyno Rod franchisee with all the Dyno Rod experience and contacts and is operating in the territory. An ex-franchisee has the benefit of considerable investment by the

> plaintiff which puts the ex-franchisee in a better position than others. Provided that it is reasonable in terms of the public interest and not unfair to the ex-franchisee in terms of time or area, the plaintiff is entitled in my judgment to ensure that his investments are protected by ensuring that unfair advantage is not taken by an ex-franchisee by for example for instance prematurely determining the franchise agreement and setting out on his own."

22. At [304] the judge recorded that Mr Strelitz for Dwyer submitted that this passage was the answer to the claims that the provisions in this case are unreasonable and unenforceable. The judge said this in response:

> "It might be but whether that is so will depend upon the circumstances of the particular agreement when it was entered into. It may be reasonable for one franchisor to be protected against another franchisee for 12 months or longer upon the terms drafted but not necessarily reasonable for another in different circumstances and/or on different terms."

23. At [305] the judge set out his reasons for concluding that the provisions in this case are unreasonable. Given that many of the submissions before this Court focused on this part of the judge's analysis, it is necessary to set it out in full:

> "Notwithstanding the goodwill to be protected by the restraint of trade clauses, they are unreasonable for the following reasons (which stand together and individually):
>
> a) When the Agreement was made the Claimant knew that Fredbar Limited with Mr Bartlett as its only employee was starting this type of business with no previous experience, with the risk that average projections achieved by other franchisees would not apply to the Cardiff territory and/or be achieved by Fredbar Limited taking into consideration the absence of any specific market information and/or that inexperience. In addition the Claimant knew that Mr Bartlett was investing all his savings, would have no other source of income other than his partner's relatively small one and would be at serious risk of losing the family home should Fredbar Limited's franchise business not succeed.
>
> b) In that context of knowledge, the Claimant through Mr Jeannes had formed the opinion that failure was foreseeable because Mr Bartlett *"... required more support and hand-holding than any other franchisee in getting set up, including help with quite simple tasks ... he struck [him] as someone who was overactive and tended to be easily agitated ... he was needy, prone to agitation and had had difficulty in building relationships, including [subsequently] with customers"* (see paragraph 108 above) and was only being accepted because *"everybody deserves a chance"*.

c) It would be wrong to draw a distinction between Fredbar Limited and Mr Bartlett in this context for the purposes of Fredbar Limited's clauses. That is because Fredbar Limited's business would start as and could remain in effect a service company for Mr Bartlett. The Claimant understood it to be Mr Bartlett's vehicle.

d) There was no evidence of any discussion or negotiation of the restraint of trade terms to take into consideration the facts and matters above. This occurred in the context of a total inequality of arms. Instead the Agreement had to be accepted or rejected in its standard form.

e) Despite those facts and matters, the prohibitions did not provide for them to be disapplied with written consent with or without (although that in itself would probably have been unreasonable) a "not to be unreasonably withheld condition". That was unreasonable in itself but also in the specific context of the prohibitions failing to distinguish between terminations at an early stage of the franchise and terminations towards the end of the ten year term when the goodwill to be protected would probably be substantially more valuable. It was unreasonable for the 12 month restraint to apply however early or late in the term the Agreement terminated.

f) The first prohibition would prevent Fredbar Limited being used by Mr Bartlett or himself from being engaged or concerned in any plumbing or drainage business within the Cardiff territory without exception. It would mean, therefore, that Fredbar Limited could not act as a subcontractor and/or Mr Bartlett could not be employed by a plumbing or drainage company or use Fredbar Limited as his service company for that purpose. That would be the case even when such sub-contracting and/or employment would have no effect on the Claimant's protected goodwill. The unreasonableness of this is obvious in the circumstances known to the Claimant at the time the Agreement was made. In particular when it was reasonably foreseeable at the date of the Agreement that its application would seriously increase the risk of Mr Bartlett being unemployed and he and his family facing mortgagee possession proceedings for want of income.

g) In that context it is to be noted that the clause itself recognised the need to distinguish and exclude circumstances where there would be no influence on the economic conduct of the business. However, that was only in respect of obtaining a financial interest in a plumbing and/or drainage business during the 12 months. Having recognised the reasonableness of such an exception, it was unreasonable for that exception not to apply in the context of *"engagement [or] concern"*.

> h) The second prohibition extended the prohibition to an unreasonable radius. There would be no goodwill to protect insofar as Fredbar Limited had not provided services within any part of the extended area. The fact that Fredbar Limited was able to work outside its territory in limited circumstances under clause 3 of the Agreement did not mean it would be reasonable to prohibit engagement concern or interest outside the territory of the Agreement whether any goodwill had been established or not. Especially when clause 3 provided that Fredbar Limited could not actively solicit customers outside the area.
>
> i) Mr Grant's approximation of the area covered on a map clearly showed the unreasonableness of its coverage taking into consideration not just measurement but the different markets within the area outside Cardiff. In addition, this second provision did not even contain the financial interest exception appreciated as reasonable for the first prohibition.
>
> j) Although Fredbar Limited would gain knowledge from the Claimant concerning the operation of a plumbing and drainage business and the requirements of the services provided to customers during the franchise term, there were no trade secrets to be protected by these prohibitions. In any event insofar as there was knowledge to protect, protection could have been provided (to the degree entitled) by more specific provisions. For example, the prohibitions against soliciting or specifically from acting for former customers.
>
> k) There was no reciprocity to be applied should the Claimant have committed a repudiatory breach."

24. The judge went on to conclude at [306] that the covenants were unenforceable and that this was not a case where the unreasonable part could be severed, saying: "These prohibitions do not strike a reasonable balance between the freedom to contract and the freedom of trade. They are far more extensive than was required to provide reasonable protection."

The Grounds of Appeal and the Respondents' Notice

25. Of the Grounds of Appeal on which Dwyer was granted permission, Ground 3 challenged the judge's conclusion that the use of the MAP fund was a repudiatory breach, but it would only have been pursued if the defendants had sought to appeal the judge's finding that they had affirmed the agreement. Since they did not seek to appeal that finding, Ground 3 is academic and no more need be said about it.

26. The other two Grounds are:

    (1) In concluding that the restrictive covenants were unenforceable the Judge erred by considering irrelevant and impermissible factors;

(2) The Judge erred in concluding that any unreasonable part of the restrictive covenant could not be severed.

27. Fredbar and Mr Bartlett seek to uphold the judge's Order on three additional Grounds set out in the Respondents' Notice:

(1) If an analogy *must* be used when assessing the reasonableness of the covenant, then it should be to the case of an employer/employee rather than to a contract of sale.

(2) The Restrictive Covenants are unreasonable for the additional reason that they would prevent the defendants from trading from Fredbar's registered office (Mr Bartlett's home).

(3) The Restrictive Covenants are unreasonable for the additional reason that there is no legitimate interest in simply reducing competition.

The parties' submissions

28. I will summarise the submissions of the parties. In doing so, I will, where appropriate, set out citations from authorities on which they particularly relied so that it will not be necessary to cite them again in the Discussion section of this judgment.

29. On behalf of Dwyer, Mr Jones QC emphasised that this was quintessentially a commercial arrangement and that, on the figures which the judge accepted, it was potentially a highly successful venture which the franchisee elected to enter intending to make a profit. What Dwyer did as franchisor was entirely typical: it created a business model with systems to support it and a detailed manual which told a franchisee how to manage every conceivable part of the business to his benefit. There was training at the outset and during the franchise.

30. He submitted that the starting point was that there was goodwill to be protected and the restrictive covenants fulfilled a policing requirement because franchisees would expect the franchisor to maintain the value of the business by ensuring that other franchisees enhance and do not devalue the brand. All franchisees would expect to be subject to restrictions, so that if there was a termination, the franchisor could get an alternative franchisee going without competition in the franchise territory and the buffer zone around it. The restraint of trade covenant is enforceable if the covenantee has something which is entitled to be protected and the covenant gives no more than reasonable protection for that. The issue was to be determined at the time the agreement was entered into, taking account of its expected duration, here ten years.

31. Mr Jones QC submitted that the judge had fallen into error in [305] of the judgment in a number of respects. First, the assessment of Mr Bartlett by Mr Jeannes at the induction day quoted in [108] of the judgment (and set out at [19] above) and his precarious financial position (for example the reference at [305(a)] to the risk of Mr Bartlett losing the family house if the business did not succeed) were irrelevant and were nothing to do with the reasonableness of the restraint. The personal circumstances of the franchisee could not affect the reasonableness of a restraint and were irrelevant to the question of what protection the franchisor required. This might be harsh, but it was correct.

32. Second, he submitted that inequality of bargaining power was irrelevant, on the basis that in a standard form contract where there was no ability to negotiate the inequality makes no difference to the question of what is required to protect the position of the franchisor. In fact, the interests of the franchisor and franchisee are the same because of what the franchisee is acquiring. He submitted that you could not have a franchise network with hundreds of agreements separately negotiated on a bespoke basis. In the course of argument, Arnold LJ put to him that it was not necessary to treat all franchisees equally if they were not equal, in particular if one was a novice and unsuitable as a franchisee, but another was experienced and established with a successful business. Mr Jones QC submitted that it could not be appropriate for the type of restriction to depend upon whether or not the covenantor might present competition in due course. The franchisor would not be able to sell a franchise to a replacement franchisee unless that franchisee could get a proper start.

33. It is fair to say Mr Jones QC resiled from the position that inequality of bargaining power was irrelevant when the Court referred the parties to the recent decision of the Court of Appeal in *Quantum Actuarial LLP v Quantum Advisory Ltd* [2021] EWCA Civ 227; [2022] 1 All ER (Comm) 473 (*"Quantum"*) where, in summarising the applicable principles on reasonableness of restrictive covenants at [65] of her judgment, Carr LJ identified at (vii) inequality of bargaining power as one of the factors to be considered when assessing reasonableness between the parties. In reply, Mr Jones QC accepted that in the light of *Quantum*, inequality of bargaining power could be considered in franchise cases, as in other cases of restraint of trade. However he submitted that it should be approached with real care given that the franchisee had the benefit of a ready-made business.

34. Third, Mr Jones QC submitted that there was evidence at trial about the need for time to identify and recruit a replacement franchisee without facing competition from the previous franchisee, referring specifically to Mr Jeannes' evidence. He submitted that the judge had not addressed this in [305], but this appears to overlook what the judge had said about that evidence at [294] which I quoted at [19] above, from which it is clear he thought this point was a lawyer's construct. There is no appeal from that assessment.

35. Mr Jones QC then took the Court through the authorities on restraint of trade starting with the famous passage from the judgment of Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co* [1894] AC 535 at 565 which is the foundation of the modern law:

> "The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to

> afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

36. Mr Jones QC then cited extensively from the speeches of the House of Lords in *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 in support of the proposition that, if the restraint affords no more than the protection needed, then it is reasonable and that in those circumstances the interests of the covenantor and the covenantee are aligned. He relied in particular on a passage in the speech of Lord Parker of Waddington at 707-8:

> "I think it clear that what is meant is that for a restraint to be reasonable in the interests of the parties it must afford *no more than* adequate protection to the party in whose favour it is imposed. So conceived the test appears to me to be valid both as regards the covenantor and covenantee, for though in one sense no doubt it is contrary to the interests of the covenantor to subject himself to any restraint, still it may be for his advantage to be able so to subject himself in cases where, if he could not do so, he would lose other advantages, such as the possibility of obtaining the best terms on the sale of an existing business or the possibility of obtaining employment or training under competent employers…
>
> If it be reasonable that a covenantee should, for his own protection, ask for a restraint, it is in my opinion equally reasonable that the covenantor should be able to subject himself to this restraint. The test of reasonableness is the same in both cases."

37. He also relied upon a passage in the speech of Lord Shaw of Dunfermline at 713-4 which, although discussing restraints in contracts for the sale of a business, was an analysis which Mr Jones QC submitted was equally applicable to the sale of the franchise in the present case:

> "When a business is sold, the vendor, who, it may be, has inherited it or built it up, seeks to realize this piece of property, and obtains a purchaser upon a condition without which the whole transaction would be valueless. He sells, he himself agreeing not to compete; and the law upholds such a bargain, and declines to permit a vendor to derogate from his own grant. Public interest cannot be invoked to render such a bargain nugatory: to do so would be to use public interest for the destruction of property. Nothing could be a more sure deterrent to commercial energy and activity than a principle that its accumulated results could not be transferred save under conditions which would make its buyer insecure."

38. Mr Jones QC referred to a passage in the speech of Lord Pearce in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 323 in support of his submission that the relationship between covenantor and covenantee is a symbiotic one.

39. He also relied upon the judgment of Millett J in *Allied Dunbar (Frank Weisinger) Ltd v Frank Weisinger* [1988] IRLR 60 where at [30] and [31] of the judgment, the judge rejected any application of the concept of proportionality in determining the reasonableness of a restraint of trade provision:

> "30… it was submitted that clause 9 was invalid because the additional restraint imposed on the defendant by the choice of covenant was out of all proportion to the additional benefit obtained thereby by the plaintiffs. To protect the speculative prospect of securing future clients at the rate of some 30 a year at the most, the plaintiffs were seeking to deny the defendant access to a market many thousands of times larger than the business which he had sold, a market in which there are millions of prospective clients and 100,000 sales associates all told. This, it was submitted, might seem reasonable from the point of view of the plaintiffs but it was certainly not reasonable from the point of view of the defendant. The need, well established by the authorities, to show that the covenant is reasonable from the point of view of both parties introduces, it was said, the now fashionable concept of proportionality.
>
> 31. In my judgment, this is a novel and dangerous doctrine. It is certainly novel, or perhaps more accurately a revival, in modern dress, of an obsolete and discredited theory. There is no trace of it in the modern cases, in which it is assumed that, in order to show that the covenant is reasonable as between the parties, it is sufficient to show that it is no greater than is reasonably required to protect the legitimate interests of the covenantee. [Millett J then cited the passage from the speech of Lord Parker of Waddington in *Morris v Saxelby* which I quoted at [36] above]."

40. Mr Jones QC then referred the Court to the various cases of franchise agreements where restrictive covenants have been considered, starting with the decision of HHJ Cooke (sitting as a Judge of the Chancery Division) in *Kall-Kwik Printing (UK) Ltd v Rush* [1996] FSR 114. In that case, the judge held that a two year restrictive covenant was not unreasonable to enable a new franchisee to have a clear run. The judge considered that franchise cases did not "fit snugly" into either the master/servant cases or what he called the goodwill cases (i.e. cases of the sale of businesses) but he concluded that franchises were closer to the latter, saying at 119:

> "One way perhaps of looking at a franchise agreement is that this is a form of lease of goodwill for a term of years, with an obligation on the tenant, as it were, to retransfer the subject matter of the lease at the end of the lease in whatever state it is. So to that extent there is an obligation to transfer goodwill in a particular form which is much more akin. I think, to the goodwill cases than to the servant cases."

41. Mr Jones QC pointed out that that case has been followed and applied in subsequent franchise cases, in particular by Neuberger J in *Dyno-Rod plc v Reeve* [1999] FSR 148. In that case, the judge granted an interim injunction on the basis that a one year

restrictive covenant was reasonable. He agreed that franchise agreements fell between sale and purchase contracts and contracts of employment but considered that they were closer to the former, continuing at 153:

> "I consider that the lease analogy of Judge Cook[e] has its attractions. If one goes through the terms of the agreement in the present case, it seems to me that the point is rather re-enforced; the franchisor, that is the plaintiff, and the franchisee, that is essentially Mr Reeve, each have a business. They are symbiotic businesses, and the goodwill provision, to which I have made reference in clause 5.3, while it emphasises that the goodwill is ultimately to be that of Dyno Rod, the plaintiff, it nonetheless indicates that the franchisee, Mr Reeve, has the benefit of the goodwill so long as he is the franchisee."

42. Mr Jones QC also relied upon the passage in the judgment of Neuberger J at 155 which the judge cited at [303] of his judgment in the present case and which I set out at [21] above, describing it as providing a classic statement of the law and that there had been nothing to undermine it since.

43. He also referred to the judgment of Dyson LJ in *ChipsAway International Ltd v Kerr* [2009] EWCA Civ 320, the other franchise case which the judge cited. Mr Jones QC relied in particular on [22] where Dyson LJ sets out the purpose of a restrictive covenant in a franchise agreement:

> "…during the term of a franchise, goodwill is built up in the franchise territory with the use of a franchisor's name and branding. Such goodwill is a potentially valuable asset in the hands of the franchisee so long as he continues to trade in the franchise territory, and in the hands of a franchisor at the termination of the franchise agreement. A franchisor's interest in that goodwill is vulnerable to competition from a former franchisee who has knowledge of the area and experience of dealing with particular groups of customers. The commercial purpose of a post-termination covenant against competition is to prevent the franchisee for a period of time from continuing and competing in his former territory in the same line of business so as to enable the franchisor to exploit the goodwill that he has built up during the term, most obviously by recruiting another franchisee for the same area."

44. He also relied on [24] where Dyson LJ said:

> "The purpose of Clause 23.1(a), therefore, was to allow the claimant a breathing space of twelve months in which to establish a replacement franchisee and to protect its goodwill, free from competition, from a franchisee who had previously operated within the franchise territory. The fact that, in the event, the claimant did not seek to find a replacement franchisee in the months following the termination has no relevance. The meaning

> of the clause cannot depend on what happened after the contract was made."

He submitted that likewise in the present case it was irrelevant that Dwyer had not appointed a new franchisee in the Cardiff area.

45. Finally in the line of franchise cases, Mr Jones QC relied upon the decision of Henderson J (as he then was) in *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch). At [126] to [128] of the judgment, Henderson J set out a succinct summary of the legal principles applicable to restrictive covenants at common law with particular reference to franchise agreements. He cited the various earlier authorities and concurred in the view that franchise agreements are closer to sale and purchase agreements. At [128] he said:

> "Apart from the provision of goodwill to the franchisee, other legitimate interests which a franchisor may reasonably protect are likely to include its confidential information and know-how, the loyalty of clients of the franchise brand, and the loyalty of employees by whom the franchise system is operated."

46. Mr Jones QC submitted that the authorities established the following points:

(1) As was common ground, one looked, as at the date of the contract, at what interest the covenantee had to protect and whether the restriction was no more than reasonably required to protect that interest.

(2) The particular circumstances of the covenantor are not considered in assessing the issue of reasonableness because the cases have established that there is a concomitant interest of the covenantor aligned with the interest of the covenantee.

(3) The Court does not consider what consideration has been paid or the question of proportionality but will consider the wider context of what is included in the contract which is relevant to what the covenantor is contracting to obtain.

(4) It is necessary to assess what is objectively contemplated by the contract including what might be the position in due course such as, in the case of an employee, promotion. This is clear from a number of authorities, including most recently the judgment of the Supreme Court in *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32; [2021] 3 WLR 598 at [67]-[70]. Mr Jones QC submitted that here the parties had contracted on the basis that the franchise would be successful.

47. He submitted that these were key building blocks in the assessment of reasonableness but they were not employed by the judge in [305]. Sub-paragraphs (a) to (d) were concerned with inequality of arms, absence of negotiation, the fact that Mr Bartlett had no previous experience of plumbing and was investing all his savings together with the risk that the projections would not be attained. Mr Jones QC submitted that none of these was relevant to the issue of the reasonableness of the restraint, other than inequality.

48. He was critical of the judge's analysis in sub-paragraph (e), noting the absence of a provision that the prohibition from competition was not subject to the covenantor giving

written consent not to be unreasonably withheld or to a distinction between terminations at the early stage of the franchise and towards the end of the ten years, when the goodwill to be protected would be substantially more valuable. Mr Jones QC went so far as to say that these were not concepts come across in other cases.

49. In relation to the judge's criticisms in sub-paragraphs (f), (g) and (j) Mr Jones QC described the prohibitions as standard policing mechanisms and said that a simple non-solicitation clause would be impossible to police. Overall, the prohibitions were designed to prevent and police competition for a reasonable period of time to give the franchisor the opportunity to protect its goodwill and get a new franchisee. The five mile radius buffer zone was appropriate because the franchise territory was not absolute.

50. So far as Ground 2 was concerned he submitted that the words "similar to" in the two prohibitions could easily be blue pencilled out as could one or more of "engaged concerned or interested" if the Court thought that appropriate, none of which would involve rewriting the provisions.

51. On behalf of Fredbar and Mr Bartlett, Mr David E Grant QC pointed out that franchises are of many sorts: service, production or distribution and may be individual or a management franchise. He also pointed out that franchises are not subject to regulation within the United Kingdom. The franchisee may be inexperienced and lacking in bargaining power, as in the present case, where there was a need for ongoing significant investment and a risk of failure. Mr Grant QC pointed to a number of matters demonstrating the inequality of bargaining power. Mr Bartlett was in effect an assetless novice with no prior experience and potentially unsuitable, as the assessment of Mr Jeannes demonstrated. Dwyer knew that Mr Bartlett was going to be doing the work himself as the judge found at [90]. He ran the business from home and hired a van for the purpose ([4] of the judgment). He paid an initial franchise fee of £35,000 plus VAT and a weekly management service fee based on a percentage of sales ([13] of the judgment). The required starting capital for a franchisee was £80,000 and at the time of his decision to proceed, Mr Bartlett had to invest his £20,000 savings and would have had to borrow another £90,000 ([97(c) and [99] of the judgment). It was clear to Dwyer also that he would need training and guidance ([78] of the judgment) and although Mr Jones QC had made much of the training provided, it was a 2 day plumbing course ([143] of the judgment). Mr Jones QC had also referred to the manual but this was not in evidence before the judge, who had noted Mr Bartlett's criticism of it.

52. Mr Grant QC pointed out that because there was no previous franchisee in the territory, the National Account work had not been serviced for 18 months and so it would take time to build it up and win back work. Given those circumstances, he submitted that what was said by Dwyer about existing goodwill should be taken with a pinch of salt. Given there was no existing franchisee or goodwill in the territory, there was a risk of failure. There had been only seven resales of franchises since 2015. Two recent new franchisees had ceased trading.

53. Mr Grant QC made the following legal submissions:

    (1) The question of illegality (to which he had referred in his skeleton argument) can be ignored. This situation was different from cases like *Patel v Mirza* [2016] UKSC 42; [2017] AC 467.

(2) Covenants in restraint of trade are not invalid or void, but unenforceable.

(3) As the judge had well in mind, these covenants would not apply if the covenantee was in repudiatory breach of the agreement: *General Billposting v Atkinson* [1909] AC 118. The covenantee would be free to appoint another franchisee. This was the point about absence of reciprocity the judge was making at [305(k)] of the judgment.

(4) The first issue is the construction of the covenant where conventional principles of contractual construction apply.

(5) The second issue is one of reasonableness which is a separate question. It is for the party seeking to uphold the covenant to satisfy the court that it is reasonable in that it goes no further than necessary in protecting the party's legitimate interest.

(6) That issue is determined at the time that the contract is made but with regard to the expectations of the parties: *Harcus Sinclair*.

(7) The question of severance and blue pencilling is formalistic. The court can sever the provision but not add words: *Egon Zehnder Ltd v Tillman* [2019] UKSC 32; [2020] AC 154.

54. Mr Grant QC challenged the judge's acceptance at [293] that the approach to be taken in this case was more akin to the treatment of covenants in contracts of sale than in employment contracts, in view of the inequality of bargaining power. Far from being irrelevant, as Mr Jones QC had originally submitted, inequality of bargaining power is an aspect of public policy which Mr Grant QC described as the cornerstone of enforceability. He relied upon a number of authorities to support those submissions, starting with *Nordenfelt* itself where Lord Macnaghten drew the distinction between the two categories of case by reference to freedom of contract:

> "To a certain extent, different considerations must apply in cases of apprenticeship and cases of that sort, on the one hand, and cases of the sale of a business or dissolution of partnership on the other. A man is bound an apprentice because he wishes to learn a trade and to practise it. A man may sell because he is getting too old for the strain and worry of business, or because he wishes for some other reason to retire from business altogether. Then there is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment."

55. Mr Grant QC placed particular reliance on the speech of Lord Diplock (with whom Lords Simon and Kilbrandon agreed) in *A Schroeder Music Publishing Co Ltd* [1974] 1 WLR 1308. That case concerned an agreement between music publishers and a then unknown 21 year old songwriter which included a restrictive covenant prohibiting him from assigning his rights under the agreement without the publisher's prior written consent. The House of Lords held that the agreement was in unlawful restraint of trade and unenforceable. Lord Diplock focused on the inequality of bargaining power between the parties at 1315-1316:

"In order to determine whether this case is one in which that power [to relieve the songwriter of his obligations] ought to be exercised, what your Lordships have in fact been doing has been to assess the relative bargaining power of the publisher and the song writer at the time the contract was made and to decide whether the publisher had used his superior bargaining power to exact from the song writer promises that were unfairly onerous to him…

It is, in my view, salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning power, the public policy which the court is implementing is not some 19th-century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable. Under the influence of Bentham and of laissez-faire the courts in the 19th century abandoned the practice of applying the public policy against unconscionable bargains to contracts generally, as they had formerly done to any contract considered to be usurious; but the policy survived in its application to penalty clauses and to relief against forfeiture and also to the special category of contracts in restraint of trade. If one looks at the reasoning of 19th-century judges in cases about contracts in restraint of trade one finds lip service paid to current economic theories, but if one looks at what they said in the light of what they did, one finds that they struck down a bargain if they thought it was unconscionable as between the parties to it and upheld it if they thought that it was not.

The same presumption, however, does not apply to the other kind of standard form of contract [the first kind Lord Diplock had identified as mercantile transactions such as bills of lading, charterparties and policies of insurance]. This is of comparatively modern origin. It is the result of the concentration of particular kinds of business in relatively few hands. The ticket cases in the 19th century provide what are probably the first examples. The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: "If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it."

To be in a position to adopt this attitude towards a party desirous of entering into a contract to obtain goods or services provides a

> classic instance of superior bargaining power. It is not without significance that on the evidence in the present case music publishers in negotiating with song writers whose success has been already established do not insist upon adhering to a contract in the standard form they offered to the respondent. The fact that the appellants' bargaining power vis-a-vis the respondent was strong enough to enable them to adopt this take-it-or-leave-it attitude raises no presumption that they used it to drive an unconscionable bargain with him, but in the field of restraint of trade it calls for vigilance on the part of the court to see that they did not."

56. The relevance of inequality of bargaining power was also emphasised by Robert Walker J in *Dawnay Day & Co Ltd v D'Alphen* [1998] ICR 1068 at 1081B-C:

> "I should make some general observations about restrictive covenants between employees and employers. It is very well settled that they are scrutinised more closely and critically by the court. This is sometimes ascribed to the supposed inequality of bargaining power between the parties, and such inequality is no doubt often an important factor. But the fundamental reason for the stricter approach is that it is a stronger thing, requiring more cogent justification (both as between the parties and in the public interest) to prevent a working man or woman from earning his or her living as he or she chooses."

Mr Grant QC submitted that these authorities made clear that inequality of bargaining power was a significant factor in assessing reasonableness in cases of this kind.

57. In relation to the need to avoid deciding cases by resort to categorisation, Mr Grant QC referred to what was said by Lord Fraser of Tullybelton giving the judgment of the Privy Council in *Bridge v Deacons* [1984] 1 AC 705 at 714E-F:

> "The agreement in the present case, being one between partners, does not conform exactly to either of the types to which reference has just been made, although it had some resemblance to both. Their Lordships are of opinion that a decision on whether the restrictions in this agreement are enforceable or not cannot be reached by attempting to place the agreement in any particular category, or by seeking for the category to which it is most closely analogous. The proper approach is that adopted by Lord Reid in the *Esso Petroleum case* [1968] A.C. 269 , where he said, at p. 301:
>
> > "I think it better to ascertain what were the legitimate interests of the appellants which they were entitled to protect and then to see whether these restraints were more than adequate for that purpose."

> What were the respondent's legitimate interests will depend largely on the nature of their business, and on the position of the appellant in the firm."

58. Mr Grant QC submitted that, as that passage demonstrates, it is always a question of the context of the particular case. It was inequality of bargaining power that has led to the distinction between vendor and purchaser cases and master and servant cases. The question in this case is where it lies in that range.

59. In support of the submission that the court should avoid categorisation, Mr Grant QC relied upon a number of recent cases including *Ideal Standard International SA v Herbert* [2018] EWHC 3326 (Comm) at [28], a passage approved by Asplin LJ giving the principal judgment of the Court of Appeal in *Guest Services Worldwide Ltd v Shelmerdine* [2020] EWCA Civ 85; [2020] 2 All ER (Comm) 455 at [42].

60. Mr Grant QC submitted that sale of business cases were ones where the restrictive covenants were entered at the point of exit, whereas in the franchise cases, like in cases of master and servant, the covenant is being entered into at the point of entry. In the sale of business cases it is the vendor who has built up the business who is selling it and who is the covenantor which is a significant difference from a franchise where the franchisee is giving the covenant at the time the franchise agreement is entered into, at the outset. He submitted that *Allied Dunbar* was an exit case.

61. Mr Grant QC submitted, in relation to the franchise cases, that they were all first instance decisions and all but two were interim injunction cases where the court was deciding if it was arguable that the restrictive covenant was enforceable, not making a final determination. He submitted that the pronouncement in several of the cases that franchises were closer to sales of business than to contracts of employment partly ignore the warning against rigid categorisation and none of the earlier franchise cases discuss the question of inequality of bargaining power. As Mr Grant QC pointed out those cases were ones where at the time of the termination which led to the franchisor seeking to enforce the restrictive covenant, the franchise was well-established, running for 12 years on *Kall-Kwik*, about 9 years in *Dyno-Rod*, 5 years in *ChipsAway*, 14 years in *Carewatch* and 5 years in *Countrywide Signs*. In all those cases the franchise was far more developed than here and there was greater goodwill.

62. In relation to the five mile radius buffer zone outside the franchise territory to which clause 18.2.1.2 refers, he submitted that the courts had shown a disinclination to uphold restrictions which went beyond the franchise territory. In *Kall-Kwik* at 123-4 the judge referred to a need for a real functional correspondence between the business carried on and the business which is competing with that business. Mr Grant QC showed the court a map attached to his opening submissions at the trial which showed that the five mile zone was more extensive than the original franchise territory, stretching to the east almost to Newport and to the west beyond Cowbridge.

63. Mr Grant QC submitted that the submission by Mr Jones QC that no previous case had involved the restrictive covenant being subject to written consent of the covenantee permitting a competing business of the covenantor as suggested by the judge at [305(e)] was not correct. He identified six cases with such a provision straddling all types of case, including franchise agreements. *ChipsAway* contained at clause 23 a restriction not to engage in a competing business without the franchisor's prior written consent

and *Carewatch* contained a similar provision at clause 8.2.7 to which Henderson J had regard at [139].

64. Mr Grant QC submitted that the burden of proof was on the franchisor to demonstrate that the 12 month restriction was necessary to protect its legitimate business interests and went no further than was required for that protection. It was incumbent on the franchisor to provide evidence of the legitimate interest which requires protection. He referred to the recent decision of Stuart Isaacs QC sitting as a Deputy Judge of the Chancery Division in *Countrywide Signs Ltd v Blueprometheus Ltd* [2022] EWHC 573 (Ch) at [24]-[25]. In that case the judge declined to grant an injunction on the basis that there was insufficient evidence from the claimant. In this case, Mr Jones QC had relied on [47] of Mr Jeannes' witness statement on the need for a clear run, but as I have already said, the judge was distinctly unimpressed with that evidence.

65. Mr Grant then made submissions about the judge's analysis at [305] of the judgment. He submitted that (a) to (d), which dealt with inequality of bargaining power and the risk of failure, were all factors which were relevant in determining that the covenants were unreasonable. The reality is that, if they were enforceable, Mr Bartlett would be unable to work in the area as a plumber and would be prevented from using skills lawfully acquired which were his property, not Dwyer's. The covenants prevented him from earning a wage.

66. In relation to (e), the so-called sliding scale depending upon whether the franchise was terminated early in its period or after a number of years, he submitted the criticisms by Dwyer were unwarranted. Contrary to Mr Jones QC's submissions, it was possible to have a provision that competition was only permitted with the covenantee's written consent, as he had demonstrated.

67. Mr Grant QC submitted that [305(f), (g) and (j)] all dealt with the width of the restrictions. As (j) stated there were no trade secrets to be protected and yet the restriction covered everything save for financial interest. There was no evidence of real customer loyalty to Drain Doctor as in the various hairdresser cases. He submitted that there was no legitimate interest in simply reducing competition.

68. [305(h) and (i)] were dealing with the five mile radius in the second restriction. Mr Grant QC submitted that there was no functional correspondence between that restriction and the business actually conducted by Mr Bartlett, and it was entirely unreasonable and unprincipled for Dwyer to seek to prevent the defendants from working in that buffer zone.

69. Mr Grant QC submitted in relation to the second Ground of Appeal that the ability to sever would not save the covenants from being unreasonable. Excision of "engaged" or of "similar to" would not affect the restriction for twelve months on carrying on a competitive business which in itself remained unreasonable.

Discussion

70. As is made clear in the passage from the judgment in *Bridge v Deacons* which I quoted in [57] above, the enforceability of a restrictive covenant such as those in the present case should not be determined merely by asking whether the case falls into one category

or another. The relevant legal principles were recently summarised by Carr LJ in *Quantum* at [60]:

> " i) The doctrine is not confined to immutable boundaries or rigid categorisation, but there are certain categories of covenants to which the doctrine traditionally applies, in particular those by which an employee undertakes not to compete with his employer after leaving the employer's service and those by which a trader who has sold his business agrees not thereafter to compete with the purchaser of the business. The doctrine has been held to apply to franchise agreements, share-purchase agreements and the assignment of a patent;
>
> ii) There are no clear limits on the scope of the doctrine and no precise or exhaustive test can be stated. The doctrine is to be applied to factual situations with a broad and flexible rule of reason (see *Esso* (at 331G per Lord Wilberforce)). The question is whether or not in all the circumstances the contract should be excluded from the application of the doctrine or, as Lord Wilberforce put it in *Esso* (at 332G), whether it is appropriate to dispense the contract "from the necessity of justification under a public policy test of reasonableness"";

71. Whilst the doctrine of restraint of trade has been held, in the line of cases to which we were referred, to apply to franchise agreements, they are not in some special category nor is there "one size which fits all" for franchise agreements as Mr Jones QC seemed to be submitting. Contrary to his submission, in determining the reasonableness of the covenants, the court does not disregard the circumstances of the covenantor simply because, as he put it, there is a concomitant interest of the covenantor aligned with the interest of the covenantee. It is clear that the court will consider a number of factors in assessing reasonableness including the factual and contractual background and the relative bargaining strength of the parties, which necessarily involves looking at the circumstances of franchisees like the defendants in this case and determining whether there is such a concomitant interest.

72. The relevant legal principles were set out in a clear and cogent summary by Carr LJ in her judgment in *Quantum* at [62] to [65]:

> "62. On the question of reasonableness, it is common ground that the test identified by Lord Macnaghten in *Nordenfelt* (at 565) is to be applied:
>
> > "reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is no way injurious to the public."
>
> 63. Whilst in some of the authorities the courts have conflated the two (private and public interest) aspects of the test (see for example *Attorney-General of the Commonwealth of Australia v*

Adelaide SS Co [1913] AC 781 (at 795 per Lord Parker) and *Esso* (at 324D per Lord Pearce)), the broad view appears to be that Lord Macnaghten's dichotomy is to be preferred. Where businesses have dealt at arm's length with each other, they can usually be regarded as adequate guardians of their own interests. However, the possible impact of the bargain upon third parties, or the public more generally, may call for careful judicial scrutiny. Clarity of analysis is more likely to be facilitated by preservation of both limbs of the exposition.

64. A court will be slow to substitute its (objective) view as to the interests of the contracting parties for the (subjective) views of the contracting parties themselves. The law recognises that if business contracts are fairly made by parties who are on equal terms such parties should know their business best (see in particular *Esso* (at 300C-D per Lord Reid; at 305B-D per Lord Morris and at 323B-E per Lord Pearce)). That consideration will carry less or no weight if the parties were negotiating on other than equal terms (see *Panayiotou* (at 332 per Jonathan Parker J)). The absence of independent legal advice for the weaker party may also be relevant (see *PSM* (at [100] per Arden LJ)).

65. Beyond this, and again drawing the relevant threads together by way of summary:

i) The onus of establishing that a covenant is no more than is reasonable in the interests of the parties is on the person who seeks to rely on it (see in particular *Attwood v Lamont* [1920] 3 KB 571 (at 587-588 per Younger LJ). If he/she establishes that it is no more than reasonable in the interests of the parties, the onus of proving that it is contrary to the public interest lies on the party attacking it (see in particular *Saxelby* (at 716 per Lord Shaw));

ii) The time for considering reasonableness is again the time of the making of the contract (see in particular *Gledhow Autoparts Ltd v Delaney* [1965] 1 WLR 1366 (at 1377 per Diplock LJ); *Shell v Lostock Garage Ltd* [1976] 1 WLR 1187 (at 1197-1198 per Lord Denning MR) and *Schroeder* (at 1309H per Lord Reid));

iii) It is no answer on the question of reasonableness to say that there have been substantial financial rewards on all sides. The question of reasonableness has to be considered by reference to the terms of the contract (see in particular *PSM* (at [104] per Arden LJ));

iv) For a restraint to be reasonable between the parties it must be no more than what was reasonably required by the party in whose favour it was imposed to protect his legitimate interests (see in particular *Saxelby* (at 701 per Lord Atkinson)

and *Schroeder* (at 1310B per Lord Reid and 1315H per Lord Diplock));

v) The court is entitled to consider whether or not a covenant of a narrower nature would have sufficed for the covenantee's protection (see in particular *Office Angels Ltd v Rainer Thomas and O'Connor* [1991] IRLR 214 (at 220 per Sir Christopher Slade));

vi) What is reasonable may alter with the changing nature of commerce and society (see in particular *Nordenfelt* (at 547 per Lord Herschell));

vii) Factors to be considered when assessing reasonableness between the parties include the character of the business (see in particular *Nordenfelt* (at 550 per Lord Herschell)) and also:

a) The relevance of the consideration for the restraint;

b) Inequality of bargaining power;

c) Standard forms of contract;

d) Whether the restraints operate during or post-contract;

e) The surrounding circumstances, including the factual and contractual background;

(see in particular *Panayiotou* (at 329-336 per Jonathan Parker J));

viii) The duration of an agreement in restraint of trade is a factor of great importance in determining whether the restrictions in an agreement can be justified (see in particular *Schroeder* (at 1312F-G per Lord Reid));

ix) The level of compensation may be relevant to the question of reasonableness (see *Esso* (at 300B-C per Lord Reid) and *Panayiotou* (at 329-330 per Jonathan Parker J));

x) The motives of the party challenging the contract are immaterial to the question of whether the terms of the contract are reasonable as between the parties (see in particular *Schroeder* (at 1309H per Lord Reid) and *Panayiotou* (at 336 per Jonathan Parker J)).”

73. Thus, contrary to Mr Jones QC’s submissions, inequality of bargaining power between the covenantor and the covenantee where it exists is not only relevant, but is a significant factor in determining reasonableness. Where there is such inequality, the court will be astute to examine any restrictive covenant critically and ensure that it is only upheld if it is objectively reasonable between the parties in all the circumstances.

This is clear in the passages from Lord Diplock's speech in *Schroeder v Macaulay* which I quoted in [55] above.

74. It is also clear from the judgment of Jonathan Parker J in *Panayiotou v Sony Music Entertainment* [1994] EMLR 229 (*the George Michael case*) to which Carr LJ referred. Having noted at B4.6.2 that there are a number of references in the speeches in the *Esso Petroleum* case to the relative bargaining power of the parties and cited from those speeches, the judge said at B4.6.4 on page 332:

> "As I understand these references, they establish that while the Court is in general slow to substitute its (objective) view as to the interests of the contracting parties for the (subjective) views of the contracting parties themselves in electing to enter into the contract, that consideration will carry less weight, and may (depending on the particular facts) carry no weight at all, where the evidence establishes that the contracting parties were negotiating on other than equal terms."

75. The same point was made by Sir Patrick Elias in [68] of the lead judgment of the Court of Appeal in *Credico Marketing Ltd v Lambert* [2022] EWCA Civ 864 in which judgment was handed down on 23 June 2022.

76. In *the George Michael case* Jonathan Parker J continued at B4.6.6:

> "…inequality of bargaining power may (depending on the facts of the particular case) be relevant to negative an argument to the effect that the covenantor cannot complain that the terms of the contract are capable of being worked unreasonably against him, since in entering into the contract he chose to repose a measure of confidence in the covenantee."

77. In other words, where there is inequality of bargaining power, that will be relevant to negativing exactly the sort of argument advanced by Mr Jones QC in the present case, that the restrictive covenant is reasonable because of the concomitant interest of the franchisee aligned with the interest of the franchisee. Likewise, where there is inequality of bargaining power, on analysis, a franchise agreement may be more akin to a contract of employment than to a contract for the sale of a business.

78. The authorities make it clear that the issues of enforceability and reasonableness are to be determined at the time that the franchise agreement was entered into, but as the Supreme Court in *Harcus Sinclair* confirmed at [70], the assessment can take account of what the parties: "(objectively) intended or contemplated, consequent on the contract, at the time the contract was made as well as the contract terms." In my judgment, what the parties objectively intended or contemplated when the franchise agreement was entered into includes: (i) that whilst they may have intended that the franchise would be successful, Mr Bartlett was assuming a degree of risk, including that the franchise might fail and (ii) that the goodwill which Dwyer was seeking to protect would be less extensive and less valuable if the franchise terminated at an early stage than if it terminated after a number of years during which it had operated successfully.

79. As Mr Grant QC correctly identified, there are a number of matters in the present case which demonstrate an inequality of bargaining power between the parties. Dwyer is the largest emergency plumbing and drainage company in the country with more than thirty franchises covering sixty territories. In contrast Mr Bartlett was essentially a "man with a van", and even that he had to hire. He had to invest all his limited savings in the business and borrow money from the bank. He had to pay the initial franchise fee of £35,000 plus VAT and then a weekly management service fee based upon a percentage of sales.

80. Dwyer knew that Fredbar and Mr Bartlett were starting up this business for which he was the only employee and it also knew that he had no previous plumbing experience. He attended an induction day after which Dwyer through Mr Jeannes clearly formed the view he was not suitable as a franchisee and, as the judge found, failure of his franchise was foreseeable. As the judge also found at [305(d)] there was no evidence of any discussion or negotiation of the restraint of trade provisions to take account of those matters and there was total inequality of arms. The standard form agreement had to be accepted or rejected. Given the inequality of bargaining power which undoubtedly existed, I agree with Mr Grant QC that, on the facts of this case, the franchise agreement is more akin to an employment contract than to the sale of a business.

81. Mr Jones QC sought to argue that the amounts to be invested by Mr Bartlett were irrelevant because they simply went to the adequacy of the consideration. However, as Arnold LJ pointed out during the course of argument, the amounts invested were an aspect of the degree of risk which Mr Bartlett undertook. In my judgment, given the judge's findings that Dwyer was of the view that failure of the franchise was foreseeable and that Dwyer knew Mr Bartlett was investing all his savings and would be at serious risk of losing the family home if the franchise did not succeed, those matters which went to the degree of risk to which he was exposed were an aspect of the inequality of bargaining power to which the judge was clearly entitled to have regard. Contrary to Mr Jones QC's submissions, far from the circumstances amounting to the inequality of bargaining power summarised by the judge at [305(a) to (c)] being no more than relevant but to be approached with care, they were a significant factor which supported the judge's overall conclusion that the restraint of trade provisions were unreasonable.

82. In support of his case that the 12 month restriction was reasonable, Mr Jones QC made much of the need for Dwyer to protect its goodwill and to enable any replacement franchisee to have a clear run without competition from Fredbar and Mr Bartlett. He relied upon the line of franchise cases from *Dyno-Rod* onwards which have held that a twelve month restriction of this kind is reasonable. However, each case has to be assessed on its own facts and there cannot be some general rule that a twelve month restriction in franchise agreements is reasonable.

83. Despite Mr Grant QC's submissions to the contrary, I would not accept that, at the time that the franchise agreement was entered into, Dwyer had no goodwill at all in the territory. The Drain Doctor name connoted a national system of franchises and a business model. However, it was of limited impact given that there had been no prior franchisee in the territory and that there was no other franchise nearer than Avonmouth. The National Accounts had not been serviced for 18 months and needed to be built up. Contrary to Mr Jones QC's submission this could hardly be described as a ready-made business so far as the defendants were concerned.

84. As I have said, one of the matters which the parties objectively contemplated at the time the franchise agreement was entered into was that the protection which might be needed by the franchisor early in the franchise before the franchisee had built it up or if it was not successful was far less than would be the case well into or towards the end of the ten year period, when the franchise had been running successfully for some time. In my judgment, contrary to Mr Jones QC's submission that how long the franchise had been running when the restriction came into effect was irrelevant to its enforceability, the judge was right to conclude at [305(e)] that the restriction was unreasonable because it failed to distinguish between the position if there was early termination and the position if the franchise had been running for the full ten year period or a substantial portion of that period. There is also force in the judge's point that, if the restriction had been capable of being overridden with the franchisor's written consent, that would have gone some way towards making the restriction reasonable.

85. Given that, at the time that Dwyer accepted the defendants' repudiatory breach the franchise had only been running for eighteen months, four of which were during the pandemic and the earnings from the franchise were limited and far less than the projections, I consider that the twelve month restriction was unreasonable. As for Mr Jones QC's contention that Dwyer needed the twelve months to give a new franchisee a clear run and his argument that there was evidence to support that contention, the judge concluded at [294] that there was really no evidence to support that contention and what was in Mr Jeannes' statement was, in effect, a lawyer's construct. As I have said, there is no appeal against that finding. In the circumstances, little if any weight can be given to the contention and it certainly does not make the twelve month restriction reasonable on the facts of this case. As Mr Grant QC said, the findings the judge made at (f), (g) and (j) about the width of the restriction were all entirely justified and demonstrated that the restriction went further than was necessary to protect the franchisor's legitimate interest.

86. Accordingly, in my judgment, the judge was right to conclude that, on the particular facts of this case, the twelve month restriction in clause 18.2.1.1 was unreasonable and unenforceable. It must follow that the provision in clause 18.2.1.2 for the five mile radius buffer zone outside the territory is also unreasonable and unenforceable. Furthermore, as the judge correctly found at [305(h)] there would be no goodwill to protect in so far as Fredbar had not provided services in that extended area and it was not reasonable to have that restriction, irrespective of whether any goodwill had been established or not.

87. I should emphasise that, like the judge, I have concluded the restrictions are unenforceable on the facts of the case. It does not follow that the 12 month restriction would be unreasonable in every Dwyer franchise agreement. Where a franchisee was well-established and successful or where Dwyer could show cogent evidence of the need to protect its goodwill, a court might well conclude that the restriction was reasonable. However, that is not this case and it follows that Ground 1 of the Grounds of Appeal must be dismissed.

88. The second Ground can be dealt with shortly. Even if the second restriction in clause 18.2.1.2 were excised from the agreement, the 12 month restriction in clause 18.2.1.1 would still be unreasonable for all the reasons I have given. So far as that first restriction is concerned, the deletion of "similar to" would not overcome the fact that, again for the reasons I have given, any restriction on the business which Fredbar and Mr Bartlett

are conducting is unreasonable. Likewise the excision of one of: "engaged" "concerned" or "interested in" would not render the restriction on the business of Fredbar and Mr Bartlett reasonable. In my judgment, the judge was correct to conclude that the unreasonableness of the restrictions could not be remedied by the application of a blue pencil.

Conclusion

89. For all the reasons I have given, both Grounds of Appeal must be dismissed.

Lord Justice Arnold

90. I agree that this appeal should be dismissed for the reasons given by the Chancellor of the High Court. There is no dispute that Dwyer was entitled to protect the goodwill of the business upon termination of a franchise by a post-termination restrictive covenant which did not exceed what was reasonably required for that purpose. One can well understand the desire of a franchisor like Dwyer to have a standard form of franchise agreement, including a standard form of post-termination restrictive covenant. It is inescapable, however, that not all potential franchisees are equal. Some potential franchisees have more bargaining power, are less likely to fail as franchisees and are more likely to be able to survive the consequences of failure than others. Mr Bartlett had little bargaining power, was more likely to fail than to succeed, particularly in the short term, and was at risk of financial disaster if he failed. Accordingly, in his case, the relationship with Dwyer was closer to an employment contract than to a sale of a business. If it were the law that inequality of bargaining power was irrelevant to the reasonableness of a post-termination restrictive covenant, then some of Dwyer's criticisms of the judge's reasoning would have substance. But that is not the law. Given that inequality of bargaining power is not merely relevant but significant, a franchisor in the position of Dwyer must proceed accordingly. Dwyer did not have to take on Mr Bartlett (acting through Fredbar Ltd) as a franchisee. Even if it did, it did not have to impose its standard form of agreement upon him. Even if it wanted to impose a standard form of agreement, it did not have to have a "one-size-fits-all" restrictive covenant. For example, as the judge noted, it would have been perfectly possible to have a covenant the duration of which depended on how long the franchise agreement had subsisted prior to termination. The longer it had subsisted, the greater the goodwill that would have been expected to have been built up during the currency of the agreement and the longer the period of protection that would have been justified.

Lady Justice Whipple

91. I agree with the Chancellor of the High Court and with the observations of Lord Justice Arnold. In my judgment this appeal should be dismissed on both grounds.