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Recent Developments in Restraint of Trade

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Every few generations, the common law restraint of trade doctrine seems to go through a brief period of rapid change: old rules are destroyed or modified and new ones are developed. Thus, during Coke's lifetime the foundations were developed; in 1711 *Mitchel* v. *Reynolds*[1] unified the ancient materials; in the 1830's the rule that adequacy of consideration was irrelevant to reasonableness was settled;[2] and between the *Nordenfelt*[3] case and the First World War the distinction between general and partial restraints was abolished and our present law emerged.[4] We appear to be in the middle of another such period at present. Since the House of Lords decision in *Esso Petroleum Co., Ltd.* v. *Harpers Garage (Stourport), Ltd.*[5] there have been a number of decisions by courts throughout the Commonwealth which have affected every aspect of the doctrine. In particular, there have been several important Canadian decisions. The general effect of these decisions has been to widen the scope of the doctrine considerably. In certain respects, the doctrine has acquired the capacity to overcome some of the deficiencies of anti-trust legislation. This article will examine these changes and will attempt to predict the immediate future of the law.

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[1] 1 P. Wms. 181.

[2] *Hitchcock* v. *Coker* (1837) 6 Ad. and El. 438.

[3] *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co. Ltd.* [1894] A.C. 535.

[4] *Mason* v. *Provident Clothing and Supply Co. Ltd.* [1913] A.C. 724; *Herbert Morris, Ltd.* v. *Saxelby* [1916] A.C. 688.

[5] [1968] A.C. 269.

The restraint of trade doctrine has generally been interpreted as meaning that restraints of some or perhaps all kinds of trade are void, unless: a) there exists some legitimate interest of the person who imposes the restraint, or of the public; and b) the restraint is not excessive in relation to the need to protect that interest. A number of issues which arise from this definition will be discussed in the following sections.

What is Trade?

In an early case, Atkin L.J. stated that the restraint of trade doctrine "extends further than trade, it undoubtedly extends to the exercise of a man's profession or calling".[6] It is only recently, however, that the courts have considered this issue in detail. In *Elford* v. *Buckley* Hardie J. held that rules of the New South Wales Rugby League which permitted clubs to retain players until payment of a transfer fee were not in restraint of trade: " ... the rules of the League ... do not fall within the category of employment contracts or other obligation creating transactions or instruments appropriate for the application of the doctrine ...".[7] This view was inconsistent with *obiter dicta* of earlier judgments[8] and was soon expressly overruled by the New South Wales Full Court and the High Court of Australia in *Buckley* v. *Tutty*.[9] In that case, the Full Court stated that the purpose of the Rugby League was more than sporting. Its structure had a "financial context and significance which can be summed up in the word 'trade' ".[10] The clubs had financial interests in gaining and retaining pools of players: they not only organized players but also employed them, and the players were valuable assets which could in effect be sold for transfer fees:

> It is true that the pool of players is not labour in the usual sense because there is undoubtedly superadded an element of sport and a feeling that the sport exists over and above the professionalism involved in it. One should not assume that such feelings do not exist in other areas of remunerated activity — teaching, science, art. However, this element... does not prevent the activity when it is carried on between parties at a profit to each of them from being described in the blunt language of the law as trade.[11]

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[6] *Hepworth Manufacturing Co., Ltd.* v. *Ryott* [1920] 1 Ch. 1, 26.

[7] [1969] 2 N.S.W.R. 70, 77-8.

[8] *Eastham* v. *Newcastle United Football Club Ltd.* [1964] Ch. 413; *Blackler* v. *New Zealand Rugby Football League (Incorporated)* [1968] N.Z.L.R. 547.

[9] [1970] 3 N.S.W.R. 463.

[10] *Ibid.*, 472.

[11] *Ibid.*

The High Court stressed not so much the activities of the League and its clubs but rather those of the players. Because the players' activities helped them to make a living, they were engaged in trade, whether or not the League and its clubs were so engaged.[12] Consequently, it did not matter that the League was largely administered by unpaid officials and unincorporated associations, or that the players looked for their main livelihood outside football. In this respect, the decision extends the meaning of trade beyond what was decided in *Eastham* v. *Newcastle United Football Club Ltd.*[13] where the football association consisted of commercial limited companies employing full time professional players.

The meaning of "trade" was also considered in *McGuigan Investments Pty. Ltd.* v. *Dalwood Vineyards Pty. Ltd.*[14] In that case, the purchaser of land called "Dalwood" covenanted that he would not use the land for the purposes of a business carried on under any name of which the word "Dalwood" formed part. The issue, therefore, was whether a restriction on the use of a trade name but not on any particular trade should be considered a restraint of trade. In *Vernon* v. *Hallam* Stirling J. had held that it was not, because:

> [the covenantor] may employ his talents, his industry, and his capital in any useful undertaking he pleases. All that is restrained is the use by him, in so doing, of a particular name or style.[15]

A different view was expressed in *Hepworth Manufacturing Co. Ltd.* v. *Ryott*[16] where a film actor, who was known by a certain pseudonym while employed by the defendants, covenanted not to perform under that name after his contract of employment ended. The Court of Appeal found the covenant to be in restraint of trade because the success or livelihood of the actor was dependent upon the use of his pseudonym. In the *Dalwood* case Hope J. took a similar position, and held that the prohibition against the use of the word "Dalwood" was in restraint of trade. It is submitted that this is correct, since a trade name may be part of a trader's capital where he has traded under it before and goodwill has become attached to it.

The extent of activities which are included within "trade" was also considered in *Queensland Co-operative Milling Association Ltd.* v. *Pamag Pty. Ltd.*[17] In that case, the covenantor was a baker who agreed to take all his requirements of flour from the covenantee.

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[12] (1971) 125 C.L.R. 353, 372.
[13] *Supra*, f.n.8.
[14] [1970] 1 N.S.W.R. 686.
[15] (1886) 34 Ch. D. 748, 751.
[16] *Supra*, f.n.6.
[17] (1973) 1 A.L.R. 47.

The restraint was thus limited to the supply of raw materials, and did not affect the retail sales of products made from the flour to customers. The Court held, however, that the covenantor's trade included not only retail sales to customers but also his purchases of raw materials. The restraint of trade doctrine was thus applicable.

What is a Restraint?

The question of whether a particular limitation is a restraint has arisen in several recent cases involving professional athletes. In *Buckley* v. *Tutty*[18] the Court considered whether rules of the New South Wales Rugby League which restricted the transfer of players from one club to another were in restraint of trade. It was argued that because the retain and transfer rules applied only to professional players, who numbered less than 1,000, while the remaining League rules applied to 500,000 players, "the small area of impact of the challenged rules makes it impossible to regard them as a restraint...".[19] The New South Wales Full Court rejected this test, and examined instead the relations between individual professionals and their employers. Loss of freedom to choose employers was a restraint of a severe kind to the individual, even though a relatively small number of individuals were involved.

It was also argued that there was no restraint because the League was analogous to a single large firm preventing its employees from freely changing their departments. Both the Full Court and the High Court accepted that in such circumstances there might not be a restraint, but denied that the analogy existed in that case. The various clubs which employed the Rugby League players were separate entities and therefore different employers, even though they had subordinated themselves to a central organizing association for certain purposes. The High Court also rejected the argument that instead of restraining trade, the rules fostered and encouraged it by giving opportunities to players to make money out of their skill: "The rules however prevent professional players from making the most of the fact that there are clubs prepared to bid for their services".[20]

An agreement in restraint of trade must be distinguished from one which is in substance a profit-sharing agreement. In *Stenhouse Australia Ltd.* v. *Phillips*[21] the parties had agreed that if any client

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[18] *Supra*, f.n.7.
[19] *Ibid.*, 471.
[20] *Supra*, f.n.12.
[21] [1974] 2 W.L.R. 134.

of the covenantee should, within five years of the ending of the covenantor's employment, place insurance business so as to give the covenantor any financial benefit, the covenantor should pay the covenantee one-half the gross commission received. It was argued that this was not in restraint of trade but was rather a profit sharing agreement. The Privy Council held that the question should be "determined not by the form the stipulation wears, but ... by its effect in practice".[22] This was not profit sharing, but rather gross revenue sharing, and it operated as a disincentive to trade.

The Frontiers of the Doctrine

Does the restraint of trade doctrine apply to *all* restraints? In *Esso Petroleum Co., Ltd.* v. *Harpers Garage (Stourport) Ltd.*[23] the House of Lords rejected certain limitations which had previously been placed on the doctrine.

Before that case, though occasional statements suggested that the doctrine applied to *all* restraints of trade, in practice the only covenants normally subjected to the test of reasonableness were those imposed by employers to prevent employees competing after they left their employment and those imposed by the buyer of a business to protect its goodwill from the competition of the seller. Most of the remaining cases were horizontal price fixing or production sharing agreements.

The *Esso* case concerned two solus agreements by which the respondents agreed to take from the appellants all its petrol requirements for one garage for twenty-one years, and all its petrol requirements for another for four and one-half years. In deciding that the first covenant was unreasonable and the second reasonable, the House of Lords held that the doctrine applied to mortgages and was not limited to the traditional categories. Their Lordships held that the doctrine extended to restraints imposed during the continuance of an obligation as well as to those taking effect only after its termination. The House of Lords also rejected an argument that the doctrine only applied to restraints on persons, not to restraints on a particular piece of land from which a trader could move to carry on his trade elsewhere.

Subsequent decisions have in large part adopted the expanded application of the restraint of trade doctrine as set out in the *Esso* case. Thus, the doctrine has been repeatedly applied to restraints on

[22] *Ibid.*, 140 *per* Lord Wilberforce.
[23] *Supra*, f.n.5.

the use of land as well as restraints on individuals,[24] to restraints imposed during the continuance of some obligation as well as those imposed after its termination,[25] and to restraints contained in a mortgage document.[26]

In the *Esso* case, the House of Lords majority placed one questionable limitation on the doctrine, *i.e.*, in the case of covenants involving the use of land. It was held that the doctrine applies only where the covenantor has cut down some prior right to trade on a particular piece of land, and not where he has acquired by the covenant some right to trade, however limited, which he did not previously enjoy.[27] This limitation was not in fact applied in the *Esso* case,[28] but it was applied by the English Court of Appeal in *Cleveland Petroleum Co., Ltd.* v. *Dartstone*.[29] In that case, an interlocutory injunction was granted to restrain breach of a solus agreement by a petrol company which had no right to sell petrol on the particular site before entering the agreement. Despite this decision, this limitation has not been widely accepted; statements by the High Court of Australia in *Buckley* v. *Tutty*[30] and the English Court of Appeal in *Instone* v. *A. Schroeder Music Publishing Co., Ltd.*[31] indicate disagreement with it. There are clearly arguments of principle against the *Esso-Cleveland* view,[32] notably that the test

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[24] *McGuigan Investments Pty. Ltd.* v. *Dalwood Vineyards Pty. Ltd., supra,* f.n.14; *Amoco Australia Pty. Ltd.* v. *Rocca Bros. Motor Engineering Co. Pty. Ltd.* (1973) 1 A.L.R. 385; Hogarth J. in the South Australian Full Court was inclined to accept the view rejected by the majority in *Amoco* (unreported).

[25] *Instone* v. *A. Schroeder Music Publishing Co. Ltd.* [1974] 1 All E.R. 171; the House of Lords dismissed an appeal: [1974] 1 W.L.R. 1308.

[26] *MacIntyre* v. *Cleveland Petroleum Co. Ltd.* 1967 S.L.T. 95; *Queensland Co-operative Milling Association Ltd.* v. *Pamag Pty. Ltd., supra,* f.n.17.

[27] *Esso, supra,* f.n.5, 298 *per* Lord Reid. Lords Morris, Hodson and Pearce agreed (306-9, 316-7, and 325); Lord Pearce also said the doctrine should not apply where trade was promoted rather than restrained so that the covenantor's capacity was absorbed and not sterilized (328). (This was rejected by the Court of Appeal in *Instone's* case, *supra,* f.n.25.)

Lord Wilberforce said the doctrine should not be applied to "accepted and normal" restraints (331-3). This has occasionally been cited with approval by later courts, *e.g.,* Lord Reid in *Instone's* case, *supra,* f.n.25, 1314.

[28] See Heydon, *The Restraint of Trade Doctrine* (1971), 58-59.

[29] [1969] 1 All E.R. 201; and see *Robinson* v. *Golden Chips (Wholesale) Ltd.* [1971] N.Z.L.R. 257.

[30] *Supra,* f.n.12.

[31] *Supra,* f.n.25, 177. See also *Pharmaceutical Society of Great Britain* v. *Dickson* [1970] A.C. 403, 431 *per* Lord Hodson, and 440 *per* Lord Wilberforce; and *Queensland Co-operative Milling Association Ltd.* v. *Pamag Pty. Ltd., supra,* f.n.17, 65 *per* Stephen J.

[32] See *Heydon, supra,* f.n.28, 56-59.

leads to anomalies and is easy to evade. For example, in the *Cleveland* case the covenantor granted a lease to the covenantee, who then granted a sublease to a company controlled by the covenantor. Because the agreement in *Cleveland* was made before the *Esso* decision, there was no element of *fraude à la loi.* While Salmon L.J. might have taken a different view if there had been, it is perhaps questionable whether the courts should become involved with such issues. The *Cleveland* case is an extreme example of a refusal to pierce the corporate veil, which is not appropriate for the restraint of trade doctrine, depending as it does on issues of public policy.[33]

The majority *Esso* test was also considered in *McGuigan Investments Pty. Ltd.* v. *Dalwood Vineyards Pty. Ltd.*[34] Hope J. appeared to favour a wide application of the doctrine, and held that the limitation set out in the *Esso* case was only intended to apply:

> ... in ... cases where the covenantee has some interest in land to protect, as where a lessor imposes the covenants on the lessee in a lease of the land or where a vendor imposes the covenants for the benefit of land which he retains after the conveyance of the burdened land to the covenantor.[35]

This view may very well be sound; whatever the merits of the *Esso* principle, and despite the width of some of the language used to state it, it does not seem to have been intended to apply to covenants over land in gross (that is, which do not benefit other land), or covenants not affecting the use of land at all. It explains why the House of Lords did not apply their own test to the facts of *Esso,* because the covenant there was in gross; in *Cleveland,* on the other hand, the covenant was imposed in granting a sublease by the lessee, who retained an interest in land to protect. In *Dalwood,* though the covenantee retained land seventeen miles away, it could not have been benefited by the covenant. If Hope J. is correct, the *Esso* limitation is left only a narrow area of operation; but in the writer's view, the factors it takes into consideration are more properly relevant to issues of reasonableness than of the initial application of the doctrine.

In *Esso*[36] Lord Pearce expressed the view that the restraint of trade doctrine does not apply where the dominant character of the contract is for the promotion of trade rather than its sterilization.

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[33] See the *Amoco case, supra,* f.n.24, 388 *per* Menzies J.; see also judgments of Wells J. and Bray C.J. (unreported).

[34] *Supra,* f.n.14.

[35] *Ibid.,* 692-693.

[36] *Supra,* f.n.5, 328-329; followed in *S.A. Wire Co. (Pty.) Ltd.* 1968 (2) S.A. 777 (a tender fixing agreement); *Rhodesian Milling Co. (Pvt.) Ltd.* v. *Super Bakery (Pvt.) Ltd.* 1973 (4) S.A. 436.

This argument was treated coolly in *Buckley* v. *Tutty*;[37] further, in *Instone* v. *A. Schroeder Music Publishing Co., Ltd.*[38] the English Court of Appeal disagreed with this approach on the grounds that classification of covenants in this way would pre-empt the decision on reasonableness.

All aspects of the *Esso* decision were extensively considered in *Amoco Australia Pty. Ltd.* v. *Rocca Bros. Motor Engineering Co. Pty. Ltd.*[39] In that case, Rocca granted a lease of land to Amoco, who in turn granted a sublease back to Rocca. The agreement provided that the land was to be used only as a service station and that Rocca would buy all of its petrol supplies from Amoco. At the time of the agreement in 1964, Rocca was entitled to be registered as owner of the land and shortly thereafter became owner. A petrol station was built on the land, and in 1966 the lease and sublease were executed, with the latter containing *inter alia* the above restrictive clauses. Wells J. in the South Australian Supreme Court held that the restraint of trade doctrine applied (although he had some doubts on the issue), while the Full Court and the High Court of Australia (Stephen J. dissenting) were in no doubt that it did.

The principal argument against the application of the doctrine was that in the interval of time between lease and sublease, Rocca lost any right to trade on the land, and therefore entering the sublease subject to a tie did not cut down any existing freedom within the majority *Esso* test. This argument was rejected because the transaction had to be looked at as a whole. Rocca had only lost possession for a scintilla of time; while lease and sublease were not shams, they were simply methods of giving effect to one overall transaction and were not the true source of Rocca's right to trade, which derived instead from its ownership of the land when the negotiations began.[40] Bray C.J. in the Full Court also said that the transaction could not fall within the exception to the restraint of trade doctrine set out in the *Esso* case because it imposed onerous positive obligations to keep the petrol station open at certain times[41]

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[37] *Supra*, f.n.12, 372-373.

[38] *Supra*, f.n.25, 177.

[39] *Supra*, f.n.24. The decisions of Wells J. and the South Australian Full Court are as yet unreported.

[40] *Ibid.*, esp. 397-398 *per* Walsh J.

[41] See the *Esso* case, *supra*, f.n.5, 298 *per* Lord Reid, and 327 *per* Lord Pearce. *Cf. Robinson* v. *Golden Chips (Wholesale) Ltd.*, *supra*, f.n.29, 267, where the presence of positive obligations was ignored and the *Esso* test applied.

and not just negative restrictions. The test of the majority in *Esso* was criticized extensively although for different reasons.[42]

In *Amoco* Wells J. considered two further arguments for not applying the restraint of trade doctrine. One was that no enquiry as to reasonableness should be undertaken where the covenantor was entering a new business and had no way of doing this except by accepting some trade tie.[43] The other was that the doctrine did not apply where the parties agreed to embark on a joint venture in setting up a business. The Full Court and the High Court[44] rejected both arguments. The arguments may not even have been applicable to the facts of the case, for Rocca could have dealt with other oil companies and might have obtained better terms from them. Moroever, as Gibbs J. said, "perhaps it is in such cases that the doctrine is most likely to be needed to prevent the imposition of restraints which would be injurious . . .".[45]

Stephen J. dissented on the grounds that the covenant did not impose any restriction on the covenantee's pre-existing freedom to trade, nor did it impose a restraint operating after the commercial relationship between the parties had ended. Furthermore, he stated that the commercial realities of the situation meant that the covenant in question was actually productive of trade, since the only practical choice which Rocca had was to accept a tie with some oil company or not enter the business at all. For this reason, he believed that any evils resulting from the "tie system", whereby service stations could come into existence only if they were "tied" to some oil company for the supply of petrol, must be remedied by Parliament rather than by the common law.

In one respect, these views are particularly anomalous. If a covenant falls outside the doctrine because the covenantor can only

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[42] Hogarth J. would have preferred a narrower view. Bray C.J. would have preferred Lord Wilberforce's wider view, which depended on "the practical working of the restraint, irrespective of its legal form" (*Pharmaceutical Society of Great Britain* v. *Dickson, supra,* f.n.31, 440; see also Lord Hodson at 431). Menzies J. (at 388) and Walsh J. (at 397) doubted the limitation on the doctrine set out in the *Esso* case. Gibbs J. preferred to state no view on the limitation (at 405); while Stephen J. approved it (at 413-418). In *Queensland Co-operative Milling Association Ltd.* v. *Pamag Pty. Ltd., supra,* f.n.17, 65-66, Stephen J. suggested the limitation may be extended from cases where the covenantor had no pre-existing freedom to trade because of lack of land to cases where he lacked freedom to trade because of lack of money.

[43] This was inconsistent with the High Court of Australia decision in *Queensland Co-operative Milling Association Ltd.* v. *Pamag Pty. Ltd., ibid.*

[44] *Amoco, supra,* 388 *per* Menzies J., 398 *per* Walsh J., 406 *per* Gibbs J.

[45] *Ibid.,* 406.

trade if he accepts a tie, why should it fall within the doctrine if the restraint continues after the other provisions of the contract have ended? In both cases the restraints may be necessary if the man is to trade.[46] It is submitted that Stephen J.'s views sanction a judicial passivity which is contrary to the nature and history of the doctrine, and as such are inconsistent with the *Esso* majority. They also ignore Walsh J.'s point that although the facts relating to the practical impossibility of entry into petrol retailing without accepting a tie may have to be taken into account on the issue of reasonableness, "they should not be held to prevent the Court from considering that question at all".[47]

Recent decisions have made it plain that the doctrine extends beyond ordinary contracts in at least three respects. First, rules passed by associations which restrict the trade of their members are subject to the doctrine, according to the House of Lords decision in *Pharmaceutical Society of Great Britain* v. *Dickson*.[48] (Even if the case is regarded as contractual in that each member on joining the society impliedly agreed to the possibility of changes in the rules imposing restrictions, it still represents an extension of the doctrine's traditional scope.) Secondly, the doctrine applies to rules passed by a group of associations which affect persons who do not belong to the rulemaking body (for example, where a professional Rugby League consisting of a number of clubs enacts rules which restrict transfer of players between clubs).[49] Thirdly, monopolistic controls over entry to and expulsion from trades are subject to the doctrine, whether the controls are exercised by bodies which govern the trade[50] or by trade unions.[51]

An important but infrequently considered issue regarding the frontiers of the doctrine was raised in *Blackler* v. *New Zealand Rugby Football League (Inc.)*.[52] In that case, one rule of the defendant body prohibited Rugby League players from playing outside New Zealand. The New Zealand Court of Appeal held by a majority that the restraint of trade doctrine applied, even though the restraint only

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[46] This oddity was also accepted by the New Zealand Court of Appeal in *Robinson* v. *Golden Chips (Wholesale) Ltd., supra,* f.n.29.

[47] *Amoco, supra,* f.n.24, 398.

[48] [1970] A.C. 403. See also *Eastham* v. *Newcastle United Football Club, Ltd., supra,* f.n.8.

[49] *Eastham* v. *Newcastle United Football Club, Ltd., ibid.; Blackler* v. *New Zealand Rugby Football League (Inc.), supra,* f.n.8; *Buckley* v. *Tutty, supra,* f.n.12; *cf. Elford* v. *Buckley, supra,* f.n.7.

[50] *Nagle* v. *Feilden* [1966] 2 Q.B. 633.

[51] *Edwards* v. *S.O.G.A.T.* [1971] Ch. 354, 377, 382-383.

[52] *Supra,* f.n.8.

operated outside the jurisdiction; in other words, "restraint" included all restraints, not merely those operating within New Zealand. To hold otherwise would be undesirable from the point of view of New Zealand public policy, "for in this young country it is necessary that its citizens should have the opportunity of gaining wider experience in their chosen field in the larger overseas countries".[53]

Legitimate Interests

In post-employment covenants restraining the ex-employee, and covenants taken from the seller of a business to protect its goodwill in the purchaser's hands, the legitimate interests recognized as capable of protection are customer connection, trade secrets and know-how.[54] In *Stenhouse Australia Ltd.* v. *Phillips*[55] the Privy Council suggested that a covenant made after the termination of employment may in some circumstances be unenforceable for want of any legitimate interest to protect. This seems to overlook the fact that the interests capable of protection remain the same whenever the covenant is taken.

Sufficient Customer Connection

Sufficient customer connection to justify restraint has been found to exist in cases involving milk roundsmen,[56] hairdressers,[57] sales representatives,[58] sales managers,[59] insurance agents,[60] the employee of a household removals firm,[61] and an estate agent's clerk substantially in charge of dealings with customers at one of his employer's offices,[62] provided the customers are recurring ones.[63] In one case, however, a restraint covering a saleman's customers before he

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[53] *Ibid.*, 555 *per* North P.

[54] *Printers and Finishers, Ltd.* v. *Holloway* [1964] 3 All E.R. 731; *Commercial Plastics, Ltd.* v. *Vincent* [1965] 1 Q.B. 623.

[55] *Supra*, f.n.21, 141-142 *per* Lord Wilberforce.

[56] *Home Counties Dairies, Ltd.* v. *Skilton* [1970] 1 All E.R. 1227.

[57] *Cope* v. *Harasimo* (1964) 48 D.L.R. (2d) 744 (B.C.C.A.); *Nachtsheim* v. *Overath* 1968 (2) S.A. 270; *Marion White Ltd.* v. *Francis* [1972] 3 All E.R. 857.

[58] *National Chemsearch Corporation Caribbean* v. *Davidson* (1966) 10 W.I.R. 36.

[59] *Leontaritis* v. *Nigerian Textile Mills Ltd.* 1967 (3) A.L.R. Comm. 131.

[60] *Orville Kerr Ltd.* v. *De Witt* (1969) 8 D.L.R. (3d) 436; *Stenhouse Australia Ltd.* v. *Phillips, supra*, f.n.21.

[61] *Steevens* v. *Allied Freightways Ltd.* [1968] N.Z.L.R. 1195.

[62] *Scorer* v. *Seymour-Johns* [1966] 3 All E.R. 347; *H.E. Sergay Estate Agencies (Pvt.) Ltd.* v. *Romano* 1967 (3) S.A. 1.

[63] *Phillip M. Levy Pty. Ltd.* v. *Christopoulos* [1973] V.R. 673.

worked for the employer was held to be too wide.[64] Sufficient customer connection was an issue in *Aloha Shangri-la Atlas Cruises Pty. Ltd.* v. *Gaven*[65] where the Court considered whether the personal goodwill acquired by a ship captain such that individual customers would seek out his captaincy was capable of protection. The Court held that the preference of tourists for a particular captain created a property in him personally rather than in his employer, and as such was not capable of protection on behalf of the employer.

A further example of what is not an interest capable of protection arose in *Lido-Savoy Pty. Ltd.* v. *Paredes*.[65a] Lush J. held that where the defendant agreed to perform as an exotic dancer in the plaintiff's night clubs for twelve weeks, a covenant by the defendant not to perform in Australia for the next eighteen months without the plaintiff's approval was void. The enhancement of the defendant's reputation by a publicity campaign run by the plaintiff was something which had become part of the defendant. Any customers drawn away by the defendant would not be drawn as the result of an abuse of any connection which the plaintiff could regard as its property, but simply as a result of the use of the defendant's qualities as an exotic dancer.

Trade Secrets

The courts have generally applied strict standards in considering the existence of trade secrets[66] as interests capable of protection. In *Aloha Shangri-la Atlas Cruises*[67] the Court also concerned itself with this question.

The plaintiff company was engaged in the business of running marine tourist trips. Its directors, who were also directors of other companies which held shares in the plaintiff company, agreed that neither they nor their companies would compete with the plaintiff company so long as its shares were held by the same shareholders. The plaintiff company argued that the defendant director's know-

[64] *Northern Messenger & Transfer Ltd.* v. *Fabbro* (1964) 45 D.L.R. (2d) 73.

[65] [1970] Qd. R. 438.

[65a] [1972] V.R. 297; followed in *Phillip M. Levy Pty. Ltd.* v. *Christopoulos* [1973] V.R. 673, where it was held that the employee's skill and ability could not be restrained, and his ability to sell real estate was bound up with his reputation promoted by the employer.

[66] *Northern Messenger & Transfer Ltd.* v. *Fabbro, supra,* f.n.64; *Colonial Broadcasting System Ltd.* v. *Russell* (1964) 48 D.L.R. (2d) 242; *American Building Maintenance Co. Ltd.* v. *Shandley* (1966) 58 D.L.R. (2d) 525; *Ackermann-Göggingen Aktiengesellschaft* v. *Marshing* 1973 (4) S.A.S.R. 62.

[67] *Supra,* f.n.65.

ledge of the local tourist trade and of the plaintiff company's methods of obtaining customers through booking agents constituted trade secrets. The Queensland Full Court found that there were no interests capable of protection: the plaintiff company's methods of operating were matters of public knowledge because of widely disseminated information as to how tourists could book ships and what entertainment was available for them. This decision may be compared with *Management Recruiters of Toronto Ltd.* v. *Bagg*[68] where the employee of an employment agency broke his covenant not to compete after leaving his employment, and took with him on departure thirty-two job offers and one hundred and forty-eight prospect files. Wells C.J. in the Ontario High Court held that the mere fact the employee removed the documents suggested there was confidential information capable of being protected by the covenant.

Sometimes a court of equity may prevent the use of information even though it is not sufficiently "confidential" to support a covenant in restraint of trade. A neat example is the contrast between the decisions of the Ontario Court of Appeal and the Supreme Court of Canada in *Canadian Aero Service Ltd.* v. *O'Malley.*[69] The two defendants, while employed by the plaintiff company, unsuccessfully tried to obtain for it a contract to map a certain area. Some time later they left the plaintiff company and obtained the contract for themselves. The Ontario Court of Appeal held that no remedy could lie against them with or without a covenant. No interest capable of supporting a restrictive covenant existed because the contract was obtained by the use of the defendants' personal education and skill and information gained by them from the Canadian Government, rather than through the use of any secret information belonging to the employer. As Choor Singh J. said in *V.S.L. Prestressing (Australia) Pty. Ltd.* v. *Mulholland*[69a] when refusing an injunction against the breach of a covenant restaining a civil engineer whose employers had spent large sums on his training:

> Some of these matters are undoubtedly confidential in the sense that the plaintiffs would not like any of their competitors to have knowledge of them but in the other sense they do not in my opinion constitute a trade secret.

The Supreme Court of Canada, however, in a judgment delivered by Laskin J., found for the company. While it accepted that there were no trade secrets, it held that the defendants, as president and

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[68] (1970) 15 D.L.R. (3d) 684.
[69] (1971) 23 D.L.R. (3d) 632; (1973) 40 D.L.R. (3d) 371.
[69a] [1971] 2 M.L.J. 89.

executive vice-president of the company, were not mere employees, but owed fiduciary duties to the company. Their use of the information infringed the strict equitable rule forbidding a fiduciary to allow his interest to conflict with his duty to his principal.

Goodwill and Other Legitimate Interests

Two other possible innovations concerning interests capable of protection have recently been discussed. In *McGuigan Investments Pty. Ltd.* v. *Dalwood Vineyards Pty. Ltd.*[70] the plaintiff company had two subsidiaries. The first subsidiary sold a vineyard called Dalwood, and the purchaser agreed not to use the land for any business which would include the word "Dalwood" in its name. The second subsidiary had a right to buy all the grapes from another vineyard seventeen miles away, and had habitually used the name "Dalwood" in connection with wine. It was clear that had the second subsidiary been the covenantee, it would have had a sufficient interest to impose the covenant in restraint of trade; in effect, it would have sold the land on which the Dalwood business was carried on but would have retained the goodwill of the business. However, because the actual covenantee (the first subsidiary) had no interest in the name "Dalwood" and had never carried on any business in which the name was used, on orthodox lines it could not justify restraining the covenantor from using it.

It was argued, however, that by protecting the interests of the second subsidiary in the name Dalwood, the covenant was really protecting the interests of the group of associated companies as a whole. The argument had been rejected with regard to employee covenants by the English Court of Appeal in *Henry Leetham & Sons Ltd.* v. *Johnstone-White.*[71] The argument would also seem to be inconsistent with the rationale of the goodwill cases, for the point of permitting restrictive covenants in such cases is to preserve the value of what is sold: the covenant is imposed on the *seller* of the property, not on the *buyer*, as it was in the *Dalwood* case. Hope J. nevertheless found "much substance"[72] in the argument that a covenant protecting any interests of the group as a whole could be validated. In the present case he preferred not to uphold it because it was not supported by authority. Moreover, there was insufficient evidence that the name "Dalwood" was associated with the group generally or with any company in it other than the second subsidiary.

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[70] *Supra*, f.n.14.
[71] [1907] 1 Ch. 322.
[72] *Supra*, f.n.14, 695.

Dalwood may be compared with *Stenhouse Australia Ltd.* v. *Phillips.*[73] There, protection was given not to the covenantee company itself but rather to subsidiary companies which were separate legal entities. The *Henry Leetham*[74] case was distinguished:

> That was a case where the agreement ... was with one company of a group, that one company having a limited business, whereas the restraint was expressed in far wider terms, extending to the area covered by the operations of the group as a whole .... [But here the] subsidiary companies were merely agencies or instrumentalities through which the appellant company directed its integrated business. Not only did the appellant company have a real interest in protecting the businesses of the subsidiaries, but the real interest of so doing was that of the appellant company. It is not necessary to resort to a conception of "group enterprise" to support these proceedings.[75]

A second extension to what interests are recognized as legitimate occurred in the football cases. In the *Blackler* case the New Zealand Court of Appeal recognized that some control could be justified "as necessary to protect the sport [rugby] in New Zealand and in particular to ensure that those on whom money has been spent in training or in overseas tours return to the sport a fair measure for what has been done for them".[76] In *Buckley* v. *Tutty*[77] the Full Court held that the clubs and the league had a legitimate interest in regulating the strengths of the various teams. The High Court agreed: stability of team membership would increase players' skills, team spirit and public support.[78]

Thus, a wide basis may exist for validating restraints outside the traditional interests capable of protection by post-employment covenants and covenants by sellers of businesses. It becomes acutely necessary to consider this new wider basis — the overall welfare of groups of firms or industries — as the net of the doctrine gradually extends. Otherwise, the doctrine will come to depend not on reasonableness but rather on *per se* rules.

The difficult question of determining what legitimate interests exist outside the employee and goodwill cases has now been extensively considered. In *Mobil Oil Australia Ltd.* v. *McKenzie* Adam J. said that,

> ... the interests must be in the nature of proprietary rights, and ... a commercial interest, as distinct from one involving some right of

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[73] *Supra,* f.n.21, 142.
[74] *Supra,* f.n.71.
[75] *Supra,* f.n.21, 142.
[76] *Supra,* f.n.8, 572 *per* McCarthy J.
[77] *Supra,* f.n.9.
[78] *Supra,* f.n.12.

> property, would not, unless the legal principles already applied should be extended, be sufficient.[79]

In that case, the defendants had been appointed the plaintiff company's sales representatives in a certain area under an agreement by which the defendants became owners of the products to be marketed and by which they were prevented from selling other petroleum products within the agency area. Adam J. held that the business of marketing was essentially that of the defendants, for the assistance given to them by the plaintiff company through its provision of depots and items of plant was relatively slight. Hence any goodwill built up in the course of selling the products to the public should be considered the exclusive property of the defendants. For this reason, the interest of the plaintiff company in the success of the defendant's business was merely commercial and not proprietary. *Pyle* v. *Sharp Bros. Pty. Ltd.*[80] was distinguished; in that case, the principal did much more to find customers for the sales representative; there was a short period of training in canvassing and marketing; and the representative was obliged to inform the principal of his activities and success in selling the product by handing over a record of names and addresses of customers and particulars of purchases they had made.

Such reasoning as that of Adam J. in the *Mobil Oil* case is necessary only if the proprietary-commercial distinction is relied on. Several recent cases indicate, however, that the distinction is vanishing. The football cases show that the health of an industry as a whole may be a relevant factor to consider. Several solus agreement cases also indicate that interests other than those of a proprietary nature may be capable of protection. In *Amoco Australia Pty. Ltd.* v. *Rocca Bros. Motor Engineering Co., Ltd.* Wells J. said that a petrol company had legitimate interests to protect by a solus covenant taken from a petrol station proprietor.[81] Such arrangements were necessary to enable the company to carry on its business of selling as much petrol as possible, particularly if the company were a new one trying to enter the trade, such as Amoco was. In the Full Court, Bray C.J. said that "legitimate" in the phrase "legitimate interests",

> ... must be intended to connote some notion of fair and reasonable profit or fair and reasonable trading. In one sense, it may be in the

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[79] [1972] V.R. 315, 318.

[80] [1968] 2 N.S.W.R. 511.

[81] (1972), unreported, following *Petrofina (Great Britain) Ltd.* v. *Martin* [1966] Ch. 146, 173-174 *per* Lord Denning M.R., and 188-189 *per* Lord Diplock; see also *Esso, supra*, f.n.5.

> interests of any trader to get as much profit or advantage as he can for as little detriment as possible, but if that were to be protected ad infinitum the whole doctrine of restraint would be swept away.... [The covenant must only provide] adequate protection for his proprietary and commercial interests involved, so as to give him both reasonable security for his investment, when that is in question, and adequate assurance of reasonably profitable trading when that is in question.[82]

Thus, Amoco could protect both its investment of $7,775 in the land (in providing and installing equipment) and its interest in selling as much of its products as possible with a view to making a reasonable profit. But sums spent in addition to those agreed upon at the time of contracting in June 1964 were not legitimate interests. The majority of the High Court expressed agreement with the views of Wells J. and Bray C.J.[83]

In *Queensland Co-operative Milling Association Ltd.* v. *Pamag Pty. Ltd.* the Court considered the validity of an agreement by a baker to take all his flour requirements from the covenantee. Menzies J. held that although the law frowned upon attempts by covenantees to protect themselves from "competition *per se*", attempts to avoid some competition were permissible if the covenantor were given sufficient advantages.[84] Walsh J. said that the covenantee's commercial interest in selling as large a quantity of its goods as possible was a legitimate interest.[85] Stephen J., on the other hand, did not find it useful to ask whether "competition" was restrained since on the facts there was no restraint on competition between the parties. The covenantee's desire to increase sales and to retain the covenantor as his customer were legitimate interests which could be protected.

It would seem, then, that for cases of this kind, the careful measuring of restraints against "interests" typical of employee and goodwill cases is not applicable now that such a wide definition is given to "interests". Questions which must be considered instead include whether the restraint is normal, whether there is excessive hardship on the covenantor or excessive benefits to the covenantee, and whether the public interest will be harmed. However, Stephen J.[86] appears to overstate the case in *Pamag* in asserting that no interest other than increasing sales was involved; surely a long term sole requirements contract enabled the miller in that case to predict his future activities, *e.g.*, to decide whether new capital investment

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[82] *Ibid.*
[83] *Supra*, f.n.24, 397, 401 *per* Walsh J., and 410 *per* Gibbs J.
[84] *Supra*, f.n.17.
[85] *Ibid.*, 53.
[86] *Ibid.*, 60-61.

should be made and equipment installed. For new entrants as well as existing competitors these are vital matters; there is a public interest in rationally-based competition. The reasoning to be used is surely very similar to that employed in the petrol cases, though the interest to be protected there may be stronger.

Reasonableness

General Questions of Reasonableness

The Courts have devoted much attention to general questions governing reasonableness. First, an agreement will be interpreted to exclude extravagant possibilities. In *Home Counties Dairies, Ltd.* v. *Skilton*[87] a milk roundsman agreed not to sell dairy products after his employment ended. Pennycuick J. held that since "dairy products" included articles sold by grocers, the clause was too wide in that it prevented the employee from working for a grocer. The Court of Appeal reversed this decision because the position of the party suggested that the contract only related to the employee's trade as a milk roundsman. The risk of breach arising if both employee and customer moved to another part of the country was ignored, for even if this were a breach, it would sound only in nominal damages and not be enjoined. Salmon L.J. stated:

> If a clause is valid in all ordinary circumstances which can have been contemplated by the parties, it is equally valid notwithstanding that it might cover circumstances which are so "extravagant", "fantastical", "unlikely or improbable", that they must have been entirely outside the contemplation of the parties.[88]

A similar result has been achieved in Canada by holding that public policy favours competition and alienability of property, so that agreements with contrary tendencies should be strictly construed. Hence, the "business of a hairdresser and beauty salon" does not extend to the sale and servicing of wigs.[89]

One factor which may be considered in determining the reasonableness of a covenant is the relative bargaining positions of the parties. The covenantor is not always weak: he may be a formidable negotiator;[90] there may be a shortage of skilled labour; the covenantor may be protected by the bargaining power of a strong union.[91]

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[87] [1970] 1 All E.R. 1227.

[88] *Ibid.*, 1233 *per* Salmon L.J.; *Marion White Ltd.* v. *Francis* [1972] 3 All E.R. 857. See also *Pyle* v. *Sharp Bros., supra,* f.n.80.

[89] *Russo* v. *Field and Menat Construction Ltd.* (1970) 12 D.L.R. (3d) 665.

[90] *Amoco, supra,* f.n.24.

[91] *Ackermann-Göggingen Aktiengesellschaft* v. *Marshing, supra,* f.n.66.

Of course, a restraint may be set aside even though the parties have equal bargaining power.[92]

In determining reasonableness, different views have been expressed about the relevance of the fact that there is only a very brief period of employment or that employment is terminable on very short notice.[93] Some courts consider that the only relevance of such facts is to limit the extent to which the employer has any interests capable of protection by the covenant.

In determining questions of reasonableness, the High Court of Australia stated in the *Amoco* case[94] that the court will not readily substitute its own views for those of the parties.[95] However, it rejected the statement of Ungoed-Thomas J. in *Texaco Ltd.* v. *Mulberry Filling Station Ltd.*[96] that it was "right in principle and in accordance with the habitual inclination of the court not to interfere with business decisions made by businessmen authorized and qualified to make them".

In considering the reasonableness of any covenant, it is necessary to examine the question in two parts: first, as between the parties and second, according to the public interest. The *Esso* case[97] indicates that in the future there will likely be greater emphasis on the public interest than there has been in the past. In *Amoco*, Walsh J. stated that although the two limbs are distinguishable, they overlap, because something unreasonable as between the parties which deprives "a person of his liberty of action is regarded as detrimental to the public interest".[98] It is unlikely that the two limbs could be completely merged because the burden of proving reasonableness as between the parties rests on the covenantee, while the burden of proving unreasonableness in the public interest is on the covenantor.[99]

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[92] *Amoco, supra,* f.n.24, 401 *per* Walsh J., 408-409 *per* Gibbs J.; *Pamag, supra,* f.n.17, 53 *per* Walsh J., and 59 *per* Stephen J.; *cf. Texaco Ltd.* v. *Mulberry Filling Station Ltd.* [1972] 1 W.L.R. 814.

[93] *Cf. Northern Messenger & Transfer Ltd.* v. *Fabbro, supra,* f.n.64, and *Gledlow Autoparts Ltd.* v. *Delaney* [1965] 1 W.L.R. 1366, 1377; *National Chemsearch Corporation Caribbean* v. *Davidson, supra,* f.n.58, 43; *Pyle* v. *Sharp Bros., supra,* f.n.80; *Home Counties Dairies, Ltd.* v. *Skilton, supra,* f.n.56.

[94] *Supra,* f.n.24, 400 *per* Walsh J., and 409 *per* Gibbs J.

[95] See, *e.g., Lyne-Pirkis* v. *Jones* [1969] 1 W.L.R. 1293, 1301-1302.

[96] *Supra,* f.n.92, 826.

[97] *Supra,* f.n.5.

[98] *Supra,* f.n.24, 400.

[99] *Queensland Co-operative Milling Association Ltd.* v. *Pamag Pty. Ltd., supra,* f.n.17, 59 *per* Stephen J.

Finally, the dispute continues as to the extent to which a decision on the issue of reasonableness should take into account events subsequent to the date of contracting. In the *Amoco* case[100] Wells J. took into account the generally reasonable way the covenantee behaved, thus contradicting his own reliance on the orthodox rule that the relevant moment is that of contracting. Hogarth J. also stated the orthodox rule but ignored it; he also said that a more liberal rule might be desirable because of the risk that witnesses who could have testified as to the reasonable nature of the agreement when it was entered into might not be available at the time of the trial. In the High Court, Gibbs J. said that while reasonableness was to be judged at the date of contracting, subsequent events "might throw light on the circumstances existing at the relevant date...".[101] Menzies J. took into account the fact that before the litigation began, the covenantor had in fact agreed to a five year extension of the lease of the service station subject to the tie.[102]

A similar difference of opinion occurred in the English Court of Appeal in *Lyne-Pirkis* v. *Jones*[103] in considering an agreement not to practice medicine within a ten mile radius. Edmund Davies[104] and Fenton Atkinson L.JJ.[105] would have upheld this as allowing for some future expansion of the covenantee's medical practice; however, Russell L.J.[106] thought it invalid because in fact no patients existed in the outer five miles by the time of the trial.

Subsequent events were taken into account by Wootton J. in *Green* v. *Stanton*,[107] but the British Columbia Court of Appeal[108] stated that there was "ample authority" that reasonableness should be determined at the time of the covenant. The Court also rejected the argument that reasonableness in the public interest should be judged as from the time of breach, even if reasonableness between the parties were to be judged at the time of contracting. This seems correct, since both questions are merely aspects of a general issue of public policy. In spite of the general principle, subsequent events must be considered at least to this extent: reasonableness will often

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[100] *Amoco* case, *supra*, f.n.24.
[101] *Ibid.*, 409-410.
[102] *Ibid.*, 389.
[103] *Supra*, f.n.95.
[104] *Ibid.*, 1301.
[105] *Ibid.*, 1302.
[106] *Ibid.*, 1299-1300.
[107] (1969) 3 D.L.R. (3d) 358, 365.
[108] (1969) 6 D.L.R. (3d) 680, 687.

depend on how far the covenantor has learned any trade secrets or built up any customer connection before the restriction comes into effect.

The Employee and Goodwill Cases

In addition to the general questions discussed above, a number of more specific issues have arisen in the employee and goodwill cases. First, are the activities from which the covenantor is restrained too extensive? Some recent examples may be noted. A prohibition on working "in any capacity" is too wide when the covenantor only worked as sales manager; he could not be restrained from working in jobs where he would not be in a position to influence sales.[109] A restraint on engaging in practice as a "medical practitioner" is too wide if the covenantor is only a general practitioner because "medical practitioner" includes "consultant".[110] Similarly, a prohibition on an employee practising any branch of medicine or surgery is too wide where he was employed as a specialist in obstetrics and gynaecology.[111] But a covenant not to carry on the business of "manufacturing sash and doors, general woodwork" is not too wide where the covenantor had been sole shareholder in a sash and door manufacturing company.[112]

Another factor to consider in determining the reasonableness of a covenant involving former employees is the extent of the area over which the covenant extends. Although covenants against soliciting customers with whom the covenantor has formerly dealt will normally be upheld, the courts in recent cases have tended to find unreasonable covenants extending over a defined geographical area. This is particularly so where all the customers are known by name and address[113] and the business is largely done on credit by telephone,[114] or where there are many persons in the area with whom the covenantor never dealt,[115] or both;[116] or where the area includes

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[109] *T.S. Taylor Machinery Co., Ltd.* v. *Biggar* (1968) 2 D.L.R. (3d) 281.

[110] *Lyne-Pirkis* v. *Jones, supra,* f.n.95, following *Routh* v. *Jones* [1947] 1 All E.R. 758; *cf. Macfarlane* v. *Kent* [1965] 2 All E.R. 376; see also *Peyton* v. *Mindham* [1971] 3 All E.R. 1215.

[111] *Sherk* v. *Horwitz* [1972] 2 O.R. 451.

[112] *Hecke* v. *La Compagnie de Gestion Maskoutaine Ltée* [1972] S.C.R. 22; and see *Aloha Shangri-la Atlas Cruises Pty. Ltd.* v. *Gaven, supra,* f.n.65.

[113] *Macfarlane* v. *Kent* [1965] 2 All E.R. 376.

[114] *S.W. Strange Ltd.* v. *Mann* [1965] 1 All E.R. 1069.

[115] *Gledlow Autoparts, Ltd.* v. *Delaney, supra,* f.n.93; *National Chemsearch Corporation Caribbean* v. *Davidson, supra,* f.n.58; *cf. Pyle* v. *Sharp, supra,* f.n.80.

[116] *T. Lucas & Co. Ltd.* v. *Mitchell* [1974] Ch. 129.

places in which the covenantor never worked.[117] On the other hand, an area covenant will be justifiable if a solicitation covenant makes it difficult for the covenantee to discover from customers whether the covenantor is destroying his trade connection.[118] Area covenants may be considered appropriate in country districts where there are large unpopulated areas.[119] The reasonable possibility of future expansion may also be taken into account in determining the validity of area covenants.[120]

An issue closely related to the area over which a covenant extends is the number of people the covenantor is restrained from dealing with. Restraints on dealings with customers of a company are bad if the company has many more customers than the employee came into contact with.[121] On the other hand, a customer solicitation covenant is valid even though it extends to persons who were the employer's customers at one time during the employment but ceased to be before it was terminated. Harman L.J. has said:

> ... if a man was a customer at the beginning of the employment I do not see why hope should be abandoned of his becoming a customer again at the end of it and why, therefore, people who have, for the time being at any rate, ceased to be customers, have fallen outside the proprietary interest.[122]

A third issue that has arisen in cases involving former employees is the length of time the covenant may last. A restraint may be considered unreasonably long because its termination depends on the exercise of a discretionary power which may never be exercised.[123]

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[117] *Postage Mobilhome Co., Ltd.* v. *Challenger Home Builders Ltd.* (1972) 29 D.L.R. (3d) 191; *Phillip M. Levy Pty. Ltd.* v. *Christopoulos, supra,* f.n.63.

[118] *Scorer* v. *Seymour-Johns, supra,* f.n.62; *Nachtsheim* v. *Overath, supra,* f.n.57; *Reliance Cordage Co. Ltd.* v. *Hetterley* (1969) 5 D.L.R. (3d) 297. See also *Ryder* v. *Lightfoot and Burns* (1965) 51 D.L.R. (2d) 83; *Steevens* v. *Allied Freightways Ltd., supra,* f.n.61; *T.S. Taylor Machinery Co., Ltd.* v. *Biggar, supra,* f.n.109; *Cameron* v. *Canadian Factors Corporation Ltd.* (1970) 18 D.L.R. (3d) 574; *Leventis Motors Ltd.* v. *Koumolis* 1970 (1) A.L.R. Comm. 267; *Olds* v. *Tollgate Holdings Ltd.* 1970 (4) S.A. 267; *Re B.A.C.M. Ltd. and Kowall Holdings Ltd.* (1972) 28 D.L.R. (3d) 365; *Clarke Ltd.* v. *Thermidaire Corp. Ltd.* (1973) 33 D.L.R. (3d) 13.

[119] *Hawkesbury Bakery Pty. Ltd.* v. *Moses* [1965] N.S.W.R. 1242; *Papastravou* v. *Gavan* [1968] 2 N.S.W.R. 286.

[120] *McAllister* v. *Cardinal* (1964) 47 D.L.R. (2d) 313, 319 *per* Stewart J.

[121] *Northern Messenger (Calgary) Ltd.* v. *Frost* (1966) 57 D.L.R. (2d) 456, 462-463 *per* Kirby J.

[122] *G.W. Plowman & Son Ltd.* v. *Ash* [1964] 2 All E.R. 10, 13; followed in *Home Counties Dairies Ltd.* v. *Skilton, supra,* f.n.56, 1234 *per* Salmon L.J., and 1235 *per* Cross L.J. See also *National Chemsearch Corporation Caribbean* v. *Davidson, supra,* f.n.58.

[123] *Aloha Shangri-la Atlas Cruises Pty. Ltd.* v. *Gaven, supra,* f.n.65.

The Supreme Court of Canada, in a case on appeal from Quebec (where the Civil Code is to a similar effect as the common law), held that an agreement was unreasonable where it provided that the comptroller of a factoring company who had dealt with the accounts of clients would not solicit the company's customers for five years after his employment ended. A reasonable period would be one or two years, for this would be long enough for the employer to put someone else in the covenantor's place to deal with clients' accounts and prospective clients.[124]

Other Cases

Several recent cases indicate what factors should be considered in determining the reasonableness of covenants other than those involving former employees and the sale of businesses. In *Buckley* v. *Tutty*[125] the Full Court found that the football retain and transfer system was unreasonable on a number of grounds. First, the player was denied the economic value of his football capacity. Further, the fact that players had a right to contract out suggested both that the legitimate interests of the defendants were less pressing than they alleged and that there were hardships present which made it desirable to contract out. Moreover, the right of appeal did not mitigate unreasonableness because few appeals against retention succeeded and appeals resulting in a reduction of the transfer fee did not substantially touch on the vice of the system. The High Court agreed with these reasons, and held that an additional reason why the rules were too wide was because they prevented a player who had ceased to play for one club from playing for any other without taking into account how briefly he had played for the first club or how long a time had elapsed since he had played. Also, the transfer fee could be fixed at a level quite unrelated to any benefit the player might have had from his association with the club; its size could adversely affect the chance of an engagement elsewhere and the remuneration offered. In the *Blackler* case, the rule giving the New Zealand Rugby League a right to prevent players from playing abroad was held void; it gave a discretion unrestricted in point of time and area which might well be operated unreasonably, particu-

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[124] *Cameron* v. *Canadian Factors Corporation Ltd. supra,* f.n.118, 585-586 *per* Laskin J.; the same test was applied in *National Chemsearch Corporation Caribbean* v. *Davidson, supra,* f.n.58. See also *American Building Maintenance Co. Ltd.* v. *Shandley, supra,* f.n.66; and *Stenhouse Australia Ltd.* v. *Phillips, supra,* f.n.21.

[125] *Supra,* f.n.9 (Full Court); *supra,* f.n.12 (High Court).

larly since a player's "skills and strength are marketable for a few years only".[126]

Different issues arose in the *Dalwood* case.[127] Hope J. said that the lack of any time limit for the prohibition on the use of the name "Dalwood" in conjunction with the property sold would make it unreasonable. A permissible period would be that

> ... during which the name "Dalwood" would be likely to be associated by the public or by the wine trade with the property conveyed to the [covenantor], and I do not think that the difficulty in estimating this period justifies a permanent restraint.[128]

But this view seems to rest on a confusion between the facts actually before the Court and those of a typical goodwill case. In a goodwill case, the *seller* agrees not to compete with the *business sold.* In this case, the *buyer* agreed not to compete with *another business* in which a company associated with the *seller* was concerned. What was relevant, therefore, was how long the public would associate the name "Dalwood" not with the *property sold* but rather with the *business protected,* or perhaps some lesser period considered sufficiently long to protect the rights of the covenantee's associate to trade without this kind of competition.

It is a well-established principle that the reasonableness of a covenant does not depend on adequacy of consideration.[129] Several recent cases indicate, however, that in determining reasonableness, it is appropriate to take into account the relative obligations imposed on the two parties. In *Instone* v. *A. Schroeder Music Publishing Co., Ltd.*[130] the plaintiff was a young song writer who assigned to the defendant music publishers full copyright for the whole world in his works then existing as well as those composed in the five following years. In return, he would receive £50 in advance of royalties, which payment would be repeated upon recoupment by the defendant publishers. The Court of Appeal said that there was

> ... a great difference between cases of restrictions on trade during an employment or engagement and those after the contract has come to an end.... It is far less likely that a restriction during the continuance of a contract would be inimical to the public interest.[131]

However, they agreed with Plowman J. in holding that the case before them was one of the exceptional instances of invalidity. There was

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[126] *Supra,* f.n.8, 572 *per* McCarthy J.
[127] *Supra,* f.n.14.
[128] *Ibid.,* 696.
[129] *Supra,* f.n.2.
[130] *Supra,* f.n.25; see also *Clifford Sons Management Ltd.* v. *W.E.A. Records Ltd.* [1975] 1 W.L.R. 61.
[131] *Ibid.,* 178 *per* Russell L.J.

no obligation on the defendant to exploit any composition of the plaintiff: he might in effect be left with no outlet, the maximum payment due to him being the £50 advance royalties, with no right at the end of the five years to recover the copyright of unused compositions. The contract did not accord with standard practice. The House of Lords, in dismissing the appeal, pointed also to the inequality of bargaining power. In *Pyle* v. *Sharp Bros. Pty. Ltd.*,[132] however, lack of reciprocity of obligation did not make the covenant unreasonable. The covenantor was bound to sell a covenantee's products but the covenantee in certain circumstances was not obliged to keep him supplied. It was held that since the covenantor could leave the agreement on seven days notice and compete elsewhere in the same city outside a certain area, the lack of reciprocity was not unreasonable.

Finally, the *Amoco* case[133] also discussed the extent to which reasonableness of a covenant should take into account the interests of the covenantor. Menzies J.[134] and Gibbs J.[135] in the High Court agreed with the trial judge that it was proper to balance the advantages received by the covenantor against the disadvantages of the covenant to him. Bray C.J. in the Full Court and Walsh J. took a compromise position. Thus, Walsh J. stated that although the test is whether the restraint does no more than adequately protect the covenantee's interests, independently of any benefits conferred on the covenantor,

> ... the *quantum* of the benefit which the covenantor receives may be taken into account in determining whether the restraint does or does not go beyond adequate protection for the interests of the covenantee. For example, if a large sum is advanced a longer period of restraint may be held to be required to give adequate protection to the covenantee than that which would be appropriate in the case of a small advance.[136]

However, despite the refusal of Bray C.J. and Walsh J. to depart completely from orthodoxy, their consideration of the hardships on the covenantor in that case often seems to have occurred without reference to whether these were necessary to protect the covenantee.

In *Amoco*[137] a fifteen year solus agreement for the supply of petrol by Amoco to Rocca was found to be reasonable by the trial judge (Wells J.), but his decision was not upheld by the Full Court or by the High Court of Australia. Wells J. admitted two items of

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[132] *Supra*, f.n.80.
[133] *Supra*, f.n.24.
[134] *Ibid.*, 389.
[135] *Ibid.*, 407-408.
[136] *Ibid.*, 399.
[137] *Ibid.*

expert economic evidence on the issue of reasonableness between the parties. Amoco's Economic and Planning Manager estimated on the basis of available facts that after fifteen years the project would yield 10.2% profitability on a discounted cash flow basis. Anything below that would be too little to raise capital. This evidence was critically scrutinized by an expert economist, who concluded that Amoco had been cautious, and up to 17% profitability might be expected. In spite of this evidence, Wells J. held that, considering all of the circumstances of the case, the agreement was valid.

In the Full Court, Hogarth J. considered that the crucial term was the fifteen year tie; the others merely aided the operation of that tie. Without considering the expert economist's evidence, he said that Amoco's own evidence showed they had taken too gloomy a view and therefore about 10% profitability could have been achieved with a shorter term. Bray C.J. (Walters J. concurring) also found the covenants unreasonable, relying in addition on the expert's evidence. He stressed the positive duty to stay open, even at a loss; Amoco's right not to supply petrol if its sources dried up;[138] the duty to pay cash on delivery; Amoco's right to determine after ten years; and the fact that the rebate was fixed at 2.5 cents a gallon (without taking into account possible inflation) and was not proportioned to the duration of the term. The majority of the High Court agreed substantially with Bray C.J.'s reasons and stated that even if the terms other than duration had been less onerous, the agreement would still have been void. Although members of the High Court expressed different views as to the weight of the expert economic evidence, no doubts as to its admissibility were expressed.[139]

Public Interest

Beginning with the *Esso* decision, several recent cases have examined what factors should be considered and what kinds of evidence are admissible in determining whether a covenant is against the public interest. In the *Esso* case, the House of Lords, in stressing the importance of considering the effects of solus agreement cases on the public, relied on a Monopolies Commission report on the supply of petrol for information about the U.K. petrol distribution industry.[140] Some have seen a check to this development in *Pharmaceutical Society of Great Britain* v. *Dickson*[141] in which Lord

[138] *Cf. Rhodesian Milling Co. (Pvt.) Ltd.* v. *Super Bakery (Pvt.) Ltd., supra,* f.n.36.

[139] *Supra,* f.n.24, 390 *per* Menzies J., 402 *per* Walsh J., 413 *per* Gibbs J.

[140] *Supra,* f.n.4.

[141] *Supra,* f.n.31.

Wilberforce expressed doubts as to whether evidence that restraints would cause a reduction in the number of pharmacies could properly be considered in relation to the common law restraint of trade doctrine (as opposed to proceedings in the Restrictive Practices Court).

But in *Amoco* Wells J. did not doubt the relevance of similar evidence as to the public interest. An expert economist stated five year ties were desirable in that they gave some stability but also allowed some scope for new entrants to woo the twenty percent of covenantors whose agreements would come up for renewal each year. Fifteen year ties, on the other hand, ensured that fewer ties terminated each year so that fewer sites became available. This substantially reduced the possibility of competition, because the huge costs of entry made it necessary for new entrants to obtain many outlets quickly in order to enjoy economies of scale. In spite of this evidence, Wells J. held that the fifteen year tie was not against public interest because the reduction in competition and the resulting loss in efficiency were outweighed by the benefits of solus agreement contracts and the public interest in sanctity of contracts. It was not necessary for the Full Court and the High Court to consider these public interest questions.

In the *Pamag*[142] case, the High Court held that the agreement was not against the public interest, since it would not lead to a monopoly, or to an increase in prices. Indeed, Stephen J. thought that if such agreements were not made, there would be a risk of vertical integration in the flour-bread trade which would in the long run reduce competition.[143]

Sherk v. *Horwitz*[144] is an important Canadian decision discussing what factors will be considered in employee cases in determining reasonableness according to the public interest. The defendant was an obstetrician employed by an Ontario medical centre. He agreed that on termination of his employment, he would not practice any branch of medicine or surgery within five miles of the city for five years. Donohue J. held the covenant void for several reasons. First, in his four years' work the covenantor had treated thousands of patients, including 2,800 in his last year. It was wrong that they should be deprived of treatment by him during and after pregnancy: "No answer is to be found in saying that these people ... can easily

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[142] *Supra,* f.n.17.

[143] *Ibid.,* 66.

[144] (1971) 25 D.L.R. (3d) 675 (Ont. H.C.); aff'd on other grounds (1972) 31 D.L.R. (3d) 152 (Ont. C.A.).

find another specialist. Choosing a physician or surgeon is not akin to commercial transactions."[145] Secondly, there were only half the proper number of obstetricians in the area. It was therefore against the public interest for the covenantor to be restrained from working. (This will of course only be so if other areas are not short of doctors.)[146] Thirdly, the same conclusion was supported by other pieces of evidence as to public policy. Local legislation[147] was directed towards providing the widest medical care for Ontario residents; hence the public were entitled to the widest choice in the selection of their medical practitioners. Further, in May 1971, the Council of the Ontario Medical Association had expressed disapproval of restrictive covenants in contracts between physicians. Finally, the medical profession was in a strong monopoly position and the right of the public to deal with it should not be weakened further by restrictive covenants between doctors. The Ontario Court of Appeal upheld the decision, but on the ground that the defendants had failed to establish any proprietary interest under the covenant in question; the Court expressed no opinion on the reasons for judgment given by the High Court.[148]

The admissibility of evidence relating to the effects of an agreement on the public may make the common law restraint of trade doctrine a supplement to and a partial substitute for a system of antitrust legislation. The cases discussed above indicate that "public interest" is not to be interpreted restrictively as referring only to the interest the public has in freedom of trading, but may include the effects of an agreement on general economic and social conditions by which the public may be affected. In this respect, the doctrine may be at the threshold of one of its greatest advances. Indeed, in *Texaco Ltd.* v. *Mulberry Filling Station Ltd.*[149] counsel for the covenantor took a more extreme approach in seeking to have a petrol solus agreement declared invalid even though it lasted only four years seven months. It was argued that certain terms of the covenant providing for a low rate of interest on a loan from the supplier to the retailer were factors to consider in determining whether the covenant was against the public interest. It was claimed that the low interest resulted in a misallocation of resources and a raising of the price to the consumer, that it induced the retailer to enter the trade ignorant of the true costs involved (since

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[145] *Ibid.*, 678; and see *Willman* v. *Bekeler* 499 S.W. (2d) 770 (1973), 777.
[146] *Green* v. *Stanton* (1969) 6 D.L.R. (3d) 680 (B.C. C.A.).
[147] *E.g., Health Services Insurance Act,* R.S.O. 1970, c.200.
[148] *Supra,* f.n.144.
[149] *Supra,* f.n.92.

a high price might be charged to offset the low interest rate), and that it subsidized inefficient retailers to the detriment of the public. It was further argued that if the solus tie system were abolished, prices might fall, and that the system did not cause economies of scale in distribution.

Ungoed-Thomas J. rejected all of these arguments on the grounds they were not supported by the evidence. He then expressed doubts as to whether it had been proper to raise these issues in the first place. He thought they were essentially policy matters for business administration, government, or Parliament. In his view, the restraint of trade doctrine was principally concerned with the personal liberty of the citizen rather than "the utmost economic advantage".[150] "Reasonableness with reference to the public" meant simply that "the public has an interest in men being able to trade freely subject, *inter alia,* to reasonable limitations which conform with the contemporary organisation of trade".[151] He added that if the phrase

> ... refers to interests of the public at large, it might not only involve balancing a mass of conflicting economic, social and other interests which a court of law might be ill-adapted to achieve; but, more important, interests of the public at large would lack sufficiently specific formulation to be capable of judicial as contrasted with unregulated personal decision and application.[152]

There is much force in what Ungoed-Thomas J. says, but it is suggested he has responded too strongly to some very ill-supported appeals to the public interest. The court in evaluating the public interest is not asked to act as a benevolent despot, working out an ideal order of society; it is merely asked to prevent agreements from being enforced which have a clearly proved adverse effect on non-parties. Such an effect will doubtless be difficult to prove, particularly if there is no convenient extrinsic evidence like the Monopolies Commission Report on Petrol in the *Esso* case,[153] or the documents considered in *Sherk* v. *Horwitz,*[154] or the economic evidence in *Amoco,*[155] but that is not a reason for refusing to let litigants prove it when they can.

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[150] *Ibid.,* 827.

[151] *Ibid.,* 829.

[152] *Ibid.,* 827.

[153] *Supra,* f.n.5.

[154] *Supra,* f.n.144.

[155] *Supra,* f.n.24.

Remedies

Until recently, a contract that was found to be in unreasonable restraint of trade was unenforceable, yet a person who had suffered as a result of it had no positive remedies. But major changes have occurred in the last decade. Declarations have been granted at the suit of footballers to the effect that agreements to which they were not parties but which prevented them from playing for the employers they wished were in unreasonable restraint of trade.[156] In *Nagle* v. *Feilden*[157] the Court of Appeal held, in proceedings similar to demurrer, that where the stewards of the Jockey Club of England abused their monopoly power over entry to the trade by excluding women, the plaintiff established a *prima facie* case for having the practice declared void as against public policy, and for obtaining injunctions to restrain the defendants from following the practice, and for an order either to grant the plaintiff a licence or to consider any future application on its merits. The High Court of Australia has even said that a final injuction would lie to prevent such agreements being acted on or such practices continued.[158] And there has been a suggestion that powers or practices of trade unions by which persons are expelled or refused membership may be declared unreasonable as interfering with the right to work.[159]

These developments, particularly the possible grant of an injunction, are very welcome in that they overcome the danger that restraints beneficial to parties who agreed on them will never be upset although they affect third party rights. But certain problems arise from these developments. One relatively minor difficulty is based on the fact that monopolies and cartels are usually thought to be matters for the legislature. So far as the legislation deals only with agreements and monopolies respecting the supply of goods, there is no conflict with Parliamentry policy: Parliament has left a gap which the common law should fill. Even if there is no gap, the provision of additional means of enforcement would seem to be a fulfilment of the legislative policy, not its destruction.

Another problem concerns the availability of damages. In *Cooke* v. *Football Association*[160] the plaintiff was an Irish player who wished

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[156] *Eastham* v. *Newcastle United Football Club Ltd., supra,* f.n.8; *Blackler* v. *New Zealand Rugby Football League Ltd., supra,* f.n.8; *Elford* v. *Buckley, supra,* f.n.7. See also *Pharmaceutical Society of Great Britain* v. *Dickson, supra,* f.n.31.

[157] *Supra,* f.n.50.

[158] *Buckley* v. *Tutty* (1971) 125 C.L.R. 353, 379-382.

[159] *Edwards* v. *S.O.G.A.T., supra,* f.n.51.

[160] *The Times,* March 24, 1972; [1972] C.L. 516.

to join an English club. The defendant, acting in accordance with the rules of F.I.F.A., the game's international governing body, refused to register the plaintiff's transfer until his club approved. Foster J. held that although these rules might be in unreasonable restraint of trade, the plaintiff could not recover damages. Such a decision would seem to be questionable if the "right to work" arises from the development of the restraint of trade doctrine in the common law courts. The injunction would then be granted in equity's auxiliary jurisdiction, but it is an odd common law cause of action which does not sound in damages as of right. The other view is that the right to work is a purely equitable creation, so that the injunction is granted in equity's exclusive jurisdiction. If so, it seems curious that no discussion has occurred as to the availability of an award of damages (which may be possible in respect of a purely equitable interest)[161] in lieu of or in substitution for an injunction under *Lord Cairns' Act*.[162] In the case of aging footballers, the availability of damages for past losses is probably a matter of more pressing concern than an injunction to protect a future right to work, which may be of declining value. Lord Denning said in *Nagle* v. *Feilden*[163] that damages only lie for torts or breaches of contracts. Why cannot this conduct be regarded as tortious, like that covered by any of the economic torts? While damages would often be hard to calculate, this is not usually considered to be a valid objection to the recognition of a right to damages.

Difficulties may also arise with respect to the injunction. If it is negative, requiring the parties not to act on their agreement, it may be ineffective, for the defendants may reply untruthfully that their actions are based on other factors. If it is positive, requiring a club to employ a player, for example, it would be contrary to equity's dislike of compelling parties between whom there is ill-feeling to work together, particularly when they have not yet contracted to do so. In *Nagle* v. *Feilden* the Court of Appeal held there was jurisdiction to grant the relief sought, which included a positive injunction requiring the defendant either to grant the licence or to give a future application proper consideration. In cases of this kind, it will be hard for the Courts to penetrate behind sham statements by the defendants such as: "Mrs Nagle, we will not grant you a licence to train, not because you are a woman — that policy has changed — but because you are inefficient, or of bad character, or too old, etc."

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[161] *Eastwood* v. *Lever* (1963) 4 De G.J. & S. 114, 128, 46 E.R. 859, 865 *per* Knight Bruce L.J.; *Elliston* v. *Reacher* [1908] 2 Ch. 374, 395 *per* Parker J.

[162] 21 and 22 Vict., c.27, s.2.

[163] *Supra*, f.n.50, 646.

But at least in cartel cases, one of the cartelists will probably be more eager to break the agreement than the others. The effect of a declaration and a negative injunction is to make the cartel much more difficult to enforce.

Revolutionary though the recognition of the right to work is on the face of it, its implications may be even more serious. If single professionals or employees can obtain the above remedies, perhaps business concerns which are the victims of boycotts can also obtain them. But an anomalous decision to the contrary is *Adrian Messenger Services and Enterprises Ltd.* v. *The Jockey Club Ltd.*[164] where the defendant, who had a near monopoly of racing in Southern Ontario, successfully resisted the plaintiff company's action brought in the Ontario High Court to obtain access to the races for its bet-carrying messengers. A company's right to work ought not to be less extensive than an individual's. In any event, *Buckley* v. *Tutty*, in giving a private right of action against cartels and monopolies, is at least a partial undermining of the combined authority of *Allen* v. *Flood*[165] and *Lumley* v. *Gye*[166] which assert that if there is no conspiracy, no interference with contracts and no unlawful means, there is no liability for intentionally caused trade loss.

It was said earlier that the admission of evidence as to the public interest would help the common law restraint of trade doctrine become a supplement to, or even a substitute for, a system of anti-trust legislation. It operates as a supplement, as has been seen, in that the common law has recognized private causes of action for individuals injured by cartels and monopolies to which they are not parties. Indeed, it operates as both supplement and substitute if the legislation does not grant private rights of action so that the vindication of public and private rights would otherwise depend entirely on the efficiency and honesty of state officials. It is also a substitute so far as it extends to conduct either not covered by antitrust statutes or only partially covered. Such statutes sometimes proscribe cartels more fully than monopolies: they may condemn restrictions on the terms of dealing rather than refusals to deal at all. But the common law has been applied to refusals to admit individuals to trade associations and trade unions, and to expulsions of individuals from these bodies; arguably, certain refusals to buy goods or services or to permit companies to trade should be treated the same way as a refusal to permit a man to work. Finally, the

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[164] [1972] O.R. 369.
[165] [1898] A.C. 1.
[166] (1853) 2 E. & B. 216.

common law of its nature gives courts flexibility and creativity in meeting unforeseen problems; on the other hand, a particular antitrust statute may deny such powers to the courts in their administration of that statute.

Severance

In *T. Lucas & Co. Ltd.* v. *Mitchell*[167] Pennycuick V.-C. refused to sever a restriction in a covenant which prohibited the covenantor from dealing in certain goods in a particular area from a restriction in the same clause prohibiting the solicitation of orders for those goods. He stated that even though the latter part of the clause would be unreasonable if it stood alone, its severance from the remainder of the clause would give it a meaning "different in kind as well as in extent".[168] The Court of Appeal disagreed on this point;[169] more importantly, the Court refused to follow the views of Atkin and Younger L.JJ. in *Attwood* v. *Lamont*,[170] which were based on Lord Moulton's remarks in *Mason* v. *Provident Clothing and Supply Co. Ltd.*[171] that the courts should not sever employee covenants unless the part of the covenant which is unreasonable is merely trivial and not an essential part of the agreement. It would seem, therefore, that the present rule is that:

> ... if you find two restraints which as a matter of construction are to be regarded as intended by the parties to be separate and severable, and the excision of the unenforceable restraint being capable of being made without other addition or modification, there is no third question, even in master and servant cases.[172]

Statutory reform has gone further. The New Zealand *Illegal Contracts Act, 1970*[173] has abolished the blue pencil test. Its abolition has been recommended in New South Wales;[174] the proposal is that the court will have a discretion to refuse to modify a promise in

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[167] *Supra*, f.n.116. See also *Amoco Australia Pty. Ltd.* v. *Rocca Bros. Motor Engineering Co. Pty. Ltd. (No.2)* (1975) 5 A.L.R. 65.

[168] *Ibid.*, 948.

[169] *Ibid.*, 938.

[170] [1920] 2 K.B. 571, 593.

[171] [1913] A.C. 724, 745.

[172] *T. Lucas & Co. Ltd.* v. *Mitchell, supra*, f.n.116, 939. *Cf. E.P. Chester Ltd.* v. *Mastorkis* (1968) 70 D.L.R. (2d) 133; *Furlong* v. *Burns & Co.* (1964) 43 D.L.R. (2d) 689; and *Cameron* v. *Bray Gibb & Co. (Pvt.) Ltd.* 1966 (3) S.A. 675.

[173] *New Zealand Statutes*, 1970, No.129, s.8.

[174] *Report of the N.S.W. Law Reform Commission on Covenants in Restraint of Trade* (1970), 9.

restraint of trade to make it enforceable if the reason it is against public policy is because of a manifest failure to attempt to make a reasonable promise. In America, where the blue pencil test has been abolished by the common law courts in many jurisdictions, there is a similar inherent equitable discretion not to modify void covenants on the ground that the covenantee has unclean hands (for example, where he has shown bad faith or deliberate oppression).[175]

If an employer promises his employee a pension, or a share of profits or commissions, provided that he does not compete after leaving employment, can the employee sue? In America, there is a common view that the employer need not pay if the condition on which payment depends has not been performed; the condition is valid because the restraint of trade doctrine does not apply to conditions, only to contracts.[176] This view is not shared by the majority of Commonwealth courts or by some American courts.[177] But assuming the condition is an unreasonable restraint of trade, a bewildering number of views as to whether the employer remains bound to pay is possible. First, the employer need not pay if what is against public policy is not the condition but rather the employer's conditional promise to pay, for that provides the incentive to the employee to cease trading.[178] Secondly, the employer need not pay if payment was only to be made on the understanding that the condition was valid, whether or not it is in fact performed.[179] Thirdly, the employer need not pay if the promise to pay is inseverably dependent on performance of the condition so that, if the employer had to make the payment without the condition being fulfilled, the nature of his obligation would fundamentally alter. On this view, the right to each instalment depends on performance of the condition; and the condition is not a means of defeating a vested

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[175] See, *e.g.*, *Insurance Center, Inc.* v. *Taylor* 499 P. 2d 1252 (1972).

[176] *Brown Store Works, Inc.* v. *Kimsey* 167 S.E. 2d. 693 (1969); *Allredge* v. *City National Bank and Trust Co. of Kansas City* 468 S.W. 2d. 1 (1971); *Rochester Corp.* v. *Rochester* 450 F. 2d. 118 (1971); *Swift* v. *Shop Rite Food Stores, Inc.* 489 P. 2d. 881 (1971). See also *Inglis* v. *Great West Assurances Co.* [1941] O.R. 305; and *Ronayne* v. *Howard F. Hudson Pty. Ltd.* (1970) 71 S.R.N.S.W. 269, 278 *per* Asprey J.A. (diss.).

[177] *Wyatt* v. *Kreglinger and Fernau* [1933] 1 K.B. 793; *Bull* v. *Pitney-Bowes, Ltd.* [1966] 3 All E.R. 384; *Howard F. Hudson Pty. Ltd.* v. *Ronayne* (1972) 46 A.L.J.R. 173; and see *Muggill* v. *Reuben H. Donnelley Corp.* 398 P. 2d 147 (1965).

[178] *Wyatt* v. *Kreglinger and Fernau, ibid.;* and the *Ronayne* case, *ibid.*, 177 *per* Owen J., 180 *per* Walsh J., 181 *per* Gibbs J.

[179] *Ronayne, ibid.*, 179 *per* Walsh J.

right.[180] Fourthly, the employer may have to pay if the condition is severable and operates in defeasance of a right conferred elsewhere rather than as a statement of the conditions subject to which the right came into existence.[181] Fifthly, the employer need not pay if the promise to pay was made at the termination of a contract of employment as part of a simple contract, because there is no seal or valuable consideration other than the void condition to support his promise.[182] The employer may have to pay if the promise was made during a contract of employment rather than at its termination and there is some consideration (apart from the void condition) in the form of the employee's work, provided severance is possible on ordinary principles.[183] On this view, pension rights are earned, though deferred, compensation which should not be forfeited by unreasonable restraints of trade.

The application of the doctrine to these conditions is undoubtedly sound in that they may restrain trade as much as express restrictive agreements do. But the law may operate as a serious trap to the employee. He thinks he is getting a pension; in fact, as we have seen, the employer's promise may be entirely unenforceable. This is one area where a wider doctrine of severance would be beneficial.

Conclusion

The last decade has witnessed great changes in the restraint of trade doctrine, and there have been intimations of even greater ones to come. The notion of "trade" now includes the use of trade names and professional sport; "restraint" has widened to include restrictions on competition in pension schemes. Since the *Esso* case,[184] the frontiers of the doctrine now extend well beyond the traditional categories to include such important transactions and institutions as solus agreements and trade association rules; there is some

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[180] This appears to be the actual *ratio decidendi* of the *Ronayne* case, *supra*, f.n.176, 280 *per* Asprey J.A. and *supra*, f.n.177, 177 *per* Menzies J., 179 *per* Walsh J., and 181 *per* Gibbs J. See also *Bull* v. *Pitney-Bowes, Ltd.*, *supra*, f.n.177; and the *Ronayne* case, *supra*, f.n.176, 287 *per* Holmes and Mason JJ.A. and *supra*, f.n.177, 174 *per* Barwick C.J.

[181] *Re Prudential Assurance Co.'s Trust Deed* [1934] 1 Ch. 338 and *Bull* v. *Pitney-Bowes, Ltd.*, *supra*, f.n.177, as interpreted in the *Ronayne* case, *supra*, f.n.177, 181 *per* Gibbs J.; see also *Taylor* v. *McQuilkin* (1968) 2 D.L.R. (3d) 463.

[182] *Ronayne* case, *ibid.*, 174 *per* Barwick C.J., and 178, 189 *per* Walsh J.

[183] *Ronayne* case, *ibid.*, 180 *per* Walsh J.

[184] *Supra*, f.n.5.

authority for the radical but desirable view that all restraints of trade fall within the doctrine. More interests of a "commercial" kind have been recognized as capable of protection, particularly the general health of whole industries. The courts have taken up the suggestions of the House of Lords in the *Esso* case that there should be more stress on the public interest, and new kinds of evidence have been admitted to permit its effective investigation. Declarations have been granted to third parties, and the possibility of injunctions has been authoritatively supported. The severance doctrine may be losing its ancient rigidity. The next decade may reveal whether these developments are to be ignored, or whether they will be consolidated and extended to make the restraint of trade doctrine an even more important method of social control.