FREEDOM TO WORK OUTSIDE NEW ZEALAND

Blackler v. The New Zealand Rugby Football League
[1968] N.Z.L.R. 547.

This case is marked by a number of interesting aspects. First, its genesis is unusual; that Blackler thought it worthwhile to challenge by protracted litigation, the ruling of an amateur organisation to which he had belonged. One can only conjecture, but he may have anticipated, if successful, more than adequate compensation from participation in professional League Football in Australia.

Two other features are of interest. One is that the majority of the court made explicit the fact that they were influenced by considerations of a local character. The other, that the notion of a "right to work" was recognised and admitted some force.

The action arose in the following circumstances. Blackler was until December of 1964, a resident of New Zealand. He had a distinguished record in the sport of Rugby League culminating in national status. In late 1964, he became, for personal reasons, a resident of Australia. In the following year he sought leave from the respondent to play professional football in the state of New South Wales.

Such consent was required, because by international agreement, no player is accepted for membership in another country without the consent of his home league. The International Agreement was designed to control the movement of players between countries. It arose from the fear that those countries with the most attractive opportunities in Rugby League would attract players from other countries. The more fortunate Leagues would be at an advantage, the less fortunate at an increasingly greater disadvantage. To put this into the context of the present case, New Zealand offers amateur sport, while Australia is able to support both amateur and professional sport.

The New Zealand Rugby League by rules and established procedure, implemented locally the provisions of the International Agreement. The procedure had this effect. An applicant for overseas transfer would be acceptable only if he did not have potential national value, or had declined from that standard. By the same token, it is not likely that such a player would be acceptable to overseas professional clubs. But Blackler did not fall into this category. At the time of his application he was of proven ability, and was accordingly refused.

Upon bringing his action in the Supreme Court[1] Blackler claimed that the ruling of the respondent was illegal and void, being beyond its power and in unlawful restraint of his right to seek employment. Perry

1. [1967] N.Z.L.R. 705.

J. held that although the rule entitling the respondent was prima facie void, as in restraint of trade, it was no more than was reasonable for the protection of the defendant, having regard to his interests and the interests of the public.

In the Court of Appeal,[2] counsel for the appellant discarded some of the grounds relied upon in the Supreme Court, and made three submissions which were drafted in the alternative. It was submitted, first, that the rules of the respondent, upon a proper construction, did not entitle it to make a decision in the manner complained of. Second, if the respondent had acted within a legitimate interpretation of its rules, the rules were invalid as being in restraint of trade. Finally, if the two preceding submissions were not acceptable, the respondent acted illegally by pre-determining the issue upon general grounds without reference to the particular circumstances of the application.

Each submission stands independently. The Court of Appeal was unanimous in dismissing the first submission, holding that upon a proper construction of its rules, the respondent acted *intra vires*. In separate judgments, the members of the court reached their decision by essentially similar reasoning, and there is little value in recapitulating what was said. The third submission is of small importance. The majority of the court after accepting the second submission did not find it necessary to go further.

The second submission of counsel for the appellant, that the rule was invalid as being in restraint of trade is noteworthy in two respects. It is at once the source of the crux of the decision, and of sharp division amongst members of the court. To be read with it is a submission made by counsel for the respondent, who objected that restraint of trade had no application to the respondent which was not a trading body, but merely administered the affairs of an amateur sport.

North P. referred to the objection directly. While he acknowledged that no prior decision was directly in point, he thought at page 554 that "as a matter of principle" the court should be able to intervene "where a body administering an amateur sport takes to itself the power to prevent its players from seeking employment *overseas* as professional footballers without its consent" (emphasis added).

McCarthy J. also ruled affirmatively. He recalled at page 568 that the doctrine had recently been extended to professional sport in *Eastham* v. *Newcastle United Football Club* [1964] Ch. 413. In that case the rules of amateur body were also declared void, which "exercised unreasonable restraint on . . . [the] right to work as a professional footballer."

Whereas both the President and McCarthy J. contented themselves with a statement of preference, the former relying on principle, the latter upon an English decision at first instance, North P. made the more wide ranging statement. He answered immediately the issue which

2. [1968] N.Z.L.R. 547.

divided the court. One which "must", he said at page 554, "be resolved one way or another as my brothers have reached opposite conclusions on a matter which goes to our power to make the decision."

Although the submissions of the respective counsel hint at what proved to be the issue, it fell to Turner J. to define it. At page 561 he put it in the following way: "is there a rule of public policy which discountenances a contract or rule restraining persons from taking employment *but only outside this country.*"

Although the New Zealand Rugby League is an amateur body, it is able to regulate any of its members seeking employment overseas, by virtue of the International Agreement to which it is a party. In resolving the problem whether a restraint of employment outside the country falls within the doctrine, the court had first to examine the ambit of the doctrine of Restraint of Trade.

The classic statement of the doctrine is to be found in dicta of Lord MacNaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co. Ltd.* [1894] A.C. 535, 565:

> 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 in action in trading, and all restraints in 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 sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable . . . reasonable that is, in the interests of the parties concerned and reasonable in the interests of the public. . . .

As Lord Wilberforce has observed, there is a tendency, especially in the earlier cases, for the courts to treat Lord MacNaghten's statement as presenting a single question. Namely, by asking whether the contract is "in 'undue restraint of trade' or by a compound finding that it is not satisfied that this contract is really in restraint of trade at all but, if it is, it is reasonable."[3] Indeed Lord MacNaghten, by reference to "all restraints" aided in obscuring the problem. To speak of "all restraints" is to beg the question, for of course there exist two conceptually distinct facets to the *Nordenfelt* doctrine, even if they are applied as one. First, whether the contract is in restraint of trade at all. Second, whether, if so, it may be justified as a reasonable restraint. The first leg of the doctrine was the primary concern of the court in the instant case.

In *Nordenfelt*, the appellant, who was a patentee and manufacturer of guns and ammunition, entered into a wide ranging covenant with a company to which his patents and business had been transferred. The

3. *Esso Petroleum Co. Ltd.* v. *Harper's Garage (Stourport) Ltd.* [1967] 1 All E.R. 699 at 729.

covenant precluded him from engaging in the manufacture of guns and ammunition, except on behalf of the company, for a period of twenty-five years. The facts are familiar enough. But pursuant to them, it was held that restraints which operate both within and outside the country, may be adjudicated by the courts.

A recent commentator[4] upon *Blackler's* case has argued that "it is surprising" that Turner J.'s definition of the problem has been so readily accepted. After noting that one of the League's rules prohibits a New Zealand player from accepting anything other than insurance benefits, he suggested that the cumulative effect of this rule and the rules relating to transfer is to present a restraint in clear *Nordenfelt* terms. That is, a restraint which operates both within and outside the country. In the result, this would mean that the court's preoccupation with purely overseas restraints was "academic". The thought is attractive and would have provided the court with a more simple method of resolving the problem. But it would appear equally academic to argue upon the cumulative possibilities in the rules, when the possibility of their ever eventuating, in this country, is minimal. This point was amply, if implicitly, made by Turner J., in his exposition of the issue.

If we are left with the question of determining the ambit of restraint of trade, albeit with regard to geographical limits, it is with a problem perennial in this field of the law. Collinge puts its significance in this way:

> The task is important because all contracts involve some form of "restraint" in the sense of the acceptance of a negative obligation, and it may be taken as trite that not all restraints are subject to the doctrine.[5]

Certainly the "restraint", in the present case, appears quite real. An amateur organisation had assumed: "the power to prevent a person no longer under its control from turning professional for an unlimited time wherever the power was effective."[6] Was the respondent entitled to act in this manner?

From the tenor of his judgment, and more especially from a statement cited earlier, a fair inference exists that North P. was in the position of exercising a casting vote. He contented himself with a conclusion drawn from principle and policy, not examining in his judgment the authorities adduced by the other members of the court. In the event, the authorities did not settle or directly contemplate the situation which confronted the court. Thus the judgments of Turner and McCarthy JJ. are rendered largely inferential in this aspect. Support was derived from rationalisation upon the facts or from isolated statements. Nevertheless, the conclusions which each judge reached are diametrically opposed.

Turner J. tentatively propounded, and finally adopted the view at

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4. "The Right to Play". A. C. Holden [1968] N.Z.L.J. 333, 334.
5. "The Doctrine of Restraint of Trade." J. G. Collinge, (1968) 41 A.L.J. 410.
6. Holden loc. cit. 333.

page 561, that "no consideration of public interest . . . nothing indeed but the private interests of the individual concerned is affected by such a provision and . . . no consideration of public interest requires it to be set aside."

McCarthy J. adopted what he called a "rationale" of the authorities, and his understanding of the law, as it had developed, is stated at page 569:

> any restraint of employment wheresoever, whether it be intended to operate in New Zealand, or only overseas, or both, is *prima facie* void, and the fact that the area of restraint extends beyond this country, or . . . applies only beyond this country, . . . is a matter going to reasonableness.

Two authorities exemplified the differences of Turner and McCarthy JJ. The first was the leading authority, *Nordenfelt's* case, which has already been examined, and found by a factual distinction, to be inapplicable to the present case. In that case, the restraint was regarded as clearly contrary to public policy and *prima facie* void, the issue being whether it could be saved by consideration of reasonableness. To that the attention of the court was directed.

Nevertheless, McCarthy J. believed that members of the court were also aware of the effect and the extent of the restriction. And if they had been called to do so, they might well have decided that an overseas restraint was injurious. He adopted the pragmatic statement of Lord MacNaghten, asking: "What is a reasonable restraint with regard to the particular case?" But this latter question was employed by Lord MacNaghten in the context of determining whether the restraint was justified, not whether it was prima facie void.

Turner J. at page 562 relied upon dicta of Lord Herschell, which he recognised were directed to the reasonableness of the restraint, but which he thought went further to indicate the exclusion of purely overseas restraints from the concern of the courts. This inference, drawn from the passage cited in his judgment, appears accurate, but his reliance on some other statements lacks justification. One illustration is the emphasis placed upon a statement by Lord MacNaghten. "It can hardly be injurious to the public, that is the British Public, to prevent a person from carrying on a trade in weapons of war abroad."[7] Turner J. at page 562 acknowledged that the question of armaments might be a "special consideration", but believed Lord MacNaghten to be saying: "the general run of such agreements will not run counter to public policy." With respect to the learned judge, it is difficult to construe the sentence in any other sense than as a reference to armaments; especially as Lord MacNaghten himself emphasised within the immediate context that it was: "a special feature in the present case".

The second case which drew varying interpretations was *Leather Cloth Co.* v. *Lorsant* (1869) 9 L.R.Eq. 345, 354. In particular, it was a

7. *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co. Ltd.* (supra) at 574.

statement of Sir William James V.-C., which appeared apposite to the present case. "The principle is this: public policy requires that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself or the state of his liberty, skill or talent by any contract that he enters into." McCarthy J. used the extract to illustrate that by the middle of the 19th century, the interests of the state and of the individual were fused components in public policy, while Turner J. cited the statement as an indication that the Vice-Chancellor denied that the courts had any concern with overseas restraints. The extract does not appear capable of both meanings, although it is recorded by an interjection, that the Vice-Chancellor construed general restraints as those extending throughout, and no further than the United Kingdom. Even accepting that this was the Vice-Chancellor's view, it is difficult to see how much value should be attached to it. The decision was given before *Nordenfelt's* case, in which general restraints were construed to include those having force both inside and outside the country. If both judges were at variance upon the significance of these cases, they were agreed that three decisions support the view that the courts may rightly concern themselves with purely overseas restraints.

In *Dowden* v. *Pook* [1904] 1 K.B. 45 the plaintiffs, who were cider makers with a limited overseas trade, extracted from the defendant an agreement, upon employment, not to engage in the trade for five years after he ceased working for them. The English Court of Appeal did not directly decide the point which concerns us. But it held the covenant, which was world-wide, void. Turner J. agreed that the decision in this case was consistent only with the court's proper concern with overseas restraints. He noted, however, that the questions arose at a later date, before the Court of Appeal in *Lamson Pneumatic Tube Co.* v. *Phillips* (1904) 91 L.T. 363. That case, he suggested, showed the inclination of the court to examine its earlier dicta, especially as the question was expressly left open. McCarthy J. also drew attention to the attitude of the court in *Lamson's* case, but seems to imply that it is a reason for optimism. Presumably, he took this position because the court did not condemn, out of hand, concern with overseas restraints.

The two other decisions recognised by Turner J. as against his view were distinguished by him. The first was *Continental Tyre Co.* v. *Heath* (1913) 29 T.L.R. 308, which he observed was an oral decision of Scrutton J. at first instance. Although, the second was *Goldsoll* v. *Goldman* [1914] 2 Ch. 603; [1915] 1 Ch. 292, C.A., which was a decision of Neville J., affirmed in the Court of Appeal. The value of both was impaired by the fact that they concerned general covenants operating at home and abroad. The attention of the courts was directed to that portion of the restraint which operated inside the country.

What is perhaps most apparent from the respective judges' examination of the authorities is the impasse which emerges. As the authorities did not, upon logical grounds, compel one conclusion or the other, the reasons for the definite division must lie elsewhere.

The first question is, not simply whether a strict reliance upon the

authorities was possible, but whether it was appropriate. A distinction has been drawn, most notably by Lord Watson, between the force of precedent in public policy and in other branches of the law.

> A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal.

Lord Watson continued, to point out that public policy, over a period of time, will

> undergo change in development from various cases which are altogether independent of the action of the courts.[8]

McCarthy J., as did the learned President, recognised the nature of the law governed by public policy. He said at page 568: "The law relating to restraint of trade has been in movement and that movement will continue. Founded as it is in public policy, it will change as views of what is regarded in the public interest will inevitably change." Turner J. did not give any such explicit recognition to this perspective. The consequence of these differing approaches was that the President and McCarthy J. were able to consider the authorities in general terms, and to adopt a "rationale" conditioned by the present New Zealand position. Whereas Turner J. adhered to what he thought to be the *status quo*.

Perhaps his attitude to the authorities was influenced by qualms he seems to have felt about the sort of action which was before the court. Early in his decision at page 558, Turner J. made the gratuitous statement:

> I do not record anything here as to the merits of appellant's application.

More explicitly at page 564, at the conclusion of his judgment, he said:

> I think that to hold such a provision void would be to extend public policy beyond what has been certainly decided in any of the cases, and for myself I cannot regard *this case* as the justification for the required extension (emphasis added).

McCarthy J. may have defined the position taken by Turner J., when he said at page 571, "The country may not suffer greatly if he [Blackler] is denied the exploitation of his skills in Australia." Nevertheless, North P. and McCarthy J., moved, at this point, to wider considerations. They preferred to think of the implications of their decision for New Zealand. This aspect appears to have been given decisive importance.

The learned President at page 551 thought the logical result of the position taken by Turner J. to be:

> A New Zealand company, could, with impunity, extract a covenant from its employees not to seek employment overseas at the conclusion of their term of service with the New Zealand company.

8. *Nordenfelt* (supra) at 553.

Both North P. and McCarthy J. took the view that to deny Blackler his declaration would be tantamount to allowing commercial organisations in this country licence to stultify intellectual and technical traffic overseas. Special consideration was given to the value attaching to the exchange of ideas and experience which results from study in Europe, Australia and the United States.

It is commonplace that we have relied heavily upon the graduates of overseas institutions in the past and will continue to do so. Anything which restricts the gain of expertise which results should be regarded seriously. Yet, it is questionable whether the court was compelled to grant Blackler his declaration, upon this consideration. To say that a football player is not entitled to a declaration that the rule restraining him from playing professionally overseas is void, is not necessarily to say that a young scientist tied to a commercial organisation is similarly precluded. There is no logical inconsistency in denying the former, while allowing the latter. From the commercial perspective, one is of value to the nation, the other is not. Presumably, it was this that Turner J. had in mind. Although the majority of the court seem to have been influenced by a further notion. They saw the problem in a slightly different perspective.

When Lord MacNaghten stated that the individual has as much an interest as the public, in *his* ability to trade freely, he was perhaps indulging a capacity for understatement. Nevertheless, what was observed by Lord MacNaghten, in rather vague terms, has been receiving increasing attention in the courts.

Turner J. placed a traditional emphasis upon the doctrine of Restraint of Trade, when at page 561 he said: "Where people restrain themselves, or are restrained from making their labour or services available *to the public* . . . then *public policy* will discountenance the contract . . . " (emphasis added). This is a literal exposition of the interest of the body politic seen in commercial terms. It is more readily understood by the courts in a national rather than an international context. Understandably, Turner J. concluded that only the interests of the individual in this case were affected by restraint upon his activities overseas.

We have already seen that North P. and McCarthy J. were convinced of a practical relationship between the welfare of the individual and of the state, in terms of gaining experience in the larger countries overseas. But, more pertinently to this case, is it desirable, as a matter of principle, that the liberty of the individual should be curtailed in such a manner? Inevitably any attempt to answer a question, expressed at this degree of generality, is fraught with difficulties. It is scarcely surprising that members of the court treated the notion of a right to work with caution.

Turner J. stated the "right to work" as "the right of every person resident within the jurisdiction individually," but questioned whether such a notion existed in the law. He was even more doubtful, even if it did exist, whether it would extend abroad.

North P. at page 555 recorded, without comment, the view suggested by the Editor of *Smith's Leading Cases* at page 493; that the state has been increasingly concerned that its citizens' right to work should not be unduly restricted. He thought the subject controversial, but then went on to say: "I cannot think . . . that it would be right in these days for New Zealand courts to hold that the interests of New Zealand are adversely affected only in the case of restraints which apply in New Zealand."

Although this statement was made in the immediate context of his discussion of a right to work, it is not clear whether North P. intended that it should be so read. Assuming that this was the intention of the learned President, is it a fair implication to say that he was prepared to answer the two questions which troubled Turner J.? Perhaps to view with approval the existence of a right to work, extending both inside and outside the country.

McCarthy J., on the other hand, made his position more plain. "My stand is," he said at page 571, "that I prefer what I suggest is the wider view, that public policy is concerned with a man's freedom to work beyond our shores, and I say that notwithstanding any appreciation of the difficulties which lie in setting limits." He quoted a statement of Lord MacMillan, to the effect that restraint of trade represents a compromise between two principles. The first, that people who enter contracts should be held to their word. The second, that people should be able to exercise their powers and abilities unfettered, for their own and the community's benefit. A balance has to be reached. McCarthy J. was prepared to side with the individual. He felt justified in doing so, because he observed an historical trend, in which: "the consideration of the protection of the individual has grown in importance." Also because he perceived some support for his view in the recent case of *Nagle* v. *Feilden* [1966] 2 Q.B. 633.

The English Court of Appeal, in that case, was called upon to decide whether Mrs. Nagle had a *locus standi* from which to pursue her action. Strictly, the court went no further than to say that she *might* have an arguable case, and as such she was entitled to her day in court. Nevertheless, *Nagle* is in some essential respects similar to the present case. Moreover, the Court of Appeal went further than merely to decide the limited question before it, and made statements of relevance to these circumstances.

Briefly, the stewards of the jockey club controlled horse racing on the flat in Britain. They made the rules, sanctioned the holding of race meetings, and allowed only those horses to race which were presented by a licensed trainer. Mrs. Nagle had trained racehorses for many years. but the stewards refused to grant a trainers' licence to a woman in any circumstances. Thus her personal applications were refused, while the stewards indulged in a myth by granting the licence to her menservants. The purpose of the action was to explode the myth.

A statement taken from Salmon L.J. illustrates the tenor of the

court's observations as well as any. "I should be sorry to think," he said at page 655, "that . . . we have grown so supine that today the courts are powerless to protect a man against an unreasonable restraint upon his right to work to which he has in no way agreed and which a group with no authority, save that which it has conferred upon itself, seeks capriciously to impose on him." Admitting that this is so, where does it leave us in law? Despite the fact that the members of the court each expressed the view that a "right to work" has long existed, the notion remains vague.[9] Whereas the principle of freedom of trade has, in the past, been applied to restrictive covenants in a contract or to a tortious conspiracy, neither situation applied in *Nagle's* case. If this means that a person has a right to be given employment, the lack of a basis makes it still unclear by whom and under what circumstances. Possibly a general comment could be made. The court appears to have envisaged a situation in which an organisation had a virtual monopoly of the field, and where the individual is denied the exercise of his chosen vocation unless he accepts or is capable of falling within arbitrary rules or conditions. If this is a new principle, as some writers maintain, then it appears a rigidly circumscribed one.

In *Blackler,* the circumstances are similar in certain respects. If his sporting career was at all similar to that of most other New Zealanders, it is likely that he joined the Papanui Club at an early age with a simple desire to play rugby league. It is likely that he would not have been aware of the existence of the respondent, let alone the sort of control it could exercise over his activities. If Blackler entered the game in New Zealand heedlessly, he was later apprised that his leaving it would not be so easy. The League exercised a wide ranging restraint based on the arbitrary belief that it would otherwise suffer unfair competition for players of good quality. It effectively prevented him from exercising his capacities, and improving his standard of living.

Under the circumstances, Turner J. was correct when he said that a right to work was "hinted at" in *Nagle* v. *Feilden,* but the same sort of attitude was exhibited by McCarthy J. and possibly North P. in the present case. The substantive issue, of an extensive restraint, was obscured by the question of "overseas" restraints which occupied the court. Yet it is clear that the spirit of the law would look upon it with disfavour.

Even though he recognised that it would be desirable to hold the restraint void, Turner J. thought it would involve an extension of the law. Something which he was not prepared to do in this case, presumably because its commercial significance was negligible. The majority were prepared to take a wider view based upon the value judgment that it is desirable that a man should not be unreasonably curtailed from using what abilities he has to his own advantage. The commercial aspect of the doctrine was put to second place. It will be interesting to see whether, in the future, the courts extend the notion of a right to work, beyond the undeveloped value judgment which seems to have been influential in this case.

P. J. K.

9. See "The Right to Work" A.L.G. (1966) 82 L.Q.R. 319.