SUPREME COURT OF QUEENSLAND

CITATION:	*CSR Limited & Anor v Wagner Investments Pty Ltd* [2002] QSC 143
PARTIES:	**CSR LIMITED ACN 000 001 276 AND CSR READYMIX (QLD) PTY LTD ACN 055 429 199** (applicant) **v** **WAGNER INVESTMENTS PTY LTD ACN 011 055 271** (respondent)
FILE NO/S:	2982 of 2002
DIVISION:	Trial Division
DELIVERED ON:	18 April 2002
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2002
JUDGE:	Mackenzie J
ORDER:	**1. A declaration that, according to its true construction, cl 9.1.3 of the Agreement for Sale dated 2 October 1998 prevents the applicant from supplying sand and gravel for use by the person intended to be supplied where the purpose of supplying it is to enable the latter to carry on its business activities within A 15 km radius of the Grantham land referred to in the Agreement, notwithstanding that:** **(a) the applicant does not intend to locate business premises or operate a quarry within that 15 km radius; and** **(b) the registered office or principal place of business of the person intended to be supplied is not within that 15 km radius.** **2. A declaration that cl 9.1.3 is not unenforceable on the grounds that it is an unreasonable restraint of trade.** **3. An order that the applicant pay the respondent's costs of and incidental to the application, to be**

assessed.

CATCHWORDS: TRADE AND COMMERCE – TRADE AND COMMERCE GENERALLY – RESTRAINT OF TRADE – RESTRAINT BY AGREEMENT – VALIDITY AND REASONABLENESS – IN GENERAL – REASONABLENESS – application for a declaration – where clause in Agreement for Sale restrains the carrying on of business of a concrete plant and the business of supplying sand and gravel within the 15 km radius of the Grantham Land – where applicant does not intend to locate business premises within the geographical area of the restraint – where tenderers with whom the applicant wish to supply are not based within the geographical area – where the construction work with which the applicant wishes to tender will take place within the 15 km radius – whether supplying the contractor of the construction work with sand and gravel is carrying on the business of supplying sand and gravel within the 15 km radius of the Grantham land - whether the clause in the Agreement for Sale is void and unenforceable as an unlawful restraint of trade

Bridge v Deacons (a firm) (1984) 1 AC 705, considered
Box v Taxation Commissioner (1952) 86 CLR 387, considered
Lu v Lim (1993) 30 NSW LR 332, distinguished

COUNSEL: Mr A Crowe SC for the applicant
Mr P Keane QC with Mr T Sullivan for the respondent

SOLICITORS: Carter Newell for the applicant
Deacons for the respondent

[1] **MACKENZIE J**: In its amended form the application seeks a declaration that cl 9.1.3 of an Agreement for Sale dated 2 October 1998 between the applicant as vendor and the respondent as purchaser, does not prevent the applicant from supplying sand or gravel for use within the 15 km radius of the Grantham Land referred to in the agreement, provided the applicant does not locate a business of supplying sand or gravel within the 15 km radius and provided that such supply is not to a customer whose place of business is within the said radius. Further or in the alternative, a declaration that cl 9.1.3 is void and unenforceable as an unlawful restraint of trade is sought.

[2] On or about 2 October 1998 the applicant and the respondent entered into an agreement of sale of businesses, land and assets located at Pittsworth, Oakey and Grantham for the sum of $825,000. The apportionment for the Grantham land, buildings and assets was $444,200. Cl 9 of the agreement relevantly provides as follows:

"**9. PROTECTION OF GOODWILL**

9.1 The Vendor (and each of them) agrees that it shall not carry on or be in any manner whatsoever either directly or indirectly concerned, associated or interested, her as owner or as a beneficiary, partner, manager, or agent of any other person, firm or company, or as shareholder of any company, in:

9.1.1 the business of a concrete plant within a 15 kilometre radius of the Oakey Lease excluding the Kingsthorpe township;

9.1.2 the business of a concrete plant within a 25 kilometre radius of the Pittsworth Land; or

9.1.3 the business of a concrete plant or of supplying sand and gravel within a 15 kilometre radius of the Grantham Land,

for a period of five years from the Completion Date.

9.2 The Vendor acknowledges that the Purchaser is buying the Grantham Assets for the purposes of recommencing the businesses of a concrete batching plant on, and supplying sand and gravel from, the Grantham Land as soon as possible after the Completion Date.

9.3 In this clause 9 "business of a concrete plant" includes the supply of ready-mixed concrete products.

9.4 In the event that clause 9.1 is held void or unenforceable by any court on the basis that the areas or periods specified are excessive, the Purchaser may by notice in writing specify a reduced area or period, and in such case clause 9.1 shall be interpreted including that reduced area or period in place of the area or period specified.

9.5 Nothing in this clause prevents the Vendor from being a holder for investment purposes only of marketable securities for the time being quoted on a recognised stock exchange where such holding does not confer any significant influence on the listed company."

[3] The immediate issue has arisen because the applicant has provided prices to supply quarry products (which for the purposes of these proceedings include sand and gravel) to tenderers for construction of an extension to the Gatton Bypass on the Warrego Highway. It is deposed that the applicant does not intend to locate business premises nor acquire or operate a quarry within the geographical area of restraint provided for in cl 9.1.3. The tenderers to whom the quotations have been supplied by the applicant are all companies which, on the face of it, are based in

Brisbane or Cairns. It is common ground that the construction work on each stage of the Bypass will take place within the 15 km radius of the Grantham land.

[4] The respondent's argument is that the applicant cannot supply sand and gravel without contravening the provisions of cl 9. As is obvious from cl 9 the restraint operates against carrying on the business of a concrete plant in respect of Oakey and Pittsworth. In respect of the Grantham land it restrains the carrying on of the business of a concrete plant and the business of supplying sand and gravel within a 15 km radius of the Grantham land. The issue is whether supplying the contractor for the construction of the Gatton Bypass extension with sand and gravel is carrying on the business of supplying sand and gravel within a 15 km radius of the Grantham land within the meaning of the clause.

[5] Mr Crowe submitted that the decision of Young J in *Lu v Lim* (1993) 30 NSW LR 332 was analogous to the present case. The parties were in a partnership as medical practitioners. There was a clause to the effect that if either party retired from the partnership he agreed he would not carry on or be engaged or interested in any medical practice within the radius of 5 km from the address of the existing partnership. The defendant wished to become involved in a medical practice situated outside the 5 km limit but do house calls from that practice to patients within the prohibited area.

[6] Young J observed that there was a difference between a covenant preventing engaging in practice as a medical practitioner and what was comprised in the clause in the agreement. He held that what was prohibited was carrying on, engaging in or being interested in a medical practice which had its surgery within the prohibited radius. He was of the opinion that the words "any medical practice" reinforced that conclusion and that the prohibition was directed against setting up a practice within the prohibited area, not merely practising within the prohibited area from premises outside.

[7] In the present case what is prohibited is carrying on the business of supplying sand and gravel within a 15 km radius of the Grantham land. Cl. 9.1.3 refers to carrying on "the business", not "a" business. This is not decisive but it would be easier to justify the applicant's construction if the latter had been used. That view is not inconsistent with cl 9.2 where the reference to "the business" is to a specific business formerly carried on by the applicant on the Grantham land.

[8] Nor does the concept of carrying on the business of supplying sand and gravel necessarily take its colour from the reference to carrying on the business of a concrete plant, which would ordinarily suggest a physical location at which a concrete plant existed. It follows from the extended definition in cl 9.3 of "business of a concrete plant", which includes supplying ready mixed concrete products, that the reference to the business of a concrete plant does not of itself necessarily imply that it is limited to supplying from specific premises within the 15 km zone.

[9] When one takes into account the nature of the business referred to, which may be broadly described as the manufacture of products ordinarily produced by a concrete

plant, the supply of ready mixed concrete products and the supply of sand and gravel, I am satisfied that the proper interpretation of cl 9.1.3 is that it relates to manufacturing products, supplying ready mixed concrete products and supplying sand and gravel as part of the applicant's business activities within a 15 km radius. Adopting Young J's analysis, the covenant is not directed only against setting up business premises within the 15 km radius.

[10] The uncontroversial facts are that it is known by the applicant that the sand and gravel is to be supplied for the purpose of the purchaser using it at sites within the 15km radius of the Grantham Land for the purposes of the purchaser's business activities. On those facts it is an irrelevant circumstance that the company to which the gravel is to be supplied has its registered office or principal place of business outside the 15km radius.

[11] Mr Crowe submitted that the reference in cl 9.2 to the acknowledgement that the purchaser was buying the Grantham land and the Grantham assets for the purpose of recommencing the businesses of a concrete batching plant on, and supplying sand and gravel from the Grantham land was an indication that the applicant was to be prohibited from that kind of activity only when it was carried on from a site within the 15 km radius of the Grantham land. Cl 9.2 is no more than what it states itself to be, an acknowledgement that the purpose of buying the land and the assets was for the purpose of recommencing a business which had been closed down by the applicant. It has no wider significance than that.

[12] The consideration for the Grantham land and the assets was substantial. There is nothing in the other facts to lead to the conclusion that a lesser protection of the respondent's interests than the level asserted by the respondent was contemplated by cl 9. It is an irrelevant circumstance that the opportunity to tender for what will probably be a lucrative source of revenue to a successful tenderer has arisen during the currency of the agreement. The applicant's loss of the opportunity to tender for the Gatton Bypass extension is merely one of the vicissitudes of predicting when and how business opportunities may develop in the medium term when contracts of the kind in issue are entered into.

[13] The other issue is whether cl 9 is enforceable notwithstanding that it operates as a restraint against trade. It was submitted that if cl 9 is so wide as to prevent the applicant from supplying sand and gravel in the circumstances postulated by the amended application, it is a restriction which exceeds what is reasonable to protect the interest acquired by the respondent. It was submitted that the respondent was not buying protection against competition within the area of the restraint from the applicant but only buying the land and plant and the equipment and the prospect of developing future goodwill.

[14] In my opinion the clause is not unenforceable. Cl. 9.2 shows that the parties contemplated that, in return for the substantial consideration, the respondent was purchasing the land and assets from the applicant, in contemplation of re-opening the business closed down by the applicant at that site. The inference to be drawn from that fact is that the intention of the parties was that the respondent could build

up goodwill based both on location and reputation (*Box v Taxation Commissioner* (1952) 86 CLR 387, 397), an element in the process of which was protection against competition from the applicant within the prohibited area for 5 years. The geographical extent of the restraint is not alleged to be excessive in itself. There is nothing unreasonable as between the parties about such a clause, which was negotiated and entered into freely by the applicant which was by no means in a position of less bargaining power than the respondent.

[15] Further, there is no reason to conclude that a 5 year term for the protection is unreasonable in the circumstances of the case. Indeed, the period was reduced from 7 years to 5 years during negotiation of the terms of the clause at the instigation of the applicant which said it had received advice that that period of 7 years might be unreasonably long. That conclusion was, on the face of it, accepted by the respondent. Cases where the duration of the restraint alone will render a restraint unreasonable, where the terms of the restraint are otherwise reasonable, will be rare *(Bridge v Deacons (a firm)* (1984) 1 AC 705, 717). The conclusion is that the clause is not unenforceable on the ground that it is unreasonable restraint as between the parties.

[16] There is evidence that there are several other potential competitors to the respondent in respect of supplying the sand and gravel for the project. It is not a case where public interest concerns are such that it is necessary to strike down the clause.

[17] The following declarations and order are made:

1. A declaration that, according to its true construction, cl 9.1.3 of the Agreement for Sale dated 2 October 1998 prevents the applicant from supplying sand and gravel for use by the person intended to be supplied where the purpose of supplying it is to enable the latter to carry on its business activities within a 15 km radius of the Grantham land referred to in the Agreement, notwithstanding that:
   (a) the applicant does not intend to locate business premises or operate a quarry within that 15km radius; and
   (b) the registered office or principal place of business of the person intended to be supplied is not within that 15 km radius.
2. A declaration that cl. 9.1.3 is not unenforceable on the ground that it is unreasonable restraint of trade.
3. An order that the applicant pay the respondent's costs of and incidental to the application, to be assessed.