HOUSE OF LORDS

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Judgments - Co-operative Insurance Society Limited v. Argyll Stores

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HOUSE OF LORDS

Lord Browne-Wilkinson Lord Slynn of Hadley Lord Hoffmann Lord Hope of Craighead Lord Clyde

OPINIONS OF THE LORDS OF APPEAL FOR JUDGEMENT IN THE CAUSE

CO-OPERATIVE INSURANCE SOCIETY LIMITED
(RESPONDENTS)

v.

ARGYLL STORES (HOLDINGS) LIMITED
(APPELLANTS)

ON 21ST MAY 1997

LORD BROWNE-WILKINSON

My Lords,

I have read in draft the speech of my noble and learned friend Lord Hoffmann with which I agree. For the reasons which he gives I would allow this appeal.

LORD SLYNN OF HADLEY

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hoffmann. For the reasons he gives I would allow this appeal.

LORD HOFFMANN

My Lords,

1. The Issue

In 1955 Lord Goddard C.J. said:

> "No authority has been quoted to show that an injunction will be granted enjoining a person to carry on a business, nor can I think that one ever would be, certainly not where the business is a losing concern."

(Attorney-General v. Colchester Corporation [1955] 2 Q.B. 207, 217). In this case his prediction has been falsified. The appellants Argyll Stores (Holdings) Ltd ("Argyll") decided in May 1995 to close their Safeway supermarket in the Hillsborough Shopping Centre in Sheffield because it was losing money. This was a breach of a covenant in their lease, which contained in clause 4(19) a positive obligation to keep the premises open for retail trade during the usual hours of business. Argyll admitted the breach and, in an action by the landlord, the Co-operative Insurance Society ("CIS") consented to an order for damages to be assessed. But the Court of Appeal, reversing the trial judge, ordered that the covenant be specifically performed. It made a final injunction ordering Argyll to trade on the premises during the remainder of the term (which will expire on 3 August 2014) or until an earlier sub-letting or assignment. The Court of Appeal suspended its order for three months to allow time for Argyll to complete an assignment which by that time had been agreed. After a short agreed extension, the lease was assigned with the landlord's consent. In fact, therefore, the injunction never took effect. The appeal to your Lordships is substantially about costs. But the issue remains of great importance to landlords and tenants under other commercial leases.

2. The Facts

A decree of specific performance is of course a discretionary remedy and the question for your Lordships is whether the Court of Appeal was entitled to set aside the exercise of the judge's discretion. There are well established principles which govern the exercise of the discretion but these, like all equitable principles, are flexible and adaptable to achieve the ends of equity, which is, as Lord Selborne L.C. once remarked, to "do more perfect and complete justice" than would be the result of leaving the parties to their remedies at common law. (*Wilson v. Northampton and Banbury Junction Railway Co.* (1874) L.R. 9 Ch.App. 279, 284). Much therefore depends upon the facts of the particular case and I shall begin by describing these in more detail.

The Hillsborough Shopping Centre consists of about 25 shops. Safeway was by far the largest shop and the greatest attraction. Its presence was a commercial benefit to the smaller shops nearby. The lease was for a term of 35 years from 4 August 1979 with five-yearly rent reviews. Clause 4(12)(a) contained a negative covenant as to the user of the premises:

> "Not to use or suffer to be used the demised premises other than as a retail store for the sale of food groceries provisions and goods normally

> sold from time to time by a retail grocer food supermarkets and food superstores. . . ."

Clause 4(19) was the positive covenant enforced in this case:

> "To keep the demised premises open for retail trade during the usual hours of business in the locality and the display windows properly dressed in a suitable manner in keeping with a good class parade of shops."

Competition in the supermarket business is fierce and in 1994 Argyll undertook a major review of its business and decided to reduce the scale of its operations. The management was to be reorganised, 27 loss-making or less profitable supermarkets closed and thousands of employees made redundant. Hillsborough, which according to Argyll's management accounts had made a loss of about £70,000 in the previous year, was on the list for closure. For administrative reasons as well as to avoid the demoralising effect of successive closure announcements, it was decided to close all the supermarkets at once and try to negotiate the disposal of their sites as a package. In early April 1995 Argyll announced that Hillsborough and the other supermarkets would close on 6 May 1995.

As soon as CIS heard of the impending closure, it protested. On 12 April 1995 Mr. Wightman, the Regional Surveyor of the Investment Department, wrote to Mr. Jefferies of Safeway:

> "Whilst obviously there is little point in trying to influence your corporate decision with regard to the closure of this unit I am dismayed at the short period of notice given which will undoubtedly have immediate impact on the Centre and all the other tenants trading therein."

He drew attention to the covenant to keep open, invited Safeway to agree to continue trading until a suitable assignee had been found, offered to negotiate a temporary rent concession and asked for a reply by return of post.

Unfortunately he received no answer. Mr. Jefferies had himself fallen victim to the reorganisation; he had been made redundant. No one else dealt with the letter. On Saturday 6 May 1995 the supermarket closed and over the next two weeks its fittings were stripped out. On 22 May 1995 CIS issued a writ claiming specific performance of the covenant to keep open and damages.

3. The Trial

CIS issued a summons for judgment under RSC Ord 14 but when the matter came before His Honour Judge Maddocks, sitting as a judge of the High Court on 1 August 1995 it was agreed that, since the material facts were not in dispute, the hearing should be treated as the trial of the action. The learned judge was therefore invited by CIS to make a final order that the covenant be performed for the remainder of the lease or until an earlier assignment or subletting. By this time Argyll were already in serious negotiation with another supermarket chain for an assignment but no contract had yet been signed.

The judge refused to order specific performance. He said that there was on the authorities a settled practice that orders which would require a defendant to run a business would not be made. He was not content, however, merely to follow authority. He gave reasons why he thought that specific performance would be inappropriate. Two such reasons were by way of justification for the general practice. An order to carry on a business, as opposed to an order to perform a "single and well defined act," was difficult to enforce by the sanction of committal. And where a business was being run at a loss, specific relief would be "too far reaching and beyond the scope of control which the court should seek to impose." The other two related to the particular case. A resumption of business would be expensive (refitting the shop was estimated to cost over £1 million) and although Argyll had knowingly acted in breach of covenant, it had done so "in the light of the settled practice of the court to award damages." Finally, while the assessment of damages might be difficult, it was the kind of exercise which the courts had done in the past.

4. The Settled Practice

There is no dispute about the existence of the settled practice to which the judge referred. It sufficient for this purpose to refer to *Braddon Towers Ltd. v. International Stores Ltd.* [1987] 1 E.G.L.R. 209, 213, where Slade J. said:

> "Whether or not this may be properly described as a rule of law, I do not doubt that for many years practitioners have advised their clients that it is the settled and invariable practice of this court never to grant mandatory injunctions requiring persons to carry on business."

But the practice has never, so far as I know, been examined by this House and it is open to the respondents to say that it rests upon inadequate grounds or that it has been too inflexibly applied.

Specific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the common law damages to which a successful plaintiff is entitled as of right. There may have been some element of later rationalisation of an untidier history, but by the nineteenth century it was orthodox doctrine that the power to decree specific performance was part of the discretionary jurisdiction of the Court of Chancery to do justice in cases in which the remedies available at common law were inadequate. This is the basis of the general principle that specific performance will not be ordered when damages are an adequate remedy. By contrast, in countries with legal systems based on civil law, such as France, Germany and Scotland, the plaintiff is prima facie entitled to specific performance. The cases in which he is confined to a claim for damages are regarded as the exceptions. In practice, however, there is less difference between common law and civilian systems than these general statements might lead one to suppose. The principles upon

which English judges exercise the discretion to grant specific performance are reasonably well settled and depend upon a number of considerations, mostly of a practical nature, which are of very general application. I have made no investigation of civilian systems, but a priori I would expect that judges take much the same matters into account in deciding whether specific performance would be inappropriate in a particular case.

The practice of not ordering a defendant to carry on a business is not entirely dependent upon damages being an adequate remedy. In *Dowty Boulton Paul Ltd. v. Wolverhampton Corporation* [1971] 1 W.L.R. 204, Pennycuick V.-C. refused to order the corporation to maintain an airfield as a going concern because (at p. 211) "It is very well established that the court will not order specific performance of an obligation to carry on a business." He added (at p. 212): "It is unnecessary in the circumstances to discuss whether damages would be an adequate remedy to the company." Thus the reasons which underlie the established practice may justify a refusal of specific performance even when damages are not an adequate remedy.

The most frequent reason given in the cases for declining to order someone to carry on a business is that it would require constant supervision by the court. In *J. C. Williamson Ltd. v. Lukey and Mulholland* (1931) 45 C.L.R. 282, 297-298, Dixon J. said flatly "Specific performance is inapplicable when the continued supervision of the Court is necessary in order to ensure the fulfilment of the contract."

There has, I think, been some misunderstanding about what is meant by continued superintendence. It may at first sight suggest that the judge (or some other officer of the court) would literally have to supervise the execution of the order. In *C. H. Giles & Co. v. Morris* [1972] 1 W.L.R. 307, 318 Megarry J. said that "difficulties of constant superintendence" were a "narrow consideration" because:

> "there is normally no question of the court having to send its officers to supervise the performance of the order . . . . Performance . . . is normally secured by the realisation of the person enjoined that he is liable to be punished for contempt if evidence of his disobedience to the order is put before the court; . . ."

This is, of course, true but does not really meet the point. The judges who have said that the need for constant supervision was an objection to such orders were no doubt well aware that supervision would in practice take the form of rulings by the court, on application made by the parties, as to whether there had been a breach of the order. It is the possibility of the court having to give an indefinite series of such rulings in order to ensure the execution of the order which has been regarded as undesirable.

Why should this be so? A principal reason is that, as Megarry J. pointed out in the passage to which I have referred, the only means available to the court to enforce its order is the quasi-criminal procedure of punishment for contempt. This is a powerful weapon; so powerful, in fact, as often to be unsuitable as an instrument for adjudicating upon the disputes which may arise over whether a business is being run in accordance with the terms of the court's order. The heavy-handed nature of the enforcement mechanism is a consideration which may go to the exercise of the court's discretion in other cases as well, but its use to compel the running of a business is perhaps the paradigm case of its disadvantages and it is in this context that I shall discuss them.

The prospect of committal or even a fine, with the damage to commercial reputation which will be caused by a finding of contempt of court, is likely to have at least two undesirable consequences. First, the defendant, who ex hypothesi did not think that it was in his economic interest to run the business at all, now has to make decisions under a sword of Damocles which may descend if the way the business is run does not conform to the terms of the order. This is, as one might say, no way to run a business. In this case the Court of Appeal made light of the point because it assumed that, once the defendant had been ordered to run the business, self-interest and compliance with the order would thereafter go hand in hand. But, as I shall explain, this is not necessarily true.

Secondly, the seriousness of a finding of contempt for the defendant means that any application to enforce the order is likely to be a heavy and expensive piece of litigation. The possibility of repeated applications over a period of time means that, in comparison with a once-and-for-all inquiry as to damages, the enforcement of the remedy is likely to be expensive in terms of cost to the parties and the resources of the judicial system.

This is a convenient point at which to distinguish between orders which require a defendant to carry on an activity, such as running a business over or more or less extended period of time, and orders which require him to achieve a result. The possibility of repeated applications for rulings on compliance with the order which arises in the former case does not exist to anything like the same extent in the latter. Even if the achievement of the result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order. This point was made in the context of relief against forfeiture in *Shiloh Spinners Ltd. v. Harding* [1973] A.C. 691. If it is a condition of relief that the tenant should have complied with a repairing covenant, difficulty of supervision need not be an objection. As Lord Wilberforce said (at p. 724):

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