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Restraints of Legal Practice in Class Action Settlements

A comparative report prepared for the Legal Resources Centre

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EXECUTIVE SUMMARY

I. INTRODUCTION

1. This is a report prepared by Oxford Pro Bono Publico ('OPBP') for the Legal Resources Centre (LRC) in South Africa to assist in their settlement negotiations in the Silicosis Class Action. The Silicosis Class Action is a class action in which current and past underground goldmine workers who contracted silicosis or tuberculosis (TB), and the dependants of mineworkers who died of silicosis or TB, are seeking compensation for having contracted silicosis or TB due to the exposure to silica dust while working underground in the goldmines.[1] The Silicosis Class Action has two distinct classes, the TB class and the silicosis Class.[2] The LRC acts on behalf of miners and dependants in the silicosis class.

2. The class action was certified by the South Gauteng High Court in *Nkhala and Others v Harmony Gold Mining Company Limited and Others* case no. 48226/12. After certification, the parties decided to begin confidential settlement negotiations. As a part of the settlement agreement, the goldmining companies would like to include a clause which restrains the plaintiffs' attorneys from funding, advising, providing financial or other assistance as well as instituting any further claims for compensation on behalf of a claimant based on the same illnesses in the Silicosis Class Action. The attorneys would receive compensation for the restraint. Once concluded the settlement agreement would have to be approved by a court.[3]

II. NATURE OF THE RESEARCH

3. To assist the LRC with the settlement negotiations in this case, OPBP has undertaken research to establish the legal position and practice in comparative jurisdictions regarding clauses in settlement agreements restraining the

[1] For a more detailed exposition of the facts, see the certification judgment, *Nkhala and Others v Harmony Gold Mining Company Limited and Others* case no. 48226/12. (the *Certification Judgement*).
[2] *Certification Judgement*, para 40.
[3] *Certification Judgement*, para 145.

plaintiffs' counsel/legal representatives in class actions from acting or providing support to claimants in further litigation related to the 'original' class action.

4. Our research addresses three questions in respect of each of the jurisdictions covered:

   I. In your jurisdiction, are agreements in which plaintiff attorneys/legal representatives in class actions agree to enter into a restraint in terms of which the firm of lawyers and all their partners agree not to bring or support any further claims based on the same issue on behalf of any member of the class, valid and enforceable in law?

   II. Considering your response to question (a), would the payment of a sum of money to the plaintiff attorneys/legal representatives in exchange for entering into the restraint affect your answer?

   III. In your jurisdiction, have there been any class action settlement proposals containing a constraint described in (a) which were either rejected or accepted by the court when exercising its supervisory jurisdiction to approve class action settlement?

5. These three questions all concern the key legal issue which this Report seeks to address, namely, whether the clause in question is legal and enforceable, and if entering into such agreements is ethical in accordance with attorney's ethical conduct/standards.

6. The comparative perspective brought to this issue draws on the following jurisdictions: Canada, England and Wales and the United States. The focus on these jurisdictions is warranted as they, especially the US, have a long history of opt-out class actions and mass tort litigation.

III. SUMMARY CONCLUSIONS

7. This section is a summary of our main findings for each of the three questions considered. By identifying broad trends as well as significant differences across jurisdictions, we hope that our comparative research will enrich an understanding of the South African legal position and practice on these questions.

Question 1:

Are agreements in which plaintiff attorneys/legal representatives in class actions agree to enter into a restraint in terms of which the firm of lawyers and all their partners agree not to bring or support any further claims based on the same issue on behalf of any member of the class, valid and enforceable in law?

1. The only jurisdictions which have a definitive answer to this question are the US and the province of British Columbia in Canada. Both these jurisdictions have ethical rules which bar attorneys in class actions from entering into these agreements. England and Wales have no such rules, thus, the answer to this question hinges on whether the restraint could be said to be contrary to public policy or whether the restraint is covered under the ordinary laws governing restraints of trade, if so, the restraint would be *prima facie* unenforceable.

2. In the US, Rule 5.6(b) of the American Bar Association (ABA) Model Rules of Professional Conduct prohibits agreements in which a lawyer's right to practice is restricted as a part of the settlement agreement. This rule is identical to the Law Society of British Columbia's Code of Professional Conduct rule which provides that 'A lawyer must not participate in offering or making an agreement in which a restriction on any lawyer's right to practise is part of the settlement of a client lawsuit or other controversy.'

3. The key rationales behind these rules are that restraints of this nature:

    3.1. limit the public's access to legal representation, in particular, it limits the public's access to the more experienced lawyers in such litigation;

3.2. present a conflict of interest between class members and their attorneys, who, on the one hand have a duty to act in the best interest of the class members and on the other, also have a pecuniary interest in the settlement - this could lead to settlement agreements driven by the interests of the plaintiffs' attorneys rather than the best interests of the class members (this applies in circumstances were a sum of money has been paid to the plaintiffs' attorneys as consideration for the restraint);

3.3. present a conflict of interest between current class members, those who decide to opt-out of the class actions as well as future clients;

3.4. that they are contrary to public policy;

3.5. lastly, they risk an outcome where settlement is driven by the defendant's desire to 'buy off' the plaintiffs' attorneys, rather than the merits of the case (this applies in circumstances were a sum of money has been paid to the plaintiffs' attorneys as consideration for the restraint).

4. However, the US cases have made a clear distinction between the validity and enforceability of such clauses, and the plaintiffs' attorneys breach of the ethical rule. In most of the US cases, the courts have separated the questions whether the clause is valid and enforceable and whether the plaintiffs' attorneys have breached their ethical obligations. A general trend is that the clauses are treated as valid and enforceable, but the plaintiff attorneys are subject to disciplinary proceedings for having breached the ethical rule. The sanctions vary from public reprimand in the state of Georgia, to disbarment and an order that the plaintiffs' attorneys disgorge of any money earned.

5. In England and Wales, there are no clear rules governing such restraints. However, the Solicitors Regulatory Authority Code of Conduct lists indicative behaviour that may demonstrate compliance with the principles governing solicitors' conduct. Indicative Behaviour (1.20) provides that it would be indicative of compliance if a solicitor who receives a financial benefit as a

result of acting for a client, were to: pay such benefit to the client; offset it against their fees to the client; or keep it only where she can justify keeping it, she has told the client the amount of the benefit (or an approximation if she does not know the exact amount), and the client has agreed that she can keep it. Thus, the receipt of payment for the restraint, in circumstances falling outside the scope of the listed behaviours could be indicative of behaviour falling foul of the code of conduct. Nevertheless, a key difference between this jurisdiction and the US and Canada (under its federal jurisdiction) is that settlement agreements in class actions need not be approved by the courts, thus, it is unlikely that clauses of this nature would be examined by the courts.

6. Moreover, in England and Wales, settlement agreements in litigation are governed by contract law. Thus, the settlement agreement would have to comply with the ordinary rules of contract which prohibit contracts which are illegal or contrary to public policy. Whether or not the restraint in question would be contrary to public policy is unclear. However, if the courts were to find that the restraint on plaintiffs' attorneys fell under the laws governing restraints of trade, it would be *prima facie* unenforceable. It would only be enforceable if it was found not to interfere with the interests of the parties to the agreement and the wider public.

7. In all the jurisdictions, there is a duty to act in the best interest of one's client. Accordingly, if it could be established that a restraint clause of this sort is in the best interest of all class members, it may be valid and enforceable. Another factor which would tip the scales in favour of upholding these clauses is the sanctity of contract - this argument has been particularly persuasive in the US courts, were judges have, while noting the ethical problems related to restraints of future practice, upheld the validity of the restraints on the basis that they were entered into freely and voluntarily by the parties.

8. However, there are also considerations of public policy and the proper administration of justice. In all three jurisdictions, it could be argued that,

under certain circumstances, restraints of this nature could be found to be contrary to public policy and the proper administration of justice, especially if the restraint would create a substantial barrier to access to legal representation in future class actions.

Question 2:

Considering your response to question (a), would the payment of a sum of money to the plaintiff attorneys/legal representatives in exchange for entering into the restraint affect the answer in question 1?

9. The payment of a sum of money could be a factor taken into account in determining whether the plaintiffs' attorney has acted in the best interests of her clients. It could also be taken into account in considering whether the agreement is contrary to public policy.

10. In both the US and Canada (under the federal jurisdiction), the settlement agreement must be approved by the courts. In the US, the standard applied is that the settlement agreement must be 'fair, reasonable and adequate'. In Canada, the settlement agreement must be 'fair, reasonable and in the best interests of those affected by it.' A payment of money for the restraint could be a factor in this analysis. The proposed settlement would preclude the plaintiffs' legal representatives from acting for class members who choose to opt-out of the settlement agreement. It seems clear that the proposed agreement would not be in their interests as it would impede their ability to obtain legal assistance to pursue their claims.

11. As discussed in response to question 1, in England and Wales, the receipt of the sum of money followed by behaviour outside the listed Indicative Behaviour in Chapter 1, 1.20 could be indicative of non-compliance with the Solicitor's Code of Conduct.

12. In all the jurisdictions, the payment of money could give rise to conflict of interest issues as the plaintiffs' attorneys now have a pecuniary interest in a

certain outcome of the class action, one that could be contrary to the best interests of the class members and public policy considerations in general.

Question 3:

Have there been any class action settlement proposals containing a constraint described in (a) which were either rejected or accepted by the court when exercising its supervisory jurisdiction to approve class action settlement?

13. Of the three jurisdictions, we could only find relevant cases in the US. As already mentioned, the general trend in the US cases is a bifurcation of the question into first, whether there has been an ethics violation and secondly, whether the clause is valid and enforceable. The courts have generally upheld the validity of the restraint while also acknowledging the possibility of sanctioning the plaintiffs' attorneys for the ethics violation.

UNITED STATES

In your jurisdiction, are agreements in which plaintiff attorneys/legal representatives in class actions agree to enter into a restraint in terms of which the firm of lawyers and all their partners agree not to bring or support any further claims based on the same issue on behalf of any member of the class, valid and enforceable in law? [In addition to statutes, please consider any ethical standards or rules of attorney's conduct.]

1. While there is no legislative provision governing the enforceability of such clauses, Rule 5.6 of the American Bar Association (ABA) Model Rules of Professional Conduct provides that such clauses are unethical. The rule provides that:

   (a) a lawyer shall not participate in offering or making of a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

   (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

2. For purposes of this report, part (b) of the 'restriction of practice' rule is relevant. According to the ABA, the rationale behind the rule is threefold:

   'First, permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals. Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to 'buy off' plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients. While the Model Rules generally require that the client's interests be put first, forcing a lawyer to give up future representations may be asking too much, particularly in light of the strong countervailing policy favoring the public's unfettered choice of counsel.'[4]

[4] ABA Formal Opinion 93-371 (1993), quoted in In re Hager, 812 A. 2d 904 - DC: Court of Appeals 2002, *918*.

3. Most states have adopted these rules into their state bar rules, he latest being the state of Massachusetts which adopted this rule in 2015.[5] The penalties for violating this rule vary, for example, in the State of Georgia, '[t]he maximum penalty for a violation of this Rule is a public reprimand.'[6] However, as will be seen in the cases discussed in response to the last question, some sanctions include the disbarment of attorneys who breach the rule.

4. However, as will be discussed in the case summaries in response to the last question, the courts have tended to separate the question whether the clause is enforceable from the question whether it constitutes a breach of professional ethics. Finding that the fact that a clause has breached the ethical rules does not mean that the clause itself is void and unenforceable as the plaintiff attorneys can be sanctioned for violating the ethical standard. In *Shebay v. Davis, 717 SW 2d 678 - Tex: Court of Appeals, 8th Dist. 1986* for example, the court made it clear that while such a rule may violate professional ethical standards, it did not invalidate the settlement agreement.[7]

5. Moreover, Rule 23(g)(4) of the US Rules of Federal Procedure places an obligation on class counsel to fairly and adequately represent the interests of the class. From this, if it could be established that a particular restraint clause of this sort is in the best interest of *all* class members, it would be valid and enforceable. Whether the agreement is in the interests of all class members is ultimately a question of fact, but we would suggest that a court is likely to take into the factors identified in paragraph 11 above.

Considering your response to question (a), would the payment of a sum of money to the plaintiff attorneys/legal representatives in exchange for entering into the restraint affect your answer?

6. No, the clauses would remain contrary to Rule 5.6. However, the payment of a sum of money could play a role in the analysis of whether and the extent to which class counsel has acted in the best interests of her clients.

7. Moreover, the Class Action Fairness Act of 2005 (109–2—FEB. 18, 2005) was enacted, amongst other things, to combat what the act calls 'abuses of the class action device', for

[5] http://www.mass.gov/courts/case-legal-res/rules-of-court/sjc/sjc307-rule5-6.html
[6] https://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=135
[7] Shebay v. Davis, 717 SW 2d 678 - Tex: Court of Appeals, 8th Dist. 1986, pg. 682.

example, actions that have harmed class members with legitimate claims, for example, the Act recognises that class members often receive little or no benefit from class actions, and are sometimes harmed when counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.[8] While not exactly related to restraint of practice clauses, it could be argued that these restraint clauses, particularly those related to monetary gains for the plaintiff attorneys, create a potential conflict of interest between the attorneys and the class members. This could lead to situations where the settlement negotiations are driven by the pecuniary interests of plaintiff's counsel and the interest of the defendant in thwarting further claims against her and her company, not the interests of the class members.

In your jurisdiction, have there been any class action settlement proposals containing a constraint described in (a) which were either rejected or accepted by the court when exercising its supervisory jurisdiction to approve class action settlement?

8. Yes. Most of the cases dealing with restraint of practice clauses in settlement agreements are either disciplinary proceedings against plaintiff attorneys for breaching Rule 5.6 (or state rules modelled onRule 5.6) or cases in which the defendant seeks to bar the plaintiffs' attorneys from acting on behalf of the plaintiffs based on a restraint of practice clause linked to a previous settlement agreement in a class action against the defendant.

9. In *In re Hager, 812 A. 2d 904 - DC: Court of Appeals 2002*, an attorney entered into a restriction of practice agreement, in which he, together with his co-counsel, received $225,000 and agreed never to represent anyone with related claims against the opposing party and to keep totally confidential and not disclose to anyone all information learned during his investigations in the case. The court, confirming the findings made by the disciplinary board, held that this conduct violated Rule 5.6(b).[9] As a penalty, the attorney was barred from practicing law for a year. It may be of interest to note that the court seriously considered ordering the attorney to disgorge the fee he collected as a part of the

[8] See section 2 'Findings and Purposes' of the Class Action Fairness Act of 2005.
[9] *In re Hager, 812 A. 2d 904 - DC: Court of Appeals 2002, 918. (Hager)*

settlement, but found that there was not sufficient evidence to establish the exact amount.[10]

10. In *Shebay v. Davis, 717 SW 2d 678 - Tex: Court of Appeals, 8th Dist. 1986*, the plaintiffs argued that a settlement agreement which had been affirmed by a lower court was not reasonable and fair. Part of the argument related to a restraint of practice on the Plaintiffs' attorneys. The plaintiffs argued that the restraint violated the State Bar of Texas Code of Professional Responsibility, which has a clause similar to Rule 5.6 and provides that 'in connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.'[11]

11. The clause in this case provided that:

> 'Cecil E. Munn and the law firm of Cantey, Hanger, Gooch, Munn & Collins hereby agree that, in consideration of this Settlement Agreement, they will not represent, or in any way aid in the representation of, any individual or class of individuals for or on behalf of any claim made by any individual or any class of individuals against Permian, or against any of its parents, subsidiaries, affiliates, predecessors, or successors, or against any of their officers, directors, employees or agents, relating to any claim involving the alleged mismeasurement of crude oil by Permian during the Settlement Period.'[12]

12. In this case, the court did not decide on the ethics of the clause but made it clear that the clause itself did not void the settlement agreement. It argued that:

> 'We need not and do not determine whether this clause violates the Code of Professional Responsibility. In any event, its inclusion does not void the settlement agreement. The attorneys involved in the agreement are not parties to this lawsuit. Nor does the agreement affect the outcome of the lawsuit. The ethics of the attorneys' actions, if justifiably questioned, are for a state bar grievance committee to decide and not for this tribunal.'[13]

13. A similar finding, (separating the validity and the enforceability of the settlement agreement and the question of ethics) was made in the *Lee v. Florida Dept. of Ins. &*

[10] Hager, 922 – 923.
[11] *Shebay v. Davis, 717 SW 2d 678 - Tex: Court of Appeals, 8th Dist. 1986*, pg. 682.
[12] Ibid.
[13] ibid.

Treasurer, 586 So. 2d 1185 - Fla: Dist. Court of Appeals, 1st Dist. 1991 where the court enforced a restraint of practice clause, arguing that:

'We hold that the hearing officer erred in ruling that the provision in paragraph 8 of the settlement agreement is prohibited and thus made void by rule 4-5.6 of the Florida Bar's Rules of Professional Conduct. We first would note that the application of rule 4-5.6 to invalidate or render void a provision in a private contract between two parties is beyond the scope and purpose of the Rules and constitutes error. As the preamble to the Rules states, they "simply provide a framework for the ethical practice of law"...to use rule 4-5.6 as the basis for invalidating a private contractual provision is manifestly beyond the stated scope of the Rules and their intended legal effect. Until paragraph 8 of the settlement agreement has been voided, canceled, or nullified by a court of competent jurisdiction, it must be treated as valid and binding on all parties legally affected by its terms'[14]

14. Similar to the *Shebay* decision, the court separated the question as to the enforceability of the restraint of practice clause and the settlement agreement from the question as to whether the attorney has breached her ethical obligations. Finding that 'Whether attorney Bateman acted unethically in violation of the Rules by participating in the negotiation of a settlement agreement that included the provisions in paragraph 8 and should be disciplined therefor is not the issue in this proceeding.'[15]

15. In *Feldman v. Minars, 230 A.D.2d 356 (N.Y. App. Div. 1997)*, the defendants in a suit sought to bar the attorneys from representing the plaintiff on the basis of a previous settlement agreement. The settlement agreement had a clause similar to the clause subject to this report. The clause provided that:

'As an inducement to the settling defendants [including Haber] to enter into this Settlement Agreement, and as a material condition thereof, [the Beigel firm] warrants and represents to the settling defendants that neither such firm nor any of its employees, agents, or representatives will assist or cooperate with any other parties or attorneys in any such action against the settling defendants arising out of, or related in any way to the investments at issue in the actions or any other offerings heretofore or hereafter made by the settling defendants * * * nor shall they encourage any other parties or attorneys to commence such action or proceeding'[16]

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[14] *Lee v. Florida Dept. of Ins. & Treasurer, 586 So. 2d 1185 - Fla: Dist. Court of Appeals, 1st Dist. 199*, pg. 1188.
[15] ibid.
[16] *Feldman v. Minars, 230 A.D.2d 356 (N.Y. App. Div. 1997),* pg. 357. (Feldman)

16. The attorneys in this case were paid $50, 000 for entering into this agreement.[17] The court held that the agreement was not contrary to public policy, it argued that:

'…an agreement by counsel not to represent similar plaintiffs in similar actions against a contracting party is not against the public policy of the State of New York. At the least, failure to enforce a freely entered-into agreement would appear unseemly, and the "clean hands" doctrine would preclude the offending attorneys from using their own ethical violations as a basis for avoiding obligations undertaken by them. Even if it is against the public policy of this State, the "violation" can be addressed by the appropriate disciplinary authorities'[18]

17. Essentially, the court enforced the settlement agreement and dismissed the attorneys as representatives for the plaintiffs, based on the sanctity of contract. It bears emphasis however, that the court still considered that such agreements could be contrary to public policy, nevertheless, the court seemed to be persuaded by academic commentary stating that the rule was 'is an anachronism, illogical and bad policy'.[19] The court, quoting Gilliers' free market argument against this rule, held that it was illogical to assume that future plaintiffs would not have access to attorneys to represent them in future actions, arguing that 'They ignore the market. If a claim has merit and elimination of one lawyer creates a vacancy, the market will produce a replacement. Undoubtedly, some lawyers will accept a restriction, but surely not enough to deprive worthy claimants of all counsel.'[20]

18. This sanctity of contract line of reasoning was followed in the *Blue Cross and Blue Shield v. Philip Morris, Inc., 53 F. Supp. 2d 338 - Dist. Court, ED New York 1999*, where the court argued that, 'The Agreement is valid. It was freely entered into and is clear and unambiguous.'[21] The reason, according to the court was that the restraint of practice clause:

'poses no threat to the public's unfettered right to counsel or any danger that the rights of potential future claimants are being bargained away. It concerns only the right of a single

[17] Feldman, 358.
[18] Feldman, 360.
[19] ibid.
[20] Gillers, *A Rule Without a Reason, Let the Market, Not the Bar, Regulate Settlements that Restrict Practice*, 79 ABA J 118 [Oct. 1993], quoted in Feldman, 360.
[21] *Blue Cross and Blue Shield v. Philip Morris, Inc., 53 F. Supp. 2d 338 - Dist. Court, ED New York 1999*,pg. 343.

defendant, Philip Morris, to be represented by its chosen counsel, the firm, in a single (albeit massive) lawsuit.'[22]

19. The overall trend in these cases seems to be that the courts separate the validity of the settlement agreement and the question as to whether there has been a breach of professional ethics. A strong factor supporting the courts acceptance of these clauses is the notion of freedom of contract. Nevertheless, the courts recognise that even if the clauses are valid, the plaintiffs' lawyers could be in breach of the ethical standard.

20. Nevertheless, according to Rule 23(e)(2) of the US Rules of Federal Procedure, a settlement proposal in a class action may only be approved if the court finds that it is fair, reasonable, and adequate. Thus, it could be argued that certain restraint of practice clauses, under circumstances where, for example a large number of claimants have opted-out and there is a likelihood that they may not be able to receive alternative legal representation, the settlement agreement could be found to be unfair or unreasonable.

[22] Blue Cross, 344.

CANADA

In your jurisdiction, are agreements in which plaintiff attorneys/legal representatives in class actions agree to enter into a restraint in terms of which the firm of lawyers and all their partners agree not to bring or support any further claims based on the same issue on behalf of any member of the class, valid and enforceable in law? [In addition to statutes, please consider any ethical standards or rules of attorney's conduct.]

1. The Law Society of British Columbia has a rule similar to the ABA's Rule 5.6. Introduced in October 2006, the law society's Code of Professional Conduct for British Columbia, Chapter 3, Rule 3.2-10, provides that 'A lawyer must not participate in offering or making an agreement in which a restriction on any lawyer's right to practise is part of the settlement of a client lawsuit or other controversy.' None of the other provinces have a similar rule.

Considering your response to question (a), would the payment of a sum of money to the plaintiff attorneys/legal representatives in exchange for entering into the restraint affect your answer?

2. No. If, however, the offer or payment puts class counsel in conflict with the class, this may lead to a breach of the counsel's fiduciary duty to her clients. The plaintiff's counsel has a fiduciary duty to her clients, she must act in their best interest, 'the class must be paramount when counsel are engaged in negotiations to settle the issues with an opposing party.'[23] Similar to the US standard, in approving the settlement agreement, the court must be satisfied that the settlement is 'fair, reasonable and in the best interests of those affected by it.'[24] The payment of a sum of money to the plaintiffs' attorney, depending on the factors, could be relevant to the analysis of fairness and reasonableness, especially if the courts were to interpret 'those affected' by the settlement agreement as including possible future claimants or those claimants who have chosen to opt-out of the class action because of an unhappiness with the terms of the settlement agreement.

In your jurisdiction, have there been any class action settlement proposals containing a constraint described in (a) which were either rejected or accepted by the court when exercising its supervisory jurisdiction to approve class action settlement?

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[23] *Garland v. Enbridge Gas Distribution Inc., [2006] O.J. 4907* at para. 29 (S.C.J.) (QL)

[24] *Sutherland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 at para. 10 (S.C.J.) (QL); *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.* (1998), 169 D.L.R. (4th) 565 at para. 21 (B.C. S.C.) (QL).

3. The presence of the clause prohibiting restrictions on further practice in the British Columbia Law Society's rules suggests that there may have been some concern about this, but the research did not turnout any publicly recorded cases.

ENGLAND AND WALES

In your jurisdiction, are agreements in which plaintiff attorneys/legal representatives in class actions agree to enter into a restraint in terms of which the firm of lawyers and all their partners agree not to bring or support any further claims based on the same issue on behalf of any member of the class, valid and enforceable in law? [In addition to statutes, please consider any ethical standards or rules of attorney's conduct.]

1. It is unclear how an English court would respond to a clause such as this. There are arguments for and against its validity, and so far as the research reveals, no similar clause has come before the courts.

2. It is important to appreciate that the approach to class action litigation in England may be different to other jurisdictions. This kind of litigation in England and Wales is governed by Part 19 of the Civil Procedure Rules, which concerns group litigation. The Court may make a group litigation order where there are or are likely to be a number of claims giving rise to common or related issues of fact or law. However, *each of the claims remains an individual claim*[25], and the purpose of group litigation is to dispose of them all as expeditiously as possible.

3. There is no especial impediment to the settlement of a dispute which forms a part of group litigation.[26] The settlement of litigation is a contract, and is subject to the rule that contracts which are illegal or contrary to public policy will not be enforced. There is only a limited jurisdiction for a court to sever an unlawful term to save the remainder of the contract, so it is very important that advisers keep their eyes open for possible illegal terms.[27] The question which courts must ask themselves is: does public policy require that this claimant, in the circumstances which have occurred, should be refused relief to which he would otherwise have been entitled with respect to all or part of his claim?[28]

4. There does not seem to have been any case where a settlement has purported to restrain representatives or advisors from continuing to represent one of the parties to the settlement agreement. Such an agreement would fall to be tested by reference to the question of whether public policy required relief to be refused. No case discussing the implications of

[25] Hodges, *Multi-Party Actions* (OUP 2001) 5.11
[26] CPR 19.15; Hodges, *Multi-Party Actions* (OUP 2001) 7.21
[27] *Foskett on Compromise* (Sweet and Maxwell 2015) 4-71
[28] *Patel v Mirza* [2016] UKSC 42

this rule for clauses restraining lawyers could be found; there are cases which concern attempts to restrain witnesses from giving evidence, which are clearly unlawful,[29] and cases where parties have agreed to support each other in planning applications, which is not contrary to public policy.[30] Where a clause such as this would fall on that spectrum is a matter of debate. Factors relevant to this determination in English law will be considered below.

5. Further, contracts in restraint of trade are presumptively unenforceable. Contracts which purport to restrain the provision of professional services are subject to the doctrine limiting the enforceability of contracts in restraint of trade.[31] A contract in restraint of trade is one which interferes with the general freedom of a person to go about their business and trade with whoever they want.[32] There is no clear dividing line between those contracts in restraint of trade and those not, although paradigm cases of the rule have emerged.[33] This is a case which falls a long way from any of those paradigms.

6. Of particular concern would be the fact that, for this contract to be enforceable, it would seemingly have to be tripartite: between the lawyers, the claimants and the defendant. The restraint of trade doctrine was said by Lord Diplock in *Petrofina* to be applicable where the covenantor agrees to restrict their liberty to carry on trade with others not party to the contract.[34] However, a possible alternative interpretation is that it is conceivable the court could use its case management powers and refuse to hear submissions from a lawyer on behalf of a client who had promised not to use that lawyer again; in much the same way as litigation over a matter which has been the subject of a valid settlement will not be permitted.

7. Assuming a clause restraining lawyers from further acting in a case is covered by the restraint of trade rules, that clause will be *prima facie* unenforceable.[35] It will be enforceable only if it is reasonable by reference to the interests of the parties concerned and the wider public.[36] Broadly similar factors would probably be taken into account by a court faced with such a clause, whether the matter was couched in terms of restraint of trade or the wider public

[29] *Collins v Blantern* (1767) 2 Wils. 341
[30] *Fulham Football Club Ltd v Cabra Estates Plc* [1994] 1 B.C.L.C. 363
[31] *Budget Rent-a-Car International Inc v Mamos Slough Ltd* (1977) 121 S.J. 374
[32] *Petrofina v Martin* [1966] Ch. 146, *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269, *Macaulay v Schroeder Music* [1974] 1 W.L.R. 1308
[33] *Chitty on Contracts* 16-091
[34] *Petrofina v Martin* [1966] Ch. 146, 180
[35] *Chitty on Contracts*, 16-102
[36] *Nodenfelt v Maxim Nordenfelt Guns* [1894] AC 535 HL

policy rule. It is, in any case, hard to predict how a court would respond to a clause such as this.

8. There is a strong public interest in the administration of justice. A seam of case law makes it clear that settlements which purport to oust the jurisdiction of the court (outside of the Arbitration Act) are unlawful and will not be enforced.[37]

9. On the other hand, this clause is quite a distance from the paradigms of the restraint of trade doctrine. Courts routinely emphasise the importance of alternative dispute resolution to modern civil justice, and the important of parties sticking to the bargains they have made.[38]

10. On top of this, special concerns regarding the relationship between client and lawyer do not seem to count for much in the context of lawyers who have left firms subject to a restraint of trade clause.[39] Lawyers can be subject to restraint of trade clauses and those clauses be reasonable, and in a case where the importance of the relationship was pointed to, the House of Lords was not impressed by that argument.[40]

11. Turning to professional ethics, there are no specific rules of professional ethics applicable to settlement negotiations. It therefore becomes necessary to fall back on the general core duties: in particular, the duty to act in the client's best interests.[41] Barristers must also not allow their independence to be compromised:[42] it may be open to question whether acquiescing to this clause but remaining instructed in the matter would comply with this requirement.

Considering your response to question (a), would the payment of a sum of money to the plaintiff attorneys/legal representatives in exchange for entering into the restraint affect your answer?

12. There would be significant professional ethical implications, which would tend against lawyers being able to accept instructions in such a case. For example, the Solicitor's Regulatory Authority Code of Conduct lists indicative behaviour that may demonstrate

[37] *Chitty on Contracts* 16-054
[38] Halsey v Milton Keynes NHS Trust [2004] EWCA Civ 576.
[39] *Wallace Bogan v Cove* 1997 WL 1104346
[40] *Bridge v Deacons* [1984] A.C. 705
[41] Boon, *Lawyers' Ethics and Professional Responsibility* (Hart 2015) 358; Bar Standards Board Code of Conduct, Core Duty 2
[42] Bar Standards Board Code of Conduct, Core Duty 4

compliance with the principles governing solicitors conduct. In compliance with the principles, one of the outcomes listed (1.15) requires a solicitor to properly account to her clients about any financial benefit that she receives as a result of her instructions. Indicative Behaviour (1.20) provides that it would be indicative of compliance if a solicitor who receives a financial benefit as a result of acting for a client, where to: pay such benefit to the client; offset it against their fees to the client; or keep it only where she can justify keeping it, she has told the client the amount of the benefit (or an approximation if she does not know the exact amount) and the client has agreed that she can keep it. Thus, the receipt of payment for the restraint, in circumstances falling outside the scope of the listed behaviours could be indicative of behaviour falling foul of the code of conduct.

13. A preliminary point is that, as settlement agreements are governed by the general law of contract, for this clause to be enforceable in contract against the lawyers in question, it would have to be supported by consideration.[43] As a matter of law, that the lawyers had taken money could conceivably be an additional factor which fed into the public policy determination.

14. As a matter of professional ethics, this could give rise to a question of conflict of interest. Barristers should not accept instructions where those instructions create a conflict between the interests of the client and the interests of the barrister, unless the client has given clear consent. It is also a requirement that barristers do nothing to imperil public confidence in the profession:[44] it is hard to see how accepting this payment would ever be appropriate.

In your jurisdiction, have there been any class action settlement proposals containing a constraint described in (a) which were either rejected or accepted by the court when exercising its supervisory jurisdiction to approve class action settlement?

15. The research did not reveal any.

[43] *Foskett on Compromise* (Sweet and Maxwell 2015 3-02
[44] Bar Standards Board Code of Conduct, Core Duty 5