7 of 1975

IN THE PRIVY COUNCIL

4

No. 8 of 1974

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT
OF SOUTH AUSTRALIA

B E T W E E N :-

AMOCO AUSTRALIA PTY. LIMITED — Appellant

- and -

ROCCA BROS. MOTOR ENGINEERING
CO. PTY. LTD. — Respondent

RECORD OF PROCEEDINGS

BLYTH DUTTON ROBINS HAY
9 Lincoln's Inn Fields
London WC2A 3DW

Solicitors for the
Appellant

SLAUGHTER & MAY
35 Basinghall Street
London EC2V 5DB

Solicitors for the
Respondent

IN THE PRIVY COUNCIL

No. 8 of 1974

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN :

AMOCO AUSTRALIA PTY. LIMITED — Appellant

- and -

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. — Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

LIST OF DOCUMENTS IN TRANSCRIPT RECORD NOT TRANSMITTED TO PRIVY COUNCIL OFFICE AND OMITTED FROM PRINTED RECORD BY CONSENT OF SOLICITORS

No.	Document	Date
23.	Order Mr. Justice Wells	26th October 1973
24.	Summons	16th November 1973
25.	Affidavit of David Norman Angel	20th November 1973
26.	Affidavit of Gino Guirino Rocca	21st November 1973
27.	Affidavit of William John Trevorrow and Douglas James Pickering	30th November 1973
28.	Document sealed pursuant to Order 38 Rule 11 Supreme Court Rules	30th November 1973
29.	Affidavit of Douglas John Haig with exhibit	29th November 1973
30.	Affidavit of David Norman Angel with exhibits	30th November 1973
31.	Associate's Certificate	18th January 1974

IN THE PRIVY COUNCIL — No. 8 of 1974

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

B E T W E E N :-

AMOCO AUSTRALIA PTY. LIMITED — Appellant

- and -

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. — Respondent

RECORD OF PROCEEDINGS

No. 1

Writ of Summons

In the Supreme Court of South Australia

No.1

Writ of Summons 16th November 1971

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1526 of 1971

B E T W E E N:

AMOCO AUSTRALIA PTY. LIMITED — Plaintiff

- and -

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. — Defendant

ELIZABETH the Second, by the Grace of God, of The United Kingdom, Australia and her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith.

TO ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. of Bridge Road, Para Hills in the State of South Australia.

We command you, That within eight (8) days

In the Supreme Court of South Australia

No. 1

Writ of Summons 16th November 1971 (continued)

after the Service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Supreme Court of South Australia in an action at the suit of AMOCO AUSTRALIA PTY. LIMITED of 38-40 Currie Street, Adelaide in the said State.

And take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, THE HONOURABLE JOHN JEFFERSON BRAY Chief Justice of our said Supreme Court at Adelaide, the 16th day of November 1971.

N.B. - This Writ is to be served within twelve calendar months from the date hereof, or if renewed, within the period for which the same is renewed and not afterwards.

A defendant may appear to this writ by entering an appearance either personally or by Solicitor at the Master's Office, Supreme Court House, Victoria Square, Adelaide.

The Plaintiff's claim is for:-

1. An injunction restraining the Defendant whether by itself its servants, agents, workmen or otherwise from acting on its notice in writing dated the 12th day of November 1971 and from removing or otherwise interfering with any of the plaintiff's pumps or the Plaintiff's illuminated sign each and all situate on the land comprised in Memorandum of Lease Registered No. 2775159 being portion of the land comprised and described in Certificate of Title Register Book Volume 3337 Folio 148 pursuant to the said Notice.

2. An injunction restraining the Defendant whether by itself its servants, agents, workmen or otherwise from constructing or erecting or using or suffering to be constructed or erected or used any pumps or signs or other service station equipment whatsoever on the land comprised in Memorandum of Lease Registered No. 2775159 being portion of the land comprised and described in Certificate of Title Register Book Volume 3337 Folio 148 so as to interfere with or trespass upon the Plaintiff's use and enjoyment of the said land.

3. A mandatory injunction that the Defendant do forthwith remove or cause to be removed all pumps and equipment owned by or in the possession or power of ~~Independent Oil Company of Australia Limited~~ I.O.C. Australia Pty. Ltd. presently erected or constructed or otherwise howsoever situate without the consent of the Plaintiff on the land comprised in Memorandum of Lease Registered No. 2775159 being portion of the land comprised and described in Certificate of Title Register Book Volume 3337 Folio 148.

4. An injunction restraining the Defendant whether by itself its servants agents workmen or otherwise from using or suffering to be used without the consent of the Plaintiff any of the Plaintiff's underground tanks or the Plaintiff's air and water reel or other service station equipment whatsoever of the Plaintiff presently situate in or on the land comprised in Memorandum of Lease Registered No. 2775159 being portion of the land comprised and described in Certificate of Title Register Book Volume 3337 Folio 148.

5. An injunction restraining the Defendant whether by itself its servants agents workmen or otherwise from making any permanent alterations in the demised premises comprised in Memorandum of Underlease Registered No. 2775160 in breach of the Defendant's covenant contained in paragraph 3(d) of the said Memorandum of Underlease.

6. An injunction restraining the Defendant whether by itself its servants agents workmen or otherwise from assigning or sub-letting or licensing or parting with possession of the demised premises comprised in Memorandum of Underlease Registered No. 2775160 in breach of the Defendant's covenant contained in paragraph 3(e) of the said Memorandum of Underlease.

7. An injunction restraining the Defendant whether by itself its servants agents workmen or otherwise from directly or indirectly, buying, receiving, using, selling, storing or disposing of or permitting to be bought, received, used, sold, stored or disposed of at or upon the demised premises comprised in Memorandum of Underlease Registered No. 2775160 or any part thereof any petroleum products not actually purchased by the Defendant from the Plaintiff, in breach of the

In the Supreme Court of South Australia

No. 1

Writ of Summons 16th November 1971 (continued)

Defendant's covenant contained in paragraph 3(h) of the said Memorandum of Underlease.

8. An injunction restraining the Defendant whether by itself its servants agents workmen or otherwise from displaying in, on or outside the demised premises comprised in Memorandum of Underlease Registered No. 2775160 any advertisement or sign which shall be objected to by the Plaintiff, in breach of the Defendant's covenant contained in paragraph 3(l) of the said Memorandum of Underlease.

9. An injunction restraining the Defendant whether by itself its servants agents workmen or otherwise from doing or permitting any act or thing which may be or become a nuisance, damage or annoyance to the Plaintiff in breach of the Defendant's covenant contained in paragraph 3(m) of the said Memorandum of Underlease Registered No. 2775160.

10. Damages.

11. Costs.

12. Such further or other relief as to the Court seems just reasonable and necessary.

This writ was issued by PIPER, BAKEWELL & PIPER, of and whose address for service is 80 King William Street Adelaide in the State of South Australia.

Solicitors for the said plaintiff, whose principal place of business within the State of South Australia is situate at 38-40 Currie Street, Adelaide.

This Writ was served by me at on the defendant on day the day of 1971.

Indorsed the day of 1971.

(Signed)

(Address)

No. 2

Order dispensing with Pleadings

In the Supreme Court of South Australia

No. 2

Order dispensing with Pleadings 8th December 1971

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1526 of 1971

B E T W E E N :

AMOCO AUSTRALIA PTY. LIMITED Plaintiff

- and -

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. Defendant

BEFORE THE HONOURABLE MR. JUSTICE WELLS IN CHAMBERS WEDNESDAY THE 8TH DAY OF DECEMBER 1971

UPON THE APPLICATION of the abovenamed Plaintiff by summons dated the 16th day of November 1971 coming on for further consideration this day UPON HEARING Mr. Jacobs Q.C. and Mr. Angel of Counsel for the Plaintiff and Mr. Johnston Q.C. and Mr. D.H. Wilson of Counsel for the Defendant AND UPON the parties filing an Agreed Statement of Issues in terms of the draft amended and signed and dated this day by the Honourable Mr. Justice Wells with liberty to either party to amend or vary the said Statement of Agreed Issues during the trial of this action as they may be advised IT IS ORDERED AND DIRECTED:-

1. THAT all pleadings in this action be dispensed with.

2. THAT upon the filing of the said Agreed Statement of Issues the Plaintiff be at liberty to set this action down for trial during the week commencing the 13th day of December 1971.

3. THAT the costs of and incidental to the said application and this order be costs in the cause

In the Supreme Court of South Australia

No. 2

Order dispensing with Pleadings 8th December 1971 (continued)

AND the parties may be at liberty to tender a Statement of Agreed Facts subject to the right of either party to supplement that Statement with further evidence AND the parties by their Counsel undertake to make all practicable discovery of documents before the trial of this action.

FIT for Counsel.

(Sgd.) ?

MASTER

THIS ORDER was obtained by Piper, Bakewell & Piper of 80 King William Street, Adelaide. Solicitors for the Plaintiff.

No. 3

Statement of Issues 10th December 1971

No. 3

STATEMENT OF ISSUES

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1526 of 1971

BETWEEN:

AMOCO AUSTRALIA PTY. LIMITED Plaintiff

- and -

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. Defendant

1. Is the defendant entitled to assert that the covenants contained in Memorandum of Underlease No. 2775160 or any of them are in restraint of trade, and unenforceable?

2. Are the covenants contained in Memorandum of Underlease No. 2775160 or any of them an unreasonable restraint of trade and unenforceable?

3. If the covenants in Memorandum of Underlease

No. 2775160 or any of them are unenforceable is the whole of the said Memorandum of Underlease void?

4. If the said Memorandum of Underlease is void is Memorandum of Lease No. 2775159 also void?

5. All questions of consequential relief for either party arising from the resolution of the above issues shall be referred for later consideration.

In the Supreme Court of South Australia

No. 3

Statement of Issues 10th December 1971 (continued)

DATED this 10th day of December 1971.

PIPER, BAKEWELL & PIPER.

Per: ?

80 King William Street,
ADELAIDE. 5000.
Solicitors for the Plaintiff.

SCAMMELL, SKIPPER & HOLLIDGE.

Per: ?

39 John Street,
SALISBURY. 5108
Solicitors for the Defendant.

THIS Statement of Issues is filed by Piper, Bakewell & Piper of 80 King William Street, Adelaide. Solicitors for the Plaintiff.

No. 4

STATEMENT OF AGREED FACTS

No. 4

Statement of Agreed Facts 14th December 1971

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1526 of 1971

BETWEEN:

AMOCO AUSTRALIA PTY. LTD. Plaintiff

- and -

In the Supreme Court of South Australia

No. 4

Statement of Agreed Facts 14th December 1971 (continued)

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. Defendant

STATEMENT OF AGREED FACTS

1. The Plaintiff was incorporated in the Australian Capital Territory on the 9th day of January 1961.

2. The Plaintiff was registered in South Australia as a foreign company on the 4th day of December 1961.

3. Details of the Plaintiff company are annexed in the schedule hereto and marked "A". 10

4. The Defendant was incorporated in South Australia on the 10th day of February 1964.

5. Details of the Defendant are annexed hereto in the Schedule marked "B".

6. In about the month of February 1964 the Plaintiff and the Defendant entered into negotiations with each other in respect of the erection of a service station on land situated at 450 Bridge Road, Para Hills West. In the course of negotiations it was agreed between the Plaintiff company and the Defendant company as follows:- 20

(a) That the Defendant would erect or cause to be erected on the said land a service station.

(b) That the Plaintiff and the Defendant would enter into an agreement that the Defendant sell from the service station only the petroleum products of the Plaintiff.

(c) That the Plaintiff would lend to the Defendant company certain plant and equipment to store and vend its products and instal the same on the service station site. 30

(d) That the Plaintiff and the Defendant would both promote and advertise the said service station as a vendor of the Plaintiff's petroleum products.

7. That on the 19th day of June 1964 the Plaintiff and the Defendant executed an agreement in writing providing for the execution by the Defendant of a lease of the service station premises to the Plaintiff and an underlease of the service station premises by the Plaintiff to the Defendant, and an agreement for the lending of plant and equipment by the Plaintiff to the Defendant, copies of the same are annexed hereto and marked "C".

8. That between the months of June and December 1964 a service station was built on the said land.

9. That between the month of June 1964 and the month of December 1964 the Plaintiff lent to the Defendant and installed on the land certain plant and equipment to enable the Defendant to store and sell the Plaintiff's petroleum products.

10. On the 6th day of July 1965 Pasquale Antonio Rocca produced for registration at the Lands Titles Office a transfer to the Defendant of the land upon which the service station was erected for a consideration of £3,000 which said land is now comprised and described in Certificate of Title Register Book Volume 3337 Folio 148 a true copy of the said Certificate of Title is annexed hereto and marked "D".

11. The service station was opened for business on the 10th day of December 1964.

12. On the 19th day of May 1966 the Plaintiff and the Defendant executed documents in the form of a lease and underlease, copies of which are annexed hereto and marked respectively "E" and "F". The lease was for a term commencing on the 30th day of November 1964 and ending on the 30th November 1979 with a proviso inter alia for cancellation by the Plaintiff of the lease after the expiration of ten years. The underlease was for a term of 15 years less one day from the 30th day of November 1964.

13. In the month of June 1966 a further dual dispensing pump was installed on the service station site and an existing single dispensing pump was relocated. The cost of this was borne by the Plaintiff.

In the Supreme Court of South Australia

No. 4

Statement of Agreed Facts 14th December 1971 (continued)

14. That in the month of January 1967 the cross-over between the service station and the carriage-way of Bridge Road was sealed. The Defendant paid the cost thereof. Later the Plaintiff reimbursed the Defendant to the extent of $200.

15. By letter dated the 3rd October 1967 the Defendant requested the Plaitiff to repaint the front, sides and canopy columns of the said service station. On the 19th day of October 1967 the Plaintiff agreed for the said painting to be done and it was duly done at a cost to the Plaintiff of $356.

16. In the month of November 1968 as a result of negotiations between the Plaintiff and the Defendant there was installed on the service station site by the Plaintiff company an under-ground tank of capacity 5,500 gallons and two additional pumps and the Plaintiff extended the driveway canopy and performed certain concrete works. The Defendant by letter dated the 27th November 1968 agreed to the extension of "our agreement" for a further period of five years on the "understanding that the Plaintiff effect these alterations and that the rebate be increased to four cents per gallon for the extended period of five years." The letter is annexed and marked "G".

17. On the 15th day of September 1969 the Plaintiff and the Defendant executed what purported to be extension of the lease and underlease which are annexed and marked "H" and "J".

18. In October 1969 the Plaintiff at the Defendant's request moved tank vent pipes situated on the said land to enable the Defendant to build a tyre store.

19. During the year 1971 the Defendant approached the officers of the Plaintiff seeking a review of the terms of the agreement.

20. On Friday the 12th day of November the Defendant by letter of the same date handed to the Plaintiff at its office at about 4.00 p.m. required the Plaintiff inter alia to remove the pumps and an illuminated sign from the said service station by 11.00 a.m. on Monday the 15th day of November 1971 a copy of the said letter is annexed hereto

and marked "K". Shortly before noon on the 15th day of November 1971 the Defendant had removed the cover of one of the pumps installed on the said land by the Plaintiff.

In the Supreme Court of South Australia

No. 4

Statement of Agreed Facts 14th December 1971 (continued)

21. By 10.40 a.m. on the 16th day of November a team of painters had moved into the service station and had commenced painting the said service station. By 4.00 p.m. on the 16th day of November 1971 the Defendant had removed or caused to be removed all five petrol dispensing pumps installed thereon by the Plaintiff and had erected five petrol dispensing pumps with I.O.C. Australia Pty. Ltd. marking, four of which had been connected and one of which awaited connection.

DATED the 14th day of December 1971.

PIPER, BAKEWELL & PIPER.

Per: ?

Solicitors for the Plaintiff.

SCAMMELL, SKIPPER & HOLLIDGE.

Per: ?

Solicitors for the Defendant.

No. 5

No. 5

Annexure "A" to Statement of Agreed Facts - Details of the Plaintiff Company

ANNEXURE "A" TO STATEMENT OF AGREED FACTS
Details of the Plaintiff Company

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1526 of 1971

BETWEEN:

AMOCO AUSTRALIA PTY. LTD. Plaintiff

- and -

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. Defendant

In the Supreme Court of South Australia

No. 5

Annexure "A" to Statement of Agreed Facts - Details of the Plaintiff Company (continued)

Shareholders in the Plaintiff Company are:-

1. Amoco Holdings Pty. Ltd. 5,000,000 shares
2. Duane Frederick Dettloff of Bayview Heights, N.S.W. 1 share

Directors of the Plaintiff Company are:-

1. Duane Frederick Dettloff
2. Ralph Eugene Anderson of Double Bay, N.S.W.
3. Carl Mueller of Castle Cove, N.S.W.
4. Michael Ian Smith of Brisbane, Queensland.

No. 6

Annexure "B" to Statement of Agreed Facts - Details of the Defendant Company

No. 6

ANNEXURE "B" TO STATEMENT OF AGREED FACTS
Details of the Defendant Company

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1526 of 1971

BETWEEN:

AMOCO AUSTRALIA PTY. LTD. Plaintiff

- and -

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. Defendant

Shareholders in the Defendant Company are:-

1. Vincenzo Rocca 1 "A" Class
2. Pasquale Antonio Rocca 1 "A" Class
3. Maria Concetta Rocca 1 "A" Class
   100 "B" Class

4.	Gino Goerino Rocca	1 "A" Class
5.	Nazarena Rocca	100 "B" Class
6.	Giuseppa Rocca	100 "B" Class
7.	ocky Rocca	100 "B" Class

Directors of the Defendant Company are:-

1. Vincenzo Rocca
2. Pasquale Antonio Rocca
3. Maria Concetta Rocca
4. Gino Goerino Rocca

In the Supreme Court of South Australia

No. 6

Annexure "B" to Statement of Agreed Facts - Details of the Defendant Company (continued)

No. 7

Annexure "C" to Statement of Agreed Facts - Agreeement 19th June 1964

No. 7

ANNEXURE "C" TO STATEMENT OF AGREED FACTS
Agreement - 19th June 1964

THIS AGREEMENT made the 19th day of June 1964 BETWEEN ROCCA BROS. MOTOR ENGINEERING CO. PTY.LTD. of Bridge Road Para Hills in the State of South Australia (hereinafter called "the Lessor") of the one part and AMOCO AUSTRALIA PTY. LIMITED of 100 New South Head Road Edgecliff in the State of New South Wales (hereinafter called "the Lessee") of the other part WHEREAS the Lessor is the registered proprietor of that piece of land situated in the Hundred of Yatala County of Adelaide being portion of Allotment 2 of the sub-division of Portion of Sections 3005 and 3008 and being the whole of the land comprised in Certificate of Title Register Book Volume 2671 Folio 83 AND WHEREAS the Lessor desires to lease to the Lessee that portion of the said land outlined in red in the plan annexed hereto together with the improvements now and hereafter to be erected thereon (hereinafter called "the demised premises") and also to lease the demised premises from the Lessee by way of Under-Lease upon and subject to the terms and conditions hereinafter appearing NOW IT IS HEREBY AGREED AND DECLARED as follows:-

In the Supreme Court of South Australia

No. 7

Annexure "C" to Statement of Agreed Facts - Agreement 19th June 1964

1. The Lessor agrees that it will on or before the 31st day of March 1965 at its own cost and expense in all things except as hereinafter appears erect a service station and complete the same fit for immediate occupation in all respects in a good and substantial manner and in accordance with the plans and specifications to be supplied by and at the cost of the Lessee and in accordance with the plan attached hereto and marked "A" PROVIDED HOWEVER that the Lessee shall at its own cost and expense paint the canopy the sales lounge and the front of the service station with the final coat of paint in colours to be selected by the Lessee.

2. The Lessee its servants agents and architects at all reasonable times may enter upon the demised premises to view the state and progress of the erection of the service station and to inspect and test the results of workmanship and for any other reasonable purpose and for the purpose of installing the plant and equipment which the Lessee shall lend to the Lessor pursuant to the terms of a certain Equipment Loan Agreement to be executed by the parties hereto in the form annexed hereto and marked "B".

3. If the service station shall be completed by the Lessor on or before the 31st day of March 1965 in accordance with the stipulations and conditions hereinbefore contained:-

(a) The Lessor forthwith upon the completion thereof will grant and the Lessee will accept and execute a Memorandum of Lease of the demised premises for the term of fifteen years from the date of completion of the service station or the 31st day of March 1965 whichever shall be the earlier with a right of determining the lease at the expiration of the first ten years of the said lease by giving three calendar months' notice of its intention so to do at a yearly rental during the said term of ONE POUND (£1) plus a sum equal to 3d. per gallon of all petrol (not including napthas distillates kerosene and other like products not customarily used in motor vehicles) delivered by the Lessee to the demised premises for sale; and

(b) the Lessee will grant and the Lessor will accept and execute a Memorandum of Under-Lease of the demised premises for a term of fifteen years less one day but subject to the right of earlier determination by the Lessee as set out in sub-paragraph (a) of this Clause at the yearly rental during the said term of ONE POUND (£1).

The said Memorandum of Lease and Memorandum of Under-Lease shall be in the forms annexed hereto and marked "C" and "D" respectively with such modifications as the parties may agree upon or circumstances may render necessary.

4. The Lessee will pay the costs of and incidental to the preparation execution and stamping of this Agreement and the Memorandum of Lease and the Lessor will pay the costs of and incidental to the preparation execution and stamping of the said Memorandum of Under-Lease.

IN WITNESS whereof the parties hereto have executed these presents the day and year first before written.

THE COMMON SEAL of ROCCA BROS. MOTOR ENGINEERING CO.PTY.LTD. was hereunto affixed in the presence of:- S E A L

V. Rocca Director

G. G. Rocca Director

THE COMMON SEAL of AMOCO AUSTRALIA PTY. LIMITED was hereunto affixed by authority of the Board of Directors in the presence of :- S E A L

D.V.Dettloff Director

P. McGrath Secretary

In the Supreme Court of South Australia

No. 8

Annexure "C" to Statement of Agreed Facts - Memorandum of Lease 19th June 1964

No. 8

ANNEXURE "C" TO STATEMENT OF AGREED FACTS
Memorandum of Lease

I/We, of in the State of South Australia (hereinafter called "the Lessor") being registered as the proprietor of an estate in fee simple subject however to such encumbrances liens and interests as are notified by memorandum underwritten or endorsed herein in the whole of the land comprised and described in Certificate of Title Register Book Volume Folio DO HEREBY LEASE to AMOCO AUSTRALIA PTY. LIMITED a Company incorporated in the Australian Capital Territory and having its principal office in South Australia at (hereinafter called "the Lessee") the whole of the land comprised and described in the said Certificate of Title Register Book Volume Folio Together with all buildings, improvements equipment, fixtures and appliances owned or controlled by the Lessor and located thereon or on some part thereof or to be erected or installed by the Lessor thereon, all rights, alleys, rights of way, easements, appurtenances thereunto belonging or in anywise appertaining, and all rights of the Lessor in and to any public or private thoroughfares abutting the above described premises all being hereinafter referred to as the "demised premises" to be held by the Lessee for a term commencing on the day of 19 and ending on the day of 19 Subject to the following powers provisos conditions covenants agreements and restrictions in addition to and without prejudice to those contained in or implied by The Real Property Act 1886-1963 except in so far as the same are expressly or by necessary implication negatived altered varied or modified by these presents that is to say:-

1. The Lessee agrees subject to the provisions of Clause 3 hereof to pay to the Lessor as rental for the demised premises, the joint amounts shown in Clauses "A" and "B" as follows:-

"A" For each year during the term of this lease

or any extension or renewal thereof a rent of (£) per year

For each month during the term of this lease or any extension or renewal thereof a cash rental as follows:-

Each January	£	Each July	£
Each February	£	Each August	£
Each March	£	Each September	£
Each April	£	Each October	£
Each May	£	Each November	£
Each June	£	Each December	£

"B" A sum equal to pence (d.) per gallon on all petrol not including napthas, distillates, kerosene and other like products not customarily used in motor vehicles, delivered by the Lessee to the demised premises for sale.

All rentals herein provided for in Clause "A" shall be payable yearly/monthly in advance on the first day of that year/month and rental payable under Clause "B" shall be due and payable on or before the fifteenth (15th) day of the succeeding calendar quarter during which petrol is delivered as aforesaid. All rental payments may be made by cheque payable and delivered to personally, or by mail, at

Unless otherwise designated herein, all rental payments may be made by cheque delivered to the Lessor or mailed to the Lessor at his address herein shown.

2. To the following covenants the Lessee covenants with the Lessor:

(a) To pay the rent hereby reserved in the manner hereinbefore mentioned except as hereinafter provided.

(b) To yield up the premises at the determination of this lease or any extension or renewal thereof.

3. To the following covenants the Lessor covenants with the Lessee:

In the Supreme Court of South Australia

No. 8

Annexure "C" to Statement of Agreed Facts - Memorandum of Lease 19th June 1964 (continued)

(a) That the Lessee paying the rent hereby reserved and performing the covenants on its part herein contained shall and may peaceably possess and enjoy the demised premises for the term hereby granted and any extension or renewal thereof without any interruption or disturbance from the Lessor or any other person or persons lawfully claiming by through under or in trust for him

(b) That the Lessor will at his own cost and expense erect upon the demised premises for the use of the Lessee, a petrol service station, said improvements to be completed in accordance with plot plan building plans and equipment shown thereon, and specification all being numbered and approved by the Lessee as evidenced by the signatures of the parties hereto thereon. All licences and permits which may be required for the purpose of erecting and maintaining the said petrol service station improvements shall be secured from the proper authorities by the Lessor, and the Lessor shall upon the signing hereof, promptly make application for and diligently proceed with such action as may be required to secure such licences and permits. Upon securing said licences and permits, the Lessor shall promptly begin the construction of the said service station improvements and shall complete the same and deliver possession thereof to the Lessee ready for operation within six months from the date of this Lease. The Lessor covenants, in connection with the erection or said improvements, to save the Lessee harmless from all claims, judgments and liens resulting therefrom. It is further agreed that in the event said service station improvements shall not be completed by the Lessor and possession thereof delivered to the Lessee within six months from the date of this lease, then the Lessee shall have the right, at its option, to terminate this lease forthwith by notice in writing to that effect.

It is further agreed that the obligations of the Lessee to pay the cash rent reserved to the Lessor in accordance with the provisions of Clause 1"A" of this lease shall not arise

until said service station improvements are completed as aforesaid and the Lessee shall have accepted actual possession thereof by written notice to the Lessor

(c) That the Lessor will at all times insure and keep insured all buildings and other improvements which during the term hereby granted or any extension or renewal thereof may be upon the demised premises from loss or damage by fire storm tempest or any other cause whatsoever in the full replacement value thereof in an insurance company of good repute and will promptly pay all premiums and sums of money necessary to keep on foot the said insurance and further will on demand produce to the Lessee the policy or policies of such insurance and the receipt for every such payment

(d) That the Lessor will upon receipt of the moneys payable and/or recoverable under and by virtue of the insurance referred to in the preceding covenant 3(c) hereof forthwith lay out and expend the same in carrying out and completing the work of rebuilding reinstating and replacing any destroyed or damaged building or buildings or other improvements in at least as good a condition as they were in before the happening of such loss or damage

(e) That in the event of such moneys as are mentioned in the last preceding covenant being insufficient to pay the cost of rebuilding reinstating or replacing any destroyed or damaged building or buildings or other improvement in order to put the same in at least as good a condition as they were in before the happening of such loss or damage as provided in and by such covenant then the Lessor shall and will make good the deficiency between the amount received under and by virtue of such insurance and the actual cost of rebuilding reinstating or replacing any building or buildings or other improvement as aforesaid

(f) That in the event of such loss or damage rendering the demised premises in the opinion

In the Supreme Court of South Australia

No. 8

Annexure "C" to Statement of Agreed Facts - Memorandum of Lease 19th June 1964 (continued)

of the Lessee inoperable as a petrol service station, the obligation of the Lessee to pay rent hereunder shall cease until the destroyed or damaged building or buildings or other improvement shall have been rebuilt reinstated or replaced to at least as good a condition as they were in before the happening of such loss or damage

(g) That in the event of any destroyed or damaged building or buildings or other improvement not being rebuilt reinstated or replaced in at least as good a condition as they were in before the happening of such loss or damage within ~~three~~ six months of the date of such loss or damage the Lessee shall have the right at its option either to terminate this lease or to carry out such rebuilding reinstating or replacing as aforesaid and to apply accruing rentals in reimbursing itself for the cost of carrying out such rebuilding reinstating or replacing until it has been fully reimbursed Provided that if this lease shall be terminated for any reason whatsoever before the Lessee has been fully reimbursed the balance of such cost shall be a debt due by the Lessor to the Lessee and be payable forthwith on demand

(h) That the Lessee may at any time during the term hereby granted or any extension or renewal thereof assign this lease or sublet or license the demised premises or any part thereof without the consent of the Lessor, provided the Lessee shall remain fully responsible for the payment of rent hereunder and for the performance of all of the other terms of this lease

(i) That the Lessor shall pay all rates taxes and assessmen ts imposed or charged upon or in respect of the demised premises

4. The Lessor hereby sets over and assigns unto the Lessee, with right of the Lessee to reassign to others all of the Lessor's licences, consents and permits to maintain and operate a petrol service station on the demised premises, such assignment to be effective only during the term of this lease, and all renewals and extensions thereof

5. The Lessee and any assignee or sublessee is

expressly given the right at any time during the term of this lease or any extension or renewal thereof, and for a period of thirty (30) days after the termination of this lease, or any extension or renewal thereof, by lapse of time or otherwise to enter upon and remove from the demised premises any equipment heretofore or hereafter purchased or placed by it or any of them upon the demised premises, but shall not be obliged to do so.

6. The Lessee shall have the right at its own cost to rearrange or remodel or construct such buildings, driveways and improvements and install such equipment fixtures or fittings on the demised premises or any part thereof as it may deem desirable or necessary, for the use of the demised premises herein authorised. All such buildings, driveways improvements fixtures or fittings upon the expiration of this lease or upon sooner cancellation or termination thereof shall not be removed by the Lessee but shall be yielded up to the Lessor upon such expiration cancellation or termination.

7. The Lessor will keep the demised premises in good and sufficient condition and repair during the whole of the term hereof and any renewals or extensions thereof, and shall make any and all repairs, alterations or improvements thereto which may be required by any Government (whether Federal or State) Municipal, Health or other public or statutory authority or body. Should the Lessor fail or refuse to make immediately any such repairs, alterations or improvements the Lessee shall have the right, at its option to make such repairs, alterations or improvements at the expense of the Lessor, whereupon the Lessee is hereby authorised to deduct same from any rents or other amounts payable to the Lessor, or may require the Lessor on demand to reimburse the Lessee therefor in whole or in part; or the Lessee may, at its option, terminate this lease forthwith. The Lessee shall have the right to paint the entire building but shall not be obliged to do so.

8. In case the Lessee shall desire to determine the term hereby granted at the end of the first
or
years thereof and shall give to the Lessor not less

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No. 8

Annexure "C" to Statement of Agreed Facts - Memorandum of Lease 19th June 1964 (continued)

than three months' notice in writing of such its desire then immediately on the expiration of such of years as the case may be the present demise shall cease and determine but without prejudice to the rights and remedies of either party against the other in respect of any antecedent claim or breach of covenant

9. (a) It is agreed that should the Lessor or its successors or assigns, at any time during the term of this lease or any extension or renewal thereof, receive an offer to purchase the demised premises, or any part thereof, or any premises which includes the demised premises, and desires to accept such offer, or should the Lessor during any such time make an offer to sell the demised premises, or any part thereof, or any premises which includes the demised premises, the Lessor shall give the Lessee ninety (90) days' notice in writing of such offer, setting forth the name and address of the proposed purchaser, the amount of the proposed purchase price, and all other terms and conditions of such offer, and the Lessee shall have the first option to purchase the premises which are the subject of the offer by giving written notice to the Lessor of its intention to purchase within the said ninety (90) day period at the same price and on the same terms of any such offer, it being understood that in the event of the Lessee not giving notice of its intention to exercise such option to purchase within the said period, this Lease and all of its terms and conditions shall nevertheless remain in full force and effect and the Lessor and any purchaser or purchasers of the demised premises or any part thereof, or any premises which includes the demised premises, shall be bound thereby, and in the event that the premises set forth in the offer are not sold for any reason, the Lessee shall have, upon the same conditions and notice, the continuing first option to purchase the demised premises, or any part thereof, or any premises which includes the demised premises, upon the terms of any subsequent offer or offers to purchase or sell

(b) In the event of the said option being exercised the Lessor will simultaneously with the payment of all purchase moneys payable in respect thereof sign and deliver to the Lessee a duly executed registrable Conveyance or Transfer as the case may be of the demised premises "being sold" together with all documents or Certificate or Certificates of Title thereto free from all encumbrances and tenancies whatsoever except this Lease. Settlement of the purchase money and transfer to the Lessee shall be made within a reasonable time from the said date of exercise and neither party shall be in default until after written demand for performance shall have been made by the other party. This Lease shall be cancelled as of the date of settlement and taxes, rates and other current expenses and rent hereunder shall be adjusted as of the date of settlement.

10. The Lessor covenants that the Lessee shall have the right at any time to redeem for the Lessor any mortgage, taxes, rates or other liens upon the demised premises in the event of default of payment by the Lessor and to apply accruing rentals in reimbursing itself for the cost of such redemption as aforesaid or may require the Lessor on demand to reimnurse the Lessee Provided that if this Lease shall be terminated for any reason whatsoever before the Lessee has been fully reimbursed the balance of such cost shall be a debt due by the Lessor to the Lessee and be payable forthwith on demand

11. In the event of the Lessee, its assignee, sublessee or licensee, being unable to obtain from any municipal or other public or statutory authorities, any permit, licence or consent necessary in the sole opinion of the Lessee for the operation of a petrol service station upon the demised premises, or in case any such permit, consent or licence, if obtained, be afterwards revoked not through the fault of Lessee, its assignee, sublessee or licensee, or if the use of the demised premises be restrained or enjoined by judicial process, then in such event or any of them the Lessee shall have the right to cancel this lease by giving the Lessor at least ten (10) days notice in writing of its intention so to do.

In the Supreme Court of South Australia

No. 8

Annexure "C" to Statement of Agreed Facts - Memorandum of Lease 19th June 1964 (continued)

12. The Lessor agrees that the Lessee shall have the right to use the demised premises, among other things, for the purpose of operating therein a petrol service station, and for the sale of tyres, tubes, batteries and automobile accessories or any other lawful purpose, and if any such use shall be forbidden, interfered with, limited, or prevented by any Act of Parliament (whether Federal or State) or any regulation thereunder or by any Municipal Health or other public or statutory authority or body, or by requests of any governmental authority, by war conditions, or by any contingency beyond the control of the Lessee, its assignee, sublessee or licensee or if by reason of any similar restriction, limitation, interference or prohibition, the Lessee, or its assignee, shall be unable to obtain adequate supplies of petroleum products essential to the profitable use of the demised premises for any of the purposes stated, or, if because of any request or order of any municipal, local or governmental authority whether State or Federal, the sale of petrol from the demised premises is substantially curtailed in the opinion of the Lessee, then and in such event or any thereof the Lessee shall have the right to cancel this Lease by giving the Lessor at least ten (10) days notice of its intention so to do

13. In the event of the Lessee holding over beyond the expiration of the term herein provided or any renewal or extension thereof, it is expressly understood and agreed that it shall hold over on a month to month tenancy only, and either the Lessor or the Lessee may terminate such tenancy at any time by giving the other party thirty (30) days written notice of its intention so to do

14. In the event of any change in grade of any adjoining streets, alleys, or highways; or in the event of the demised premises being taken by or pursuant to any governmental or local authority or body or through the exercise of the right of eminent domain; or in the event of any part of the demised premises, or any interest therein, including, but not limited to the right of free access to the demised premises, being so taken or substantially interfered with and the demised premises after said taking or interference ~~in the opinion of the Lessee~~ not being suitable

for the operation of a petrol service station or any other business carried on on the demised premises the Lessee shall be at liberty to terminate this lease by giving thirty (30) days notice in writing of its intention so to do and shall thereby be relieved from further liability hereunder or the Lessee may continue in possession of the remaining portion of the demised premises in which event the cash rent herein shall be reduced in proportion to the reduction in the utilizable area of the premises but nothing herein shall be deemed a waiver of the sole right of the Lessee to any award for damages to it or to its leasehold interest caused by such taking, whether made separately or as a part of a general award. The Lessor shall on the written request of the Lessee forthwith carry out at the expense of the Lessor any regrading of the demised premises and approaches thereto necessary to make the demised premises conform to any change in grade of any adjoining streets, alleys or highways.

15. That in case the rent hereby reserved or any part thereof shall be in arrear and unpaid for the space of one month next after any of the days appointed for payment thereof or if the Lessee shall neglect or fail to perform and observe any of the covenants conditions or agreements contained or implied in this Instrument which on the part of the Lessee are to be performed and observed and such neglect or failure shall continue for the space of fourteen (14) days next after the receipt of written notice from the Lessor of such neglect or failure or if the Lessee goes into voluntary liquidation (except for the purpose of reconstruction) or compulsory liquidation the Lessor may re-enter upon the demised premises and re-possess the same as of its former estate and expel the Lessee and those claiming through under or in trust for the Lessee and remove the effects of the Lessee without being taken or deemed guilty of any manner of trespass and thereupon the term hereby granted shall if the Lessor so elects absolutely determine but without prejudice to any claim which the Lessor may have against the Lessee in respect of any breach of the covenants and agreements on the part of the Lessee to be observed and performed

16. It is further understood and agreed that all

In the Supreme Court of South Australia

No. 8

Annexure "C" to Statement of Agreed Facts - Memorandum of Lease 19th June 1964 (continued)

notices given under this Lease shall be deemed to be properly served if delivered in writing personally, or sent by registered mail to the Lessor at the address shown in the first nnumbered paragraph of this Lease, or where rent hereunder was last paid, or to the Lessee at its office at

Date of service of a notice served by mail shall be the date on which such notice is deposited in a post office.

17. The Lessor and the Lessee agree that this Lease is not in consideration for or dependent or contingent in any matter upon any other contract, lease or agreement between them, and that the term, rental or other provisions of said Lease are not intended by said parties to be tied in with any such other contract, lease or agreement; but, on the contrary, this Lease and all of its provisions are entirely and completely independent of any other transaction or relationship between the parties.

19. Yhis Lease embodies the entire agreement between the parties hereto relative to the subject matter hereof and shall not be modified, changed or altered in any respect except in writing; and in the event of any termination of this lease pursuant to any right reserved by Lessee herein, all liability on the part of Lessee for payment of rent shall cease and determine upon payment of rent proportionately to the date of such termination of this Lease.

20. That except to the extent to which such interpretation shall be excluded by or be repugnant to the context the expression "the Lessor" as herein used shall when there is only one Lessor mean and include the Lessor his heirs executors administrators and assigns and shall where there are two or more Lessors mean and include the Lessors and each and every or any of them and the heirs executors administrators and assigns of them and each and every or any of them and shall where the Lessor is a Company or Corporation mean and include the Lessor its successors and assigns. The expression "the Lessee" shall mean and include the Lessee and its successors and assigns. Words importing persons shall extend to and include Corporations and words importing the masculine

gender shall extend to and include the feminine or neuter gender respectively as the case may require and words importing the singular or plural number shall extend to and include the plural and singular number respectively and references to Statutes and Regulations shall include any Statutes or Regulations amending consolidating or replacing the same

And the abovenamed AMOCO AUSTRALIA PTY. LIMITED HEREBY ACCEPTS this Lease of the above described land to be held by it as Lessee subject to the conditions restrictions and covenants above set forth and implied as aforesaid

DATED the day of 19

SIGNED by the said)
in the presence of)

THE COMMON SEAL of Rocca Bros. Motor Engineering Co. Pty. Ltd. was hereunto affixed in the presence of

Director

Director

THE COMMON SEAL of AMOCO AUSTRALIA PTY. LIMITED was hereunto affixed by authority of the Board of Directors in the presence of:

Director

(Sgd.) P. McGrath

Secretary

Secretary

In the Supreme Court of South Australia

No. 9

Annexure "D" to Statement of Agreed Facts - Certificate of Title 27th July 1965

No. 9

ANNEXURE "D" TO STATEMENT OF AGREED FACTS
Certificate of Title

SOUTH AUSTRALIA
(Certificate of Title)

Register Book,
Vol. 3337 Folio 148

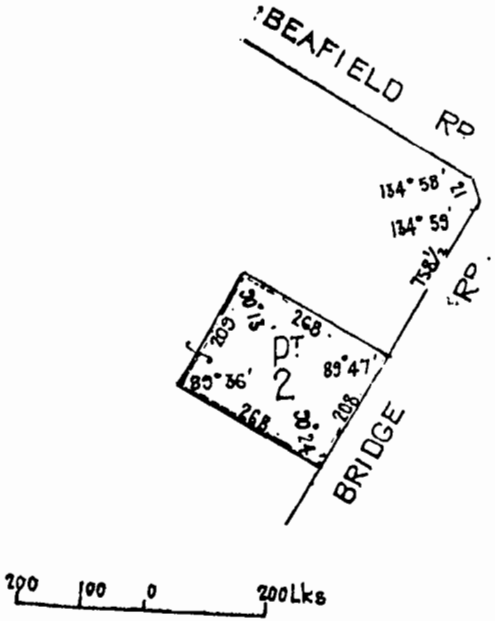
Pursuant to Memorandum of Transfer
No. 2642283 Registered on Vol.2671 Folio 83

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LIMITED of Bridge Road Para Hills is the proprietor of an estate in fee simple subject nevertheless to such encumbrances liens and interests as are notified by memorial underwritten or endorsed hereon in THAT piece of land situate in the HUNDRED of YATALA COUNTY OF ADELAIDE being PORTION OF ALLOTMENT 2 of the subdivision of portion of Section 3005 and other land and more particularly delineated and bounded as appears in the plan in the margin hereof and therein coloured green WHICH said Allotment is bounded as appears in the plan deposited in the Lands Titles Registration Office No.5641 Which said Section is delineated in the public map of the said Hundred deposited in the Land Office at Adelaide

In witness whereof I have hereunto signed my name and affixed my seal this 27th day of July 1965.

Signed the 27th day of July 1965, in the presence of M. G. Bower

D. F. COLLINS



MORTGAGE No. 2642284

TO COMMONWEALTH TRADING BANK OF AUSTRALIA
PRODUCED 6.7.1965 at 11 a.m.

DEP.REG.GEN.

LEASE No. 2775159 To Amoco Australia Pty. Limited of portion of the within land. Term commencing on 30.11.1964 and ending on 30.11.1979.

PRODUCED 15.11.1966 at 11.45 a.m.

J.W. HUGHES DEP.REG.GEN.

UNDER-LEASE No. 2775160 To Rocca Bros. Motor Engineering Co. Pty. Ltd. of the land in the within Lease No. 2775159 term 15 years (less one day) from 30.11.1964.

PRODUCED 15.11.1966 at 11.45 a.m.

J.W. HUGHES DEP.REG.GEN.

MORTGAGE No.2775161

TO COMMONWEALTH TRADING BANK OF AUSTRALIA of the within underlease No.2775160

PRODUCED 15.11.1966 at 11.45 a.m.

J.W. HUGHES DEP.REG.GEN.

In the Supreme Court of South Australia

No. 9

Annexure "D" to Statement of Agreed Facts - Certificate of Title 27th July 1965 (continued)

In the Supreme Court of South Australia

No. 9

Annexure "D" to Statement of Agreed Facts - Certificate of Title 27th July 1965 (continued)

EXTENSION No.3045818 OF LEASE No.2775159 FOR 5 YEARS FROM 30.11.1979 WITH VARIED COVENANTS

PRODUCED 20.10.1969 at 11.25 a.m.

K. CONDON DEP.REG.GEN.

EXTENSION No.3045819 OF UNDERLEASE No.2775160 FOR 5 YEARS (less one day) FROM 29.11.1979

PRODUCED 20.10.1969 at 11.25 a.m.

K. CONDON DEP.REG.GEN.

MORTGAGE No.3140107

TO COMMONWEALTH TRADING BANK OF AUSTRALIA

PRODUCED 29.9.1970 at 11.15 a.m.

J.W. HUGHES DEP.REG.GEN.

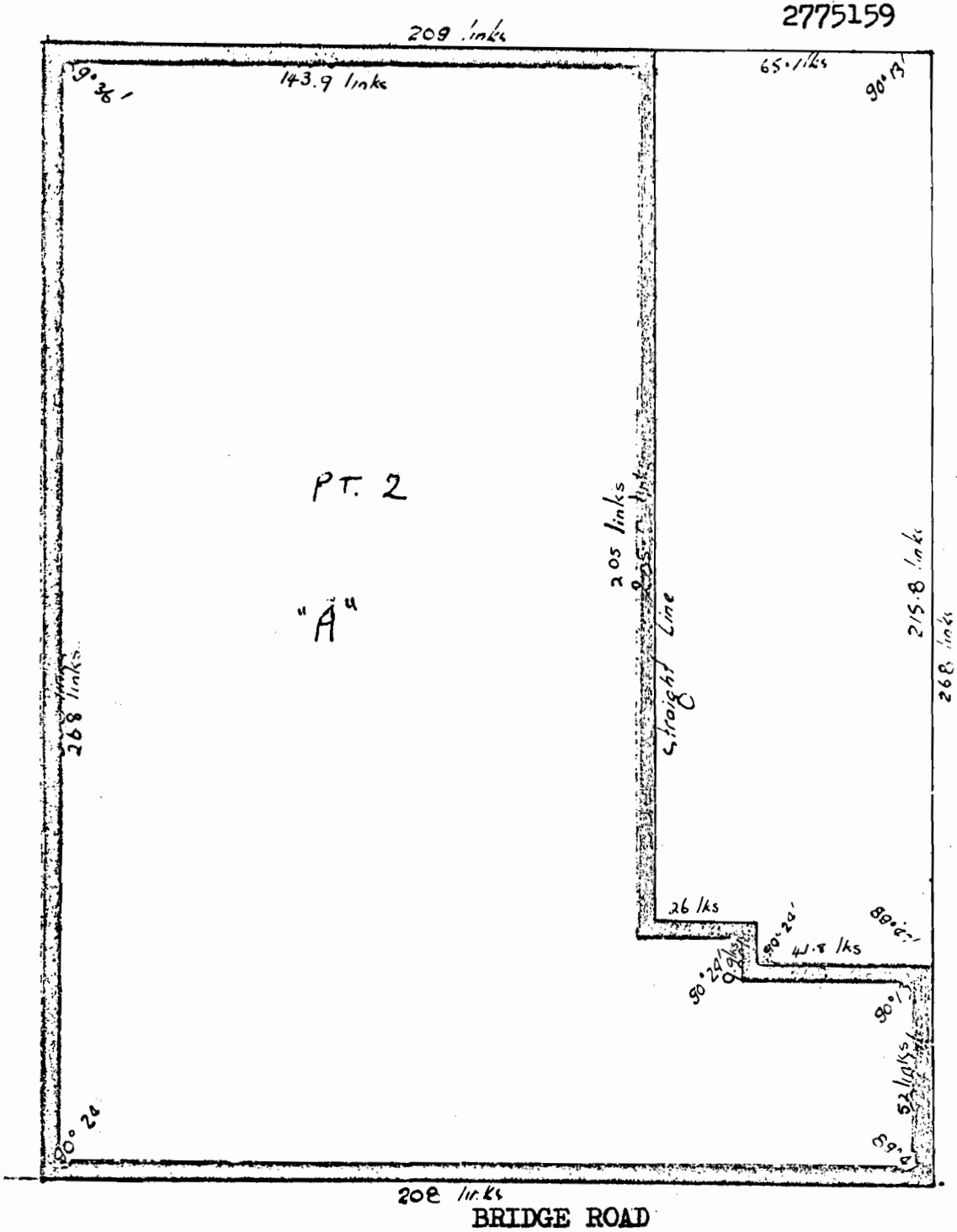
10

2775159

In the Supreme Court of South Australia

No. 9

Annexure "D" to Statement of Agreed Facts - Certificate of Title



PT LOT 2 OF SUBDVN OF PORTION OF SECTION 3005 C.T. VOL.3337 FOLIO 148 HUNDRED OF YATALA
Scale 1" - 20'0"

NOTE AREA BOUNDED IN RED DENOTES LEASED PROPERTY

In the Supreme Court of South Australia

No.10

Annexure "E" to Statement of Agreed Facts - Memorandum of Lease 19th May 1966

No. 10

ANNEXURE "E" TO STATEMENT OF AGREED FACTS
Memorandum of Lease

South Australia

I/We, ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. of Bridge Road, Para Hills in the State of South Australia (hereinafter called "the Lessor") being registered as the proprietor of an Estate in fee simple subject however to such encumbrances, liens and interests as are notified by memorandum underwritten or endorsed hereon in the whole of the land comprised and described in Certificate of Title Register Book Volume 3337 Folio 148/subject to Mortgage No.2642284 DO HEREBY LEASE to AMOCO AUSTRALIA PTY. LIMITED, a Company incorporated in the Australian Capital Territory and having its Principal Office in South Australia at 38-40 Currie Street Adelaide (hereinafter called "the Lessee") of that piece of land marked "A" in the plan attached hereto and being portion of the land comprised and described in the said Certificate of Title Register Book Volume 3337 Folio 148/subject to Mortgage No.2642284 Together with all buildings, improvements, equipment, fixtures and appliances owned or controlled by the Lessor and located thereon or on some part thereof or to be erected or installed by the Lessor thereon, all rights, alleys, rights of way, easements, appurtenances thereunto belonging or in anywise appertaining, and all rights of the Lessor in and to any public or private thoroughfares abutting the above described premises (all being hereinafter referred to as the "demised premises") TO BE HELD by the Lessee for a term commencing on the 30th day of November 1964 and ending on the 30th day of November 1979

Subject to the following powers, provisos, conditions, covenants, agreements and restrictions that is to say:-

1. The Lessee shall, subject to the provisions of Clause 4 hereof, pay to the Lessor as rental for the demised premises the joint amounts shown in Clauses "A" and "B" as follows:-

"A" For each year during the term of this lease or any extension or renewal thereof a cash rent of One pound (£1.0.0.) per year.

"B" A sum equal to three pence (3d.) per gallon on all petrol (not including naphthas, distillates, kerosene and other like products not customarily used in motor vehicles) delivered by the Lessee to the demised premises for sale

All rental herein provided for in Clause "A" shall be payable yearly in advance on the first day of that year/month and rental payable under Clause "B" shall be due and payable on or before the Fifteenth (15th) day of the succeeding calendar quarter during which petrol is delivered as aforesaid. All rental payments may be made by cheque payable and delivered to the Lessor at Bridge Road Para Hills, or by mail, at Bridge Road, Para Hills South Australia.

Unless otherwise designated herein, all rental payments may be made by cheque delivered to the Lessor or mailed to the Lessor at his address herein shown.

2. The following powers, provisos, conditions, covenants, agreements and restrictions shall be and in addition to and without prejudice to those contained in or implied by the Real Property Act 1886-1963 except in so far as the same are expressly or by necessary implication, negatived, altered, varied or modified by these presents.

3. The Lessee covenants with the Lessors:

(a) To pay the rent hereby reserved in the manner hereinbefore mentioned except as hereinafter provided.

(b) To yield up the premises at the determination of this lease or any extension or renewal thereof.

4. The Lessor covenants with the Lessee:

(a) That the Lessee paying the rent hereby reserved and performing the covenants on its part herein contained shall and may peaceably possess and enjoy the demised premises for the term hereby granted and any extension or renewal thereof without any interruption or disturbance from the Lessor or any other

In the Supreme Court of South Australia

No.10

Annexure "E" to Statement of Agreed Facts - Memorandum of Lease 19th May 1966 (continued)

person or persons lawfully claiming by, through, under or in trust for him.

(b) Deleted.

(c) That the Lessor will at all times insure and keep insured all buildings and other improvements which during the term hereby granted or any extension or renewal thereof may be upon the demised premises from loss or damage by fire, storm, tempest or any other cause whatever in the full replacement value thereof in an insurance company of good repute and will promptly pay all premiums and sums of money necessary to keep on foot the said insurance and further will on demand produce to the Lessee the policy or policies of such insurance and the receipt for every such payment.

(d) That the Lessor will, upon receipt of the moneys payable and/or recoverable under and by virtue of the insurance referred to in the preceding covenant 4(c) hereof, forthwith lay out and expend the same in carrying out and completing the work of rebuilding, reinstating, and replacing any destroyed or damaged building or buildings or other improvements in at least as good a condition as they were in before the happening of such loss or damage.

(e) That in the event of such moneys as are mentioned in the last preceding covenant being insufficient to pay the cost of rebuilding, reinstating, or replacing any destroyed or damaged building or buildings or other improvement in order to put the same in at least as good a condition as they were in before the happening of such loss or damage, as provided in and by such covenant, then the Lessor shall and will make good the deficiency between the amount received under and by virtue of such insurance and the actual cost of rebuilding, reinstating, or replacing any building or buildings or other improvements as aforesaid.

(f) That in the event of such loss or damage rendering the demised premises in the opinion of the Lessee inoperable as a petrol service

station, the obligation of the Lessee to pay rent hereunder shall cease until the destroyed or damaged building or buildings or other improvement shall have been rebuilt, reinstated, or replaced to at least as good a condition as they were in before the happening of such loss or damage.

(g) That in the event of any destroyed or damaged building or buildings or other improvement not being rebuilt, reinstated, or replaced in at least as good a condition as they were in before the happening of such loss or damage within three months of the date of such loss or damage, the Lessee shall have the right at its option either to terminate this lease or to carry out such rebuilding, reinstating, or replacing as aforesaid and to apply accruing rentals in reimbursing itself for the cost of carrying out such rebuilding, reinstating, or replacing until it has been fully reimbursed. Provided that if this lease shall be terminated for any reason whatsoever before the Lessee has been fully reimbursed the balance of such cost shall be a debt due by the Lessor to the Lessee and be payable forthwith on demand.

(h) That the Lessee may at any time during the term hereby granted or any extension or renewal thereof, assign this lease or sublet or licence the demised premises or any part thereof without the consent of the Lessor provided the Lessee shall remain fully responsible for the payment of rent hereunder and for the performance of all of the other terms of this lease.

(i) That the Lessor shall pay all rates, taxes, and assessments imposed or charged upon or in respect of the demised premises.

5. The Lessor hereby sets over and assigns unto the Lessee, with right of the Lessee to reassign to others, all of the Lessor's licences, consents, and permits to maintain and operate a petrol service station on the demised premises, such assignment to be effective only during the term of this lease and all renewals and extensions thereof.

In the Supreme Court of South Australia

No.10

Annexure "E" to Statement of Agreed Facts - Memorandum of Lease 19th May 1966 (continued)

6. The Lessee, and any assignee or sub-lessee or licensee, is expressly given the right at any time during the term of this lease, or any extension or renewal thereof, and for a period of thirty (30) days after the termination of this lease or any extension or renewaal thereof, any lapse of time or otherwise to enter upon and remove from the demised premises any equipment heretofore or hereafter purchased or placed by it or any of them upon the demised premises, but shall not be obliged to do so.

7. The Lessee shall have the right at its own cost to rearrange or remodel or construct such buildings, driveways, and improvements and install such equipment, fixtures, fittings and to erect, fix, suspend or paint such advertising signs or exhibits or materials and to repaint, alter or remove any of the same on the demised premises or any part thereof as it may deem desirable or necessary for the use of the demised premises herein authorised. All such buildings, driveways, improvements, fixtures, or fittings upon the expiration of this lease or upon sooner cancellation or termination thereof shall not be removed by the Lessee but shall be yielded up to the Lessor upon such expiration, cancellation or termination.

8. The Lessor will keep the demised premises in good and sufficient condition and repair during the whole of the term hereof and any renewals or extensions thereof and shall make any and all repairs, alterations or improvements thereto which may be required by any Government (whether Federal or State), Municipal, Health or other public or statutory authority or body. Should the Lessor fail or refuse to make immediately any such repairs, alterations or improvements, the Lessee shall have the right at its option to make such repairs, alterations or improvements at the expense of the Lessor whereupon the Lessee is hereby authorised to deduct same from any rents or other amounts payable to the Lessor or may require the Lessor on demand to reimburse the Lessee therefor in whole or in part; or the Lessee may at its option terminate this lease forthwith. The Lessee shall have the right to paint the entire building but shall not be obliged to do so.

9. In case the Lessee shall desire to determine

the term hereby granted at the end of the first ten years thereof, and shall give to the Lessor not less than three months' notice in writing of such its desire, then immediately on the expiration of such ten years the present demise shall cease and determine but without prejudice to the rights and remedies of either party against the other in respect of any antecedent claim or breach of covenant.

10. (a) It is agreed that should the Lessor at any time during the term of this lease, or any extension or renewal thereof, receive an offer to purchase the demised premises or any part thereof, or any premises which includes the demised premises and desires to accept such offer, or should the Lessor during any such time make an offer to sell the demised premises, or any part thereof, or any premises which includes the demised premises, the Lessor shall give the Lessee ninety (90) days' notice in writing of such offer setting forth the name and address of the proposed purchaser, the amount of the proposed purchase price, and all other terms and conditions of such offer and the Lessee shall have the first option to purchase the premises, which are the subject of the offer, by giving written notice to the Lessor of its intention to purchase within the said ninety (90) day period, at the same price, and on the same terms of any such offer, it being understood that in the event of the Lessee not giving notice of its intention to exercise such option to purchase within the said period this Lease and all of its terms and conditions shall nevertheless remain in full force and effect and the Lessor and any purchaser or purchasers of the demised premises, or any part thereof, or any premises which includes the demised premises, shall be bound thereby and in the event that the premises set forth in the offer are not sold for any reason, the Lessee shall have upon the same conditions and notice the continuing first option to purchase the demised premises, or any part thereof, or any premises which include the demised premises upon the terms of any subsequent offer or offers to purchase or sell.

In the Supreme Court of South Australia

No.10

Annexure "E" to Statement of Agreed Facts - Memorandum of Lease 19th May 1966 (continued)

(b) In the event of the said option being exercised the Lessor will simultaneously with the payment of all purchase moneys payable in respect thereof, sign and deliver to the Lessee a duly executed registrable Conveyance or Transfer as the case may be of the demised premises being sold, together with all documents or Certificate or Certificates of Title thereto, free from all encumbrances and tenancies whatsoever except this Lease. Settlement of the purchase money and Conveyance or transfer to the Lessee shall be made within a reasonable time from the said date of exercise and neither party shall be in default until after written demand for performance shall have been made by the other party. This Lease shall be cancelled as of the date of settlement and taxes, rates and other current expenses and rent hereunder shall be adjusted as of the date of settlement.

11. The Lessor covenants that the Lessee shall have the right at any time to redeem for the Lessor any mortgage, taxes, rates, or other liens upon the demised premises in the event of default of payment by the Lessor and to apply accruing rentals in reimbursing itself for the cost of such redemption as aforesaid, or may require the Lessor on demand to reimburse the Lessee. Provided that if this Lease shall be terminated for any reason whatsoever before the Lessee has been fully reimbursed, the balance of such cost shall be a debt due by the Lessor to the Lessee and be payable forthwith on demand.

12. In the event of the Lessee, its assignee, sub-lessee or licensee being unable to obtain from any municipal or other public or statutory authorities any permit, licence, or consent necessary in the sole opinion of the Lessee for the operation of a petrol service station upon the demised premises or in case any such permit, consent or licence if obtained be afterwards revoked not through the fault of the Lessee, its assignee, sub-lessee or licensee or if the use of the demised premises be restrained or enjoined by judicial process then in such event, or any of them, the Lessee shall have the right to cancel this Lease by giving the Lessor at least ten (10) days' notice in writing of its intention so to do.

13. The Lessor agrees that the Lessee shall have the right to use the demised premises, among other things, for the purpose of operating thereon a petrol service station and for the sale of tyres, tubes, batteries and automobile accessories or any other lawful purpose, and if any such use shall be forbidden, interfered with, limited, or prevented by any Act of Parliament (whether Federal or State) or any regulation thereunder or by any Municipal, Health, or other public or statutory authority or body, or by requests of any governmental authority, by war conditions, or by any contingency beyond the control of the Lessee, its assignee, sub-lessee or licensee or if by reason of any similar restriction, limitation, interference or prohibition, the Lessee or its assignee shall be unable to obtain adequate supplies of petroleum products essential to the profitable use of the demised premises for any of the purposes stated, or if because of any request or order of any municipal, local or governmental authority (whether State or Federal) the sale of petrol from the demised premises is substantially curtailed in the opinion of the Lessee, then and in such event, or any thereof, the Lessee shall have the right to cancel this Lease by giving the Lessor at least ten (10) days' notice of its intention so to do.

14. In the event of the Lessee holding over beyond the expiration of the term herein provided, or any renewal or extension thereof, it is expressly understood and agreed that it shall hold over on a month to month tenancy only, at the same rental and upon the same terms and conditions as are herein contained, so far as they can be applied to a monthly tenancy and either the Lessor or the Lessee may terminate such tenancy at any time by giving the other party one calendar month's written notice of its intention so to do.

15. In the event of any change in grade of any adjoining streets, alleys, or highways, or in the event of the demised premises being taken by or pursuant to any governmental or local authority or body, or through the exercise of the right of eminent domain, or in the event of any part of the demised premises or any interest therein, including but not limited to the right of free access to the demised premises, being so taken or substantially

In the Supreme Court of South Australia

No.10

Annexure "E" to Statement of Agreed Facts - Memorandum of Lease 19th May 1966 (continued)

interfered with and the demised premises after taking or interference in the opinion of the Lessee not being suitable for the operation of a petrol service station or any other business carried on on the demised premises, the Lessee shall be at liberty to terminate this lease by giving thirty (30) days' notice in writing of its intention so to do and shall thereby be relieved from further liability thereunder, or the Lessee may continue in possession of the remaining portion of the demised premises in which event the cash rent herein shall be reduced in proportion to the reduction in the utilizable area of the premises, but nothing herein shall be deemed a waiver of the sole right of the Lessee to any claim for compensation or any award for damages to it or to its leasehold interest caused by such taking, whether made separately or as a part of a general award. The Lessor shall on the written request of the Lessee, forthwith carry out at the expense of the Lessor any regrading of the demised premises and approaches thereto, necessary to make the demised premises conform to any change in grade of any adjoining streets, alleys or highways.

16. That in case the rent hereby reserved or any part thereof shall be in arrear and unpaid for the space of one month next after any of the days appointed for payment thereof, or if the Lessee shall neglect or fail to perform and observe any of the covenants, conditions or agreements contained or implied in this Instrument which on the part of the Lessee are to be performed and observed, or if the Lessee goes into voluntary liquidation (except for the purpose of reconstruction) or compulsory liquidation, the Lessor may re-enter upon the demised premises and re-possess the same as of its former estate and expel the Lessee and those claiming through, under or in trust for the Lessee and remove the effects of the Lessee without being taken or deemed guilty of any manner of trespass, and thereupon the term hereby granted shall if the Lessor so elects, absolutely determine but without prejudice to any claim which the Lessor may have against the Lessee in respect of any breach of the covenants and agreements on the part of the Lessee to be observed and performed.

17. It is further understood and agreed that all notices given under this Lease shall be deemed to

be properly served if delivered in writing personally or sent by registered mail to the Lessor at the address shown in the first unnumbered paragraph of this Lease or where rent hereunder was last paid or to the Lessee at its office at 38-40 Currie Street Adelaide South Australia. Date of service of a notice served by mail shall be the date on which such notice is deposited in a post office.

18. The Lessor and the Lessee agree that this Lease is not in consideration for or dependent or contingent in any manner upon any other contract, lease or agreement between them and that the term, rental or other provisions of said Lease are not intended by said parties to be tied in with any other such contract, lease or agreement, but on the contrary this Lease and all of its provisions are entirely and completely independent of any other transaction or relationship between the parties.

19. This Lease embodies the entire agreement between the parties hereto relative to the subject matter hereof, and shall not be modified, changed or altered in any respect except in writing and in the event of any termination of this lease pursuant to any right reserved by the Lessee herein, all liability on the part of the Lessee for payment of rent shall cease and determine upon payment of rent proportionately to the date of such termination of this Lease.

20. That except to the extent to which such interpretation shall be excluded by or be repugnant to the context, the expression "the Lessor" as herein used shall when there is only one Lessor mean and include the Lessor, his heirs, executors, administrators and assigns and shall where there are two or more Lessors, mean and include the Lessors and each and every or any of them, and the heirs, executors, administrators and assigns of them, and each and every or any of them, and shall where the Lessor is a company or corporation, mean and include the Lessor, its successors and assigns. The expression "the Lessee" shall mean and include the Lessee and its successors and assigns. Words importing persons shall extend to and include Corporations, and words importing the masculine gender shall extend to and include the feminine or

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No.10

Annexure "E" to Statement of Agreed Facts - Memorandum of Lease 19th May 1966 (continued)

neuter gender respectively as the case may require, and words importing the singular or plural number shall extend to and include the plural and singular number respectively, and references to Statutes and Regulations shall include any Statutes or Regulations amending, consolidating or replacing the same.

And the abovenamed AMOCO AUSTRALIA PTY. LIMITED HEREBY ACCEPTS this Lease of the demised premises to be held by it as lessee, subject to the conditions, restrictions and covenants herein set forth.

DATED the 19th day of May 1966.

THE COMMON SEAL of ROCCA BROS. MOTOR ENGINEERING CO. PTY.LTD. was hereunto affixed in the presence of:- S E A L

P. Rocca Secretary

V. Rocca Director

THE COMMON SEAL of AMOCO AUSTRALIA PTY. LIMITED was hereunto affixed by authority of the Directors in the presence of:

George W. Director

P. J. McGrath Secretary

ENCUMBRANCES HEREINBEFORE REFERRED TO

"B"

MEMORANDUM TO BE ANNEXED TO LEASE

MEMORANDUM made between COMMONWEALTH TRADING BANK OF AUSTRALIA (hereinafter called the Bank) of the first part ROCCA BROS. MOTOR ENGINEERING CO. PTY. LIMITED (hereinafter called the Lessor) of the second part and AMOCO AUSTRALIA PTY. LIMITED (hereinafter called the Lessee) of the third part intended to be annexed to Lease dated the 19th day of May 1966 from the Lessor to the Lessee

WHEREBY IT IS AGREED THAT:

(1) Any Consent of the Bank to the said lease shall be without prejudice to the rights powers and remedies of the Bank under the mortgage referred to in such consent which shall remain in full force and effect as if this consent had not been given except that so long as the covenants conditions and provisions of the said lease are duly observed and performed the Bank will in the event of the exercise of the power of sale or other power or remedy of the Bank on default under the said mortgage exercise the same subject to the then subsisting rights of the Lessee under the said lease.

(2) So long as the Bank is registered as mortgagee of the premises demised by the said lease the Lessee shall obtain the consent or approval of the Bank in addition to the consent or approval of the Lessor in all cases where under the said lease the consent or approval of the Lessor is required.

(3) Upon the Bank giving notice to the Lessee of demanding to enter into receipt of the rents and profits of the said premises the covenants on the part of the Lessee expressed or implied in the said lease shall be deemed to have been entered into by the Lessee with the Bank, and all the rights powers and remedies of the Lessor under the said lease shall vest in and be exercisable by the Bank until such notice be withdrawn or the said mortgage be discharged.

(4) The Bank shall in no way be bound to perform and shall not incur any liability in respect of the covenants and agreements expressed or implied in the said lease and on the part of the Lessor to be performed and observed.

(5) Whenever used herein the word "Lessee" shall mean and include the Lessee his executors administrators or permitted assigns, the word "Bank" shall mean and include the Bank and its assigns.

DATED this 2nd day of November One thousand nine hundred and sixty six

In the Supreme Court of South Australia

No.10

Annexure "E" to Statement of Agreed Facts - Memorandum of Lease 19th May 1966 Memorandum annexed (continued)

SIGNED BY John Stewart Jeffrey the duly constituted Attorney of the Commonwealth Trading Bank of Australia who is personally known to me) COMMONWEALTH TRADING BANK OF AUSTRALIA by its Attorney

J.S. JEFFREY

LAWRENCE

Justice of the Peace

MORTGAGEE (P/A No.2177746)

THE COMMON SEAL of ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. was hereunto affixed in the presence of) S E A L

P. Rocca Secretary

V. Rocca Director

THE COMMON SEAL of AMOCO AUSTRALIA PTY. LIMITED was hereunto affixed in the presence of) D.S.Anderson Secretary

Director

Commonwealth Trading Bank of Australia being the Mortgagee under Memorandum of Mortgage No.2642284 of the premises demised by the within lease HEREBY CONSENTS to such lease as from the registration thereof.

SIGNED by JOHN STEWART JEFFREY the duly constituted Attorney of the Commonwealth Trading Bank of Australia who is personally known to me) COMMONWEALTH TRADING BANK OF AUSTRALIA by its Attorney

J. S. JEFFREY

LAWRENCE

MORTGAGEE

39

UNDERLEASE No.2775160 to Rocca Bros. Motor Engineering Co. Pty. Ltd. of the land in the within Lease No.2775159 term 15 years (less one day) from 30.11.1964.

PRODUCED 15.11.1966 at 11.45 a.m.

J.W.HUGHES DEP. REG. GEN.

In the Supreme Court of South Australia

No.10

Annexure "E" to Statement of Agreed Facts - Memorandum of Lease 19th May 1966 Memorandum annexed (continued)

EXTENSION No.3645818 of Lease No.2775159 for 5 years from 30.11.1979 with varied covenants

PRODUCED 20.10.1969 at 11.25 a.m.

K. CONDON

DEP. REG.GEN.

EXTENSION No.3045819 of Underlease No. 2775160 for 5 years (less one day) from 29.11.1979

PRODUCED 20.10.1969 at 11.25 a.m.

K. CONDON

DEP. REG.GEN.

MEMORANDUM OF LEASE

ROCCA BROS. MOTOR ENGINEERING CO.PTY. LTD. LESSOR

AMOCO AUSTRALIA PTY. LIMITED LESSEE

Correct for the purposes of The Real Property Act 1886-1963

per: R.W. Piper

Solicitor

MEMORANDUM. A memorial of the within Instrument No. 2775159 was entered in the Register book, Vol.3337 Folio 148 the 2nd day of March 1967 at 11 a.m. o'clock

J.W.HUGHES
Dept.Reg.Gen.

Certificate of Registrar-General, Justice of the Peace, etc. taking declaration of attesting witness.

Appeared before me at
the
day of
one thousand nine hundred and
of

In the Supreme Supreme Court of South Australia

No.10

Annexure "E" to Statement of Agreed Facts - Memorandum of Lease 19th May 1966 Memorandum annexed (continued)

a person known to me and of good repute, attesting witness to this instrument, and acknowledged his signature to the same, and did further declare that the part executing the same personally known to him the said that the signature to the said instrument in the handwriting of the said and that the said did freely and voluntarily sign the same in the presence of him the said and at the time of sound mind

Signed

Certificate of Registrar-General, Justice of the Peace, etc., before whom instrument may have been executed by the parties thereto

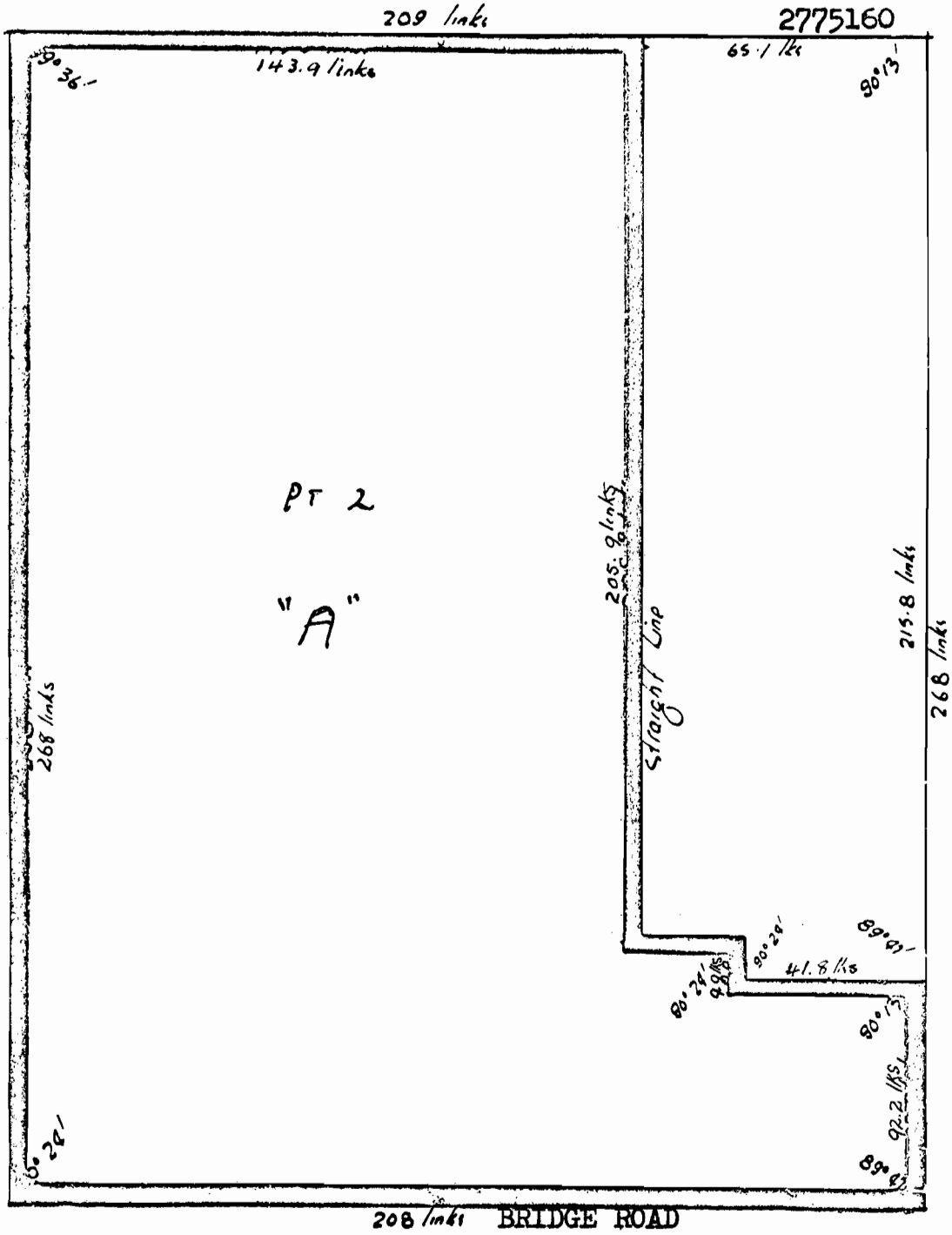
Appeared before me at the day of one thousand nine hundred and of

the part executing the within instrument, being person well known to me, and did freely and voluntarily sign the same.

Signed

LOCATION:-

PIPER, BAKEWELL & PIPER, SOLICITORS, ADELAIDE.



PT.LOT 2 OF SUB.DV. OF PORTION OF SECTION 3005 C.T. VOL.3337 FOLIO 148 HUNDRED OF YATALA
Scale 1" - 20'0"

NOTE AREA BOUNDED IN RED DENOTES LEASED PROPERTY

In the Supreme Court of South Australia

No.10

Annexure "E" to Statement of Agreed Facts - Memorandum of Lease 19th May 1966 (continued)

In the Supreme Court of South Australia

No.11

Annexure "F" to Statement of Agreed Facts - Memorandum of Underlease 19th May 1966

No. 11

ANNEXURE "F" TO STATEMENT OF AGREED FACTS
Memorandum of Underlease

South Australia

AMOCO AUSTRALIA PTY. LIMITED, a Company incorporated in the Australian Capital Territory and having its Principal Office in South Australia at 38-40 Currie Street Adelaide (hereinafter called "the Lessor") being registered or entitled to be registered as the proprietor of an estate as lessee pursuant to the terms of Memorandum of Lease dated the 19th day of May 1966 wherein Rocca Bros. Motor Engineering Co.Pty.Ltd. is the Lessor and the said Amoco Australia Pty. Limited is the Lessee subject to such encumbrances, liens and interests as are notified by memorandum underwritten or endorsed hereon in portion of the land comprised and described in Certificate of Title Register Book Volume 3337 Folio 148 DO HEREBY SUB-LEASE to Rocca Bros. Motor Engineering Co.Pty. Ltd. of Bridge Road Para Hills in the State of South Australia (hereinafter called "the Lessee") that piece of land marked "A" in the plan attached hereto being portion of the land in the said C/T Register Book Volume 3337 Folio 148 together with the buildings, fixtures, equipment, machinery and appliances located thereon, if any, including among others those listed in the Schedule hereto (all being hereinafter referred to as the "demised premises") To be held by the Lessee for a term of 15 years (less one day) from the 30th day of November 1964 at the rental hereinafter provided for subject to the following powers, provisos, conditions, covenants, agreements and restrictions that is to say:-

1. The Lessee shall pay to the Lessor as rent for the demised premises, a cash yearly rental as set forth in Paragraph "A" below.

"A" For each year during the term of this lease or any extension or renewal thereof, a cash rent of One pound (£1.0.0.) per year.

Except as hereinafter provided, all rent shall be due and payable at the office of the Lessor at 38-40 Currie Street, Adelaide, South Australia.

The rental provided for in Paragraph "A" shall be for one year in advance and shall be due on the first day of each year.

2. The following powers, provisos, conditions, covenants, agreements and restrictions shall be and in addition to and without prejudice to those contained in or implied by the Real Property Act 1886-1963, except in so far as the same are expressly or by necessary implication, negatived, altered, varied or modified by these presents.

3. The Lessee covenants with the Lessor:-

(a) To pay the rent as aforesaid.

(b) To pay all water, electric light and power charges, charges for sanitary services, telephone, gas and other operating expenses and all licence, permit or inspection fees assessed or charged on or in respect of the demised premises or the use or occupancy thereof, or the business conducted therein.

(c) To keep the said demised premises together with the adjoining footpaths and entrance and exit driveways in good order and repair and in a clean, safe and healthful condition and to comply with all Federal, State and Municipal laws, rules, regulations and ordinances with regard to the use and condition of the demised premises and the business conducted thereon, and at the expiration of this lease, or upon sooner cancellation or termination thereof, to surrender the demised premises included in this lease to the Lessor in substantially as good condition as when received, ordinary wear and tear, damage by the elements or by fire, not caused or contributed to by the Lessee's negligence, excepted.

(d) Not to commit nor suffer waste to be committed upon additions to the buildings, structures and equipment now situated or structures, nor make any permanent alterations in or the demised premises, and not to erect on said premises any buildings thereon, without first obtaining the written consent of the Lessor

In the Supreme Court of South Australia

No.11

Annexure "F" to Statement of Agreed Facts - Memorandum of Underlease 19th May 1966 (continued)

(e) Not to assign, mortgage or encumber this lease, or sublet or license or part with possession of the demised premises or any part thereof.

(f) To permit the Lessor and its agents, architects and others at any time during normal trading hours to enter and view the demised premises and their state of repair and condition and to take inventory of the equipment and appliances therein and to execute and make alterations and/or additions and construct such buildings, driveways and improvements on the demised premises and to paint same or any part thereof and to erect, fix, suspend or paint such advertising signs or exhibits or materials and to repaint, alter or remove any of the same as the Lessor may deem necessary or desirable, provided that the Lessor shall cause the Lessee as little inconvenience as possible and shall not be liable to the Lessee for any loss or damage that the Lessee may suffer either directly or indirectly through or in consequence thereof.

(g) To carry on and conduct in a proper manner in and upon the demised premises during all lawful trading hours the business of a petrol service station only and not to use same for any other business or purpose whatsoever and not during the continuance of this lease to cease to carry on the said business without the prior written consent of the Lessor.

(h) To purchase exclusively from the Lessor all petrol, motor oil, lubricants and other petroleum products required for sale on the demised premises and not directly or indirectly to buy, receive, use, sell, store or dispose of or permit to be bought, received, used, sold, stored or disposed of at or upon the demised premises or any part thereof any petroleum products not actually purchased by the Lessee from the Lessor provided that the Lessor is able to supply same.

(i) To purchase at least 8000 gallons of petrol and at least 140 gallons of motor oil from the Lessor in every month during the term of this lease.

(j) Not to be a party or privy to the doing of any act whereby the goodwill, trade or business carried on in the demised premises may be prejudicially affected.

(k) To sell the products supplied by the Lessor under the usual trademark or trade names associated with such products.

(l) Not to display in, on or outside the demised premises any advertisement or sign which shall be objected to by the Lessor but will put up or affix to the demised premises only such advertisements and signs in relation to the Lessee's business and in such position as shall by writing be indicated or approved of by the Lessor and of such design and size as it shall approve of.

(m) Not to do or permit any act or thing which may be or become a nuisance, damage or annoyance to the Lessor or the owners or occupiers of other property in the neighbourhood.

(n) Not to hold any auction sale on the demised premises.

(o) To comply strictly at all times with all the duties and obligations imposed upon a Licensee of the petrol pumps or petrol service station by the Local Authority in which the demised premises are situate or by any Act or regulation for the time being in force affecting the said petrol pumps and petrol service station.

(p) Not to commit, omit or suffer to be done, committed or omitted, any act, matter or thing whereby the licences or any renewal thereof for the time being in respect of the said petrol pumps or petrol service station may be allowed to expire or become void or may be rendered liable to be forfeited, suspended, taken away or refused or whereby the Lessee may be disqualified for any period or permanently from receiving or having the licence or any renewal thereof granted in respect of the said petrol pumps or petrol service station.

In the Supreme Court of South Australia

No.11

Annexure "F" to Statement of Agreed Facts - Memorandum of Underlease 19th May 1966 (continued)

4. It is hereby declared and agreed by and between the Lessor and Lessee as follows:-

(a) The Lessor agrees to sell to the Lessee and deliver to the demised premises at the Lessor's usual list prices to resellers at the time and place of delivery, the Lessee's entire requirements of petroleum products. Delivery shall be made in quantities of not less than the Lessee's average weekly requirements calculated over the immediately preceding six weeks. Deliveries may be made at any such time or times as the Lessor may in its absolute discretion determine and the Lessee shall pay the Lessor in cash for products delivered at the time of delivery of such products.

(b) In the event of the Lessor being unable for any reason whatsoever which is, in the sole opinion of the Lessor, beyond its control to supply petroleum products as required under this lease, the obligation to supply such petroleum products shall be suspended for the period during which the Lessor is unable so to supply and the Lessee shall be at liberty to supply himself from other sources with sufficient petroleum products but only until such time as the Lessor shall notify him that it is prepared to resume such supply and the Lessee shall not hold out or offer for sale such other petroleum products as the products of the Lessor.

(c) Nothing in this lease shall impose any obligations upon the Lessor to sell or supply any such petroleum products to the Lessee until he shall have paid for any such products already supplied to him by the Lessor and otherwise observed and performed the terms and conditions of this lease, nor shall a refusal on the part of the Lessor so to supply products be deemed a breach of this lease so as to release the Lessee from his obligations hereunder to purchase exclusively from the Lessor.

(d) That the Lessee has examined and knows the condition of the demised premises and acknowledges that he has received the same in good order and repair, except as otherwise

specified, and that no representations as to the condition or repair thereof have been made by the Lessor or anyone representing the Lessor.

(e) That none of the provisions of this lease shall be construed as reserving to the Lessor any right to exercise any control over the business or operations of the Lessee conducted upon the demised premises or to direct in any respect the manner in which such business and operations shall be conducted, it being understood and agreed that so long as the Lessee shall use the demised premises in a lawful manner as herein provided, the entire control and direction of such activities shall be and remain with the Lessee. It is further understood and agreed that the Lessee shall have no authority to employ any persons as agents or employees for or on behalf of the Lessor for any purpose, and that neither the Lessee nor any other persons performing any duties or engaging in any work at the request of the Lessee upon the demised premises shall be deemed to be employees or agents of the Lessor.

(f) That the Lessee may, upon the expiration of this lease or upon its sooner termination or cancellation, remove any and all equipment, tools, containers or machinery belonging to the Lessee and placed or installed by the Lessee upon the leased premises.

(g) That the Lessor, its agents and employees shall not be liable for any loss, damage, injuries or other casualty of whatsoever kind or by whomsoever caused, to the person or property of anyone (including the Lessee) on or off the demised premises arising out of or resulting from the Lessee's use, possession or operation thereof, or from defects in the premises whether apparent or hidden, or from the installation, existence, use, maintenance, condition, repair, alteration, removal or replacement of any equipment thereon, unless due in whole or in part to negligent acts or omissions of the Lessor, its agents or employees; and the Lessee for himself, his heirs, executors, administrators, successors

In the Supreme Court of South Australia

No.11

Annexure "F" to Statement of Agreed Facts - Memorandum of Underlease 19th May 1966 (continued)

and assigns, hereby agrees to indemnify and hold the Lessor, its agents and employees, harmless from and against all claims, demands, liabilities, suits or actions (including all reasonable expenses and attorneys' fees incurred by or imposed on the Lessor in connection therewith) for such loss, damage, injury or other casualty. The Lessee also agrees to pay all reasonable expenses and attorneys' fees incurred by the Lessor in the event that the Lessee shall make default under the provisions of this Paragraph.

(h) That this lease and the rights of the Lessee hereunder are subject to all the terms and conditions of the lease under which the Lessor is entitled to the demised premises and the Lessee will not do or suffer to be done upon the demised premises any act, matter or thing which if done or suffered to be done by the Lessor would constitute a violation of any of the said terms and conditions and if for any reason whatsoever the Lessor's tenure of the demised premises is determined or surrendered, cancelled or otherwise terminated, this lease and the term hereby created shall automatically determine simultaneously therewith without notice or further act of the Lessor or the Lessee and without any liability on the part of the Lessor.

(i) That in case the rent hereby reserved or any part thereof shall be in arrear and unpaid for the space of one month next after any of the days appointed for payment thereof or if the Lessee shall neglect or fail to perform and observe any of the covenants conditions or agreements contained or implied in this Instrument which on the part of the Lessee are to be performed and observed or if the Lessee commits any act of bankruptcy or being a Company goes into voluntary liquidation (except for the purpose of reconstruction) or compulsory liquidation or if any execution is issued against the Lessee or the estate of the Lessee or if the Lessee being an individual shall die during the term of this lease or any extension or renewal thereof, the Lessor may re-enter upon the demised premises and re-possess the same as of its

former estate and expel the Lessee and those claiming through under or in trust for the Lessee and remove the effects of the Lessee without being taken or deemed guilty of any manner of trespass and thereupon the term hereby granted shall if the Lessor so elects absolutely determine but without prejudice to any claim which the Lessor may have against the Lessee in respect of any breach of the covenants and agreements on the part of the Lessee to be observed and performed AND it shall be lawful for the Lessor to execute a Surrender hereof and the Lessee hereby irrevocably appoints the Managing Director for the time being of the Lessor in Australia Attorney for the Lessee for the purpose of executing such Surrender.

(j) In the event of the Lessee holding over beyond the expiration of the term herein provided or any renewal or extension thereof it is expressly understood and agreed that the Lessee shall hold over on a month to month tenancy only, and either the Lessor or the Lessee may terminate such tenancy at any time by giving the other party thirty (30) days' written notice of their intention so to do.

(k) That nothing in this lease shall be construed as giving the Lessee the right to use the Lessor's trade marks, trade names, advertising signs or devices or colour schemes except with the Lessor's consent.

(l) That no waiver by the Lessor of any breach or non-observance by the Lessee of any of the covenants, conditions or agreements herein contained and on the Lessee's part to be observed or performed shall be or be construed to be a general waiver and such waiver shall relate only to the particular breach or non-observance in respect of which it was made.

(m) That no obligation, agreement, or understanding on the part of either party to be performed shall be implied from any of the terms and provisions of this lease, all obligations, agreements and understandings being expressly set forth herein.

In the Supreme Court of South Australia

No.11

Annexure "F" to Statement of Agreed Facts - Memorandum of Underlease 19th May 1966 (continued)

(n) That all notices given under this agreement shall be in writing and shall be deemed to be properly served if delivered personally or sent by certified or registered mail to the Lessee at the address shown in this Lease or to the Lessor at its office at 38-40 Currie Street, Adelaide or as from time to time directed in writing by the Lessor. The date of service of a notice served by mail shall be the date on which the envelope containing such notice is deposited in a post office.

(o) That except to the extent to which such interpretation shall be excluded by or be repugnant to the context, the expression "the Lessor" as herein used shall mean and include the Lessor and its successors and assigns and the expression "the Lessee" as herein used shall when there are two or more Lessees mean and include the Lessees and each and every or any of them. Words importing persons shall extend to and include corporations and words importing the masculine gender shall extend to and include the feminine or neuter gender respectively as the case may require and words importing the singular or plural number shall extend to and include the plural and singular number respectively and references to Statutes and Regulations shall include any Statutes or Regulations amending, consolidating or replacing the same.

THE SCHEDULE ABOVE REFERRED TO

1 x 44 gallon refined products pump
1 Alemite overhead greasing unit
1 Gilbarco T332R Amolite pump
1 Wayne Dual reseller pump Serial No. 537/8
1 Wayne single reseller pump Serial No. 8975
1 Gilbarco 4 tap oil bar
1 Driveway Cabinet
1 Canopy Sign
2 x 3000 gallon underground tank
1 x 500 gallon underground tank
1 H frame hoist, Servex
1 Torch & Oval Sign
1 Air and Water reel, Alemite
1 x 100 gallon overhead tank
1 Brodie flow meter

1 x 4 gallon brake bleeding outfit
1 x 12 gallon gear oil pump
1 x 12 gallon gear oil trolley
1 x 10 detergent stand
24 x quart lube oil bottles
24 x pint lube oil bottles
4 bottle stands
8 lube oil baskets
1 Lubrication board
48 pourers and caps
1 x 45 gallon lub oil pump
1 x 4 gallon automatic transmission fluid pump

And the abovenamed Rocca Bros. Motor Engineering Co.Pty.Ltd. HEREBY ACCEPTS this lease of the demised premises to be held as Lessee subject to the conditions, restrictions and covenants herein set forth.

DATED the 19th day of May 1966.

THE COMMON SEAL of AMOCO AUSTRALIA PTY.LIMITED was hereunto affixed by authority of the Directors in the presence of:

George W. ? Director

P.J. McGrath Secretary

THE COMMON SEAL of ROCCA BROS. MOTOR ENGINEERING PTY.LTD. was hereto affixed in the presence of: S E A L

V. Rocca Director

P. Rocca Secretary

In the Supreme Court of South Australia

No.11

Annexure "F" to Statement of Agreed Facts - Memorandum of Underlease 19th May 1966 (continued)

2775160

Lessor's copy

No.

MEMORANDUM OF UNDERLEASE

Correct for the purposes of The Real Property Act 1886-1963

AMOCO AUSTRALIA PTY. LIMITED
LESSOR

PIPER BAKEWELL & PIPER

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD.
LESSEE

per: R.W. Piper

Solicitor.

MEMORANDUM: A memorial of the within Instrument No. 2775160 was entered in the Register Book, Vol. 3337 Folio 148 the 2nd day of March 1967 at 11 a.m.o'clock

J.W.HUGHES
Deputy Registrar-General

Certificate of Registrar-General, Justice of the Peace, etc. taking declaration of attesting witness

Appeared before me at
the day
of one thousand
nine hundred and

of
a person known to me and of
good repute, attesting
witness to this instrument,
and acknowledged his signature
to the same, and did further
declare that
the part executing the
same personally known
to him the said
that the signature to the
said instrument in the
handwriting of the said
and that the
said
did freely and voluntarily
sign the same in the
presence of him the said

and at the time of
sound mind.

Signed

In the Supreme Court of South Australia

No.11

Annexure "F" to Statement of Agreed Facts - Memorandum of Underlease 19th May 1966 (continued)

Certificate of Registrar-General, Justice of the Peace, etc. before whom instrument may have been executed by the parties thereto

Appeared before me at the day of one thousand nine hundred and of the part executing the within instrument, being person well known to me, and did freely and voluntarily sign the same.

PIPER, BAKEWELL & PIPER, SOLICITORS, ADELAIDE.

Signed

No. 12

No.12

Annexure "H" to Statement of Agreed Facts - Extension of Lease 15th September 1969

ANNEXURE "H" TO STATEMENT OF AGREED FACTS
EXTENSION OF LEASE

SOUTH AUSTRALIA

MEMORANDUM OF AGREEMENT dated the Fifteenth day of September 1969 made BETWEEN ROCCA BROS.MOTOR ENGINEERING CO. PTY. LTD. of Bridge Road Para Hills the lessor and AMOCO AUSTRALIA PTY. LIMITED of 38-40 Currie Street Adelaide the lessee under and by virtue of the Memorandum of Lease No. 2775159 registered over portion of the land comprised in Certificate of Title Register Book Volume 3337 Folio 148 SUBJECT to Memorandum of Mortgage No. 2642284 Memorandum of Lease No. 2775159 Memorandum of Under Lease No. 2775160 and Memorandum of Mortgage No. 2775161 WHEREBY it is agreed that the term of the said Memorandum of Lease shall be extended for five years from the 30th day of November 1979 upon the same terms and conditions as are expressed or implied in the said Memorandum of Lease except

1. that the alterations and additions to the

In the Supreme Court of South Australia

No.12

Annexure "F" to Statement of Agreed Facts - Extension of Lease 15th September 1969 (continued)

lessors premises agreed upon between the Lessor and the Lessee are to be carried out by the Lessee at its own cost and expense in all things and

2. that for the period of this extension the sum payable to the Lessor under Clause 1 "B" will be at the rate of four cents (0.4) per gallon in lieu of 3 pence per gallon mentioned in the said Memorandum of Lease.

It is also agreed that this extension shall have the same force and effect as if it were endorsed on the said Memorandum of Lease pursuant to Sections 153 and 154 of The Real Property Act 1886-1967.

THE COMMON SEAL of ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. was hereunto affixed in the presence of:) S E A L

V. Rocca Director P.A. Rocca Secretary

THE COMMON SEAL of AMOCO AUSTRALIA PTY. LIMITED was hereunto affixed by authority of the Board of Directors in the presence of:-

Director Assistant Secretary

COMMONWEALTH TRADING BANK OF AUSTRALIA being the Mortgagee under Memorandum of Mortgage No.2642284 of the premises demised by the within Lease HEREBY CONSENTS to the said Extension of Lease from the said date on the same terms and conditions as the first lease except as are hereinbefore varied.

SIGNED by the duly constituted Attorney of the Commonwealth Trading Bank of Australia who is personally known to me) COMMONWEALTH TRADING BANK OF AUSTRALIA by its Attorney

LYONS
Mortgagee

Justice of the Peace

In the Supreme Court of South Australia

No.12

Annexure "F" to Statement of Agreed Facts - Extension of Lease 15th September 1969 (continued)

EXTENSION OF LEASE
LESSEE'S COPY

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. Lessor

AMOCO AUSTRALIA PTY. LIMITED Lessee

Correct for the purposes of The Real Property Act 1886-1967

PIPER, BAKEWELL & PIPER

per: R.W.Piper

SOLICITORS

MEMORANDUM:- A Memorial of the within Instrument No. 3045818 was entered in the Register Book, Vol.3337 Folio 148 on the 27th day of October 1969 at 11 o'clock.

K. CONDON
Deputy Reg.Gen.

Certificate of Registrar-General, Justice of the Peace, etc. before whom instrument may have been executed by the parties thereto

Appeared before me at the
day of one thousand nine hundred and
the within described

the part executing the within instrument, being person well known to me, and did freely and voluntarily sign the same.

Signed

Certificate of Registrar-General, Justice of the Peace, etc., before whom instrument may have been executed by the parties thereto

Appeared before me at the
day of one thousand

FEES PAID

In the Supreme Court of South Australia

No.12

Annexure "F" to Statement of Agreed Facts - Extension of Lease 15th September 1969 (continued)

nine hundred and
the within described

the part executing the within instrument, being person well known to me and did freely and voluntarily sign the same.

Signed

Certificate of Registar-General, Justice of the Peace, etc., taking declaration of attesting witness.

Appeared before me at
the
day of 19

(herein called "the Witness") a person known to me and of good repute attesting witness to this instrument and acknowledged the signature of the Witness to the same and did further declare that

within
described (herein called "the Signatory") the party executing the same is personally known to the Witness that the signature to the said instrument is in the handwriting of the Signatory and that the Signatory did freely and voluntarily sign the same in the presence of the Witness and the Signatory was at that time of sound mind.

Signed

No. 13

In the Supreme Court of South Australia

No.13

Annexure "J" to Statement of Agreed Facts - Extension of Underlease 15th September 1969

ANNEXURE "J" TO STATEMENT OF AGREED FACTS
Extension of Under Lease

SOUTH AUSTRALIA

MEMORANDUM OF AGREEMENT dated the Fifteenth day of September 1969 made BETWEEN AMOCO AUSTRALIA PTY. LIMITED of 38-40 Currie Street Adelaide the lessor and ROCCA BROS. MOTOR ENGINEERING CO. PTY. LIMITED of Bridge Road Para Hills the lessee under and by virtue of Memorandum of Under Lease No. 2775160 registered over portion of the land comprised in Certificate of Title Register Book Volume 3337 Folio 148 SUBJECT to Memorandum of Mortgage No. 2642284 Memorandum of Lease No. 2775159 Memorandum of Under Lease No. 2775160 and Memorandum of Mortgage No. 2775161 WHEREBY it is agreed that the term of the said Memorandum of Lease shall be extended for five years (less one day) from the 29th day of November 1979 upon the same terms and conditions as are expressed or implied in the said Memorandum of Under Lease; It is also agreed that this extension shall have the same force and effect as if it were endorsed on the said Memorandum of Lease pursuant to Sections 153 and 154 of The Real Property Act 1886-1967.

THE COMMON SEAL of AMOCO AUSTRALIA PTY. LIMITED was hereunto affixed by authority of the Board of Directors in the presence of:-

Karl Mueller Director

F. A. Cassel Secretary

THE COMMON SEAL of ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. was hereunto affixed in the presence of)

V. Rocca Director

P.A. Rocca Secretary

COMMONWEALTH TRADING BANK OF AUSTRALIA being the Mortgagee under Memorandum of Mortgage No. 2642284 of the premises demised by the within Under Lease HEREBY CONSENTS to the said Extension of Under Lease from the said date on the same terms and

In the Supreme Court of South Australia

No.13

Annexure "J" to Statement of Agreed Facts - Extension of Underlease 15th September 1969 (continued)

conditions as the first under lease.

SIGNED by the duly constituted Attorney of the Commonwealth Trading Bank of Australia who is personally known to me) COMMONWEALTH TRADING BANK OF AUSTRALIA by its Attorney

LYONS.
Mortgagee

Justice of the Peace.

3045819

EXTENSION OF UNDER LEASE
Lessor's Copy

AMOCO AUSTRALIA PTY. LIMITED Lessor

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. Lessee

Correct for the purposes of The Real Property Act 1886-1967

PIPER BAKEWELL & PIPER

per: R.W. Piper

SOLICITORS

MEMORANDUM:- A Memorial of the within Instrument No. 3045819 was entered in the Register Book, Vol.3337 Folio 148 the 27 day of October 1969 at 11 o'clock.

K. CONDON
Dep.Registrar-General.

Certificate of Registrar-General, Justice of the Peace etc., before whom instrument may have been executed by the parties thereto

Appeared before me at the
day of one thousand nine hundred and
the within described

the part executing the within instrument, being person well known to me, and did freely and voluntarily sign the same.

Signed

Certificate of Registrar-General, Justice of the Peace, etc., before whom instrument may have been executed by the parties thereto.

Appeared before me at
the
day of
one thousand nine hundred and
the within described

the part executing the within instrument, being person well known to me and did freely and voluntarily sign the same.

Signed

Certificate of Registrar-General, Justice of the Peace, etc., taking declaration of attesting witness.

Appeared before me at
the
day of 19

(herein called "the Witness") a person known to me and of good repute attesting witness to this instrument and acknowledged the signature of the Witness to the same and did further declare that

within described (herein called "the Signatory") the party executing the same is personally known to the Witness that the signature to the said instrument is in the hand-writing of the Signatory and that the Signatory did freely and voluntarily sign the same in the presence of the Witness and the Signatory was at that time of sound mind.

Signed

In the Supreme Court of South Australia

No.14

Reasons for Judgment of Supreme Court of South Australia on Issues 1 and 2 of Wells J. 12th April 1972

No. 14

REASONS FOR JUDGMENT OF SUPREME COURT OF SOUTH AUSTRALIA ON ISSUES 1 and 2 OF WELLS J.

AMOCO AUSTRALIA PTY. LIMITED v. ROCCA BROS. MOTOR CO. PTY. LTD.

Wells J.

In this action the plaintiff Company is seeking a series of injunctions against the defendant Company the object of which is to maintain and enforce a trade tie embodied substantially in the sub-lease of a service station granted by the plaintiff Company to the defendant Company. The defendant Company maintains that, however the alleged trade tie is viewed, and in whatever documents it purports to be embodied, it is unenforceable because it is in unreasonable restraint of trade.

The plaintiff Company (which I shall call "Amoco") which is a large, American based oil company, with Australia-wide operations, is in business principally as the supplier of petroleum products to service-stations, garages and filling stations. It was incorporated in the Australian Capital Territory on 9 January 1961, and was registered in South Australia as a foreign company on 4 December 1961. Its operating headquarters at all material times has been in Sydney.

The defendant Company (which I shall call "Rocca") is a proprietary company which (inter alia) runs its service station on land situated at Para Hills West. Rocca was incorporated on 10 February 1964; the shareholders are exclusively members of the Rocca family, and the history that was presented in evidence makes it clear that the service station business, whether carried on by natural persons or by the proprietary company, has in fact been controlled by Vincenzo Rocca, the father, and by Pasquale Rocca (known as "Pat") and Gino Rocca (known as "Jim"), who are Mr. Vincenzo Rocca's sons. Mr. Rocca senior, Mrs. Rocca, Pat and Jim are the Directors. I think it true to say, however, that Mr. Rocca has stood back in recent years and handed over most of the management to his sons, although I have the

impression that Mr. Rocca senior would be appealed to as an ultimate arbiter should need arise.

The service station is built on land of which Rocca is the registered proprietor, and which is subject (inter alia) to a head lease from Rocca to Amoco and a sub-lease from Amoco to Rocca.

Rocca claims that it is entitled wholly to disregard the trade tie sought to be enforced by Amoco, and to make its own arrangements, for the supply to it of petroleum products, with I.O.C. Australia Pty. Ltd. (which I shall refer to as "I.O.C."). When matters came to a head between Amoco, I.O.C. and Rocca in the middle of November 1971, Amoco took out a summons for immediate relief and, on 18 November 1971, I made an order, based upon certain undertakings given by counsel, granting injunctions until further order, the objects of which were to maintain, as nearly as might be, the existing state of affairs and to permit the continuance of trading at the Rocca garage without irreparable harm to the interests of either party.

The plaintiff's claim endorsed on the Writ (which is dated 16 November 1971) indicates with some particularity the structure of contest between the parties and the conduct on the part of Rocca complained of by Amoco. Amoco, in substance, makes the following claims:

(1) For an injunction restraining Rocca from removing or otherwise interfering with Amoco's pumps and illuminated signs installed in or erected on the land on which the service station is built;

(2) For an injunction restraining Rocca from constructing, erecting or installing pumps, signs and other equipment so as to interfere with Amoco's use and enjoyment of the land;

(3) For a mandatory injunction that Rocca forthwith remove all I.O.C.'s pumps and equipment placed in or on the land without Amoco's consent;

(3A) (Introduced as an amendment, by leave) - For

In the Supreme Court of South Australia

No.14

Reasons for Judgment of Supreme Court of South Australia on Issues 1 and 2 of Wells J. 12th April 1972 (continued)

a mandatory injunction that Rocca at its own expense restore all pumps and equipment belonging to Amoco that were installed immediately before 15 November 1971;

(4) For an injunction restraining Rocca from using, without permission, Amoco's underground tanks or other service station equipment situated in or on the land;

(5) For an injunction restraining Rocca from making permanent alterations in the land;

(6) For an injunction restraining Rocca from assigning, sub-letting, licensing or parting with the possession of the land;

(7) For an injunction restraining the Roccas from dealing in, or storing on the land, petroleum products not purchased from Amoco;

(8) For an injunction restraining Rocca from displaying in on or outside the land any advertisement or sign objected to by Amoco;

(9) For an injunction restraining Rocca from doing anything to the nuisance, damage or annoyance of Amoco;

(10) For a declaration that the head lease and the sub-lease are valid and enforceable;

(11) If the plaintiff is not entitled to the relief claimed in paragraphs 1 - 10, for a declaration that Amoco is entitled to compensation, and to remove its equipment, appliances, machinery and trade fixtures from the land.

(12) Damages.

(13) Costs.

(14) Further or other relief.

Appropriate references are made to clauses in the sub-lease.

The hearing before me was concerned with the relief claimed in paragraphs 1 to 10; by consent

all other questions were held over until my decision was given on the principal questions.

The matter was urgent and in the nature of a test case. I accordingly made an order dispensing with formal pleadings and directing that the trial of the action should proceed on the basis of agreed issues, which were duly filed. The statement of agreed issues reads:

"1. Is the defendant entitled to assert that the covenants contained in Memorandum of Underlease No.2665160 or any of them are in restraint of trade, and unenforceable?

2. Are the covenants contained in Memorandum of Underlease No.2775160 or any of them an unreasonable restraint of trade and unenforceable?

3. If the covenants in Memorandum of Underlease No.2775160 or any of them are unenforceable is the whole of the said Memorandum of Underlease void?

4. If the said Memorandum of Underlease is void is Memorandum of Lease No.2775159 also void?

5. All questions of consequential relief for either party arising from the resolution of the above issues shall be deferred for later consideration."

It is perhaps not without benefit to all concerned that the issues were thus contained at the interlocutory stage because, taking into account where the onus of proof rests with respect to the several questions of fact and law ultimately raised, if formal pleadings had been filed, they would probably have reached the surrebutter stage or beyond. No difficulty was encountered, however, in the presentation of the evidence or argument, and I am now able to set forth dialectically a summary of the contentions of each party (in the form of quasi-pleadings):-

Amoco's declaration: Rocca is in breach of several covenants in the sub-lease, and appropriate injunctions should be granted enforcing compliance

In the Supreme Court of South Australia

No.14

Reasons for Judgment of Supreme Court of South Australia on Issues 1 and 2 of Wells J. 12th April 1972 (continued)

with those covenants.

Rocca's plea: Rocca admits that, as registered proprietors, it gave to Amoco what purports to be a head lease of the subject land; that Amoco purported, as head lessee and sub-lessor, to grant to Rocca a sub-lease of the land; and that Rocca has not observed what appear to be covenants binding on it; but Rocca says that the sub-lease (viewed alone, or in conjunction with the head lease) is in unreasonable restraint of trade, and the relevant covenants are accordingly unenforceable.

Amoco's replication: The doctrine of restraint of trade is not applicable because Rocca bargained away whatever freedom of trade it had for the privilege of acquiring a sub-lease of the land, over which, prior to the execution of the sub-lease, it had no possessory rights; alternatively, because, in all the circumstances, the business situation was not one to which the doctrine of restraint of trade applied.

Rocca's rejoinder: The doctrine of restraint of trade is applicable because, notwithstanding the conveyancing devices adopted, or the intention expressed in clause 18 of the head lease or both, and whatever the business situation may have been, Rocca was the original freeholder and had a freedom recognized by the common law to carry on its trade without restraint; and it was by

virtue of the two leases (which, for the purposes of applying the doctrine, ought to be regarded as one transaction - as a colourable method of imposing what is in truth a simple trade tie or solus agreement), and by virtue of them alone, that Rocca bound itself as it did. Rocca stands in the same position as if, as tenant in fee simple in possession, it had entered into a straight solus agreement.

Amoco's surrejoinder: Even if the doctrine of restraint of trade is applicable (which is disputed) any restraints of trade embodied in the covenants of the sub-lease are reasonable, and evidence will be relied on to support the conclusion that those restraints were reasonable as between the parties.

Rocca's rebutter: Rocca joins issue on the question of reasonableness as between the parties, and will rely on evidence to show that, whether reasonable as between the parties or not, the restraints were unreasonable as being contrary to the public interest.

Amoco's surrebutter: Amoco joins issue on the question of public interest, and says that even if the doctrine of restraint of trade applies (which is disputed), and the relevant covenants are unreasonable (which is also disputed) then either

In the Supreme Court of South Australia

No.14

Reasons for Judgment of Supreme Court of South Australia on Issues 1 and 2 of Wells J. 12th April 1972 (continued)

(a) the head lease and sub-lease are severable, and the head lease stands; or

(b) such of the covenants as render the sub-lease unenforceable are severable.

Rocca's further answer: Neither the sub-lease nor the offending covenants can be severed.

Amoco was registered in South Australia as a foreign company at the end of 1961, and in 1962 was poised to establish itself in this State as the marketer of petroleum products. It is, I think, safe to say that in 1962 Amoco entered upon a field of commercial activity where one-brand sales of petroleum products had become established as a pattern in our community and that it would not have been, economically, a practical proposition for Amoco to have tried to break into the market other than through establishing its own tied service stations. Speaking generally, it was obliged to take the marketing scene as it found it. From 1962 onwards, sales representatives from Amoco were busy searching for new outlets. Negotiations with the Roccas began late in 1963 or early in 1964. The Roccas had no service station then; indeed the land upon which the Rocca service station is now established was not purchased till 1963 by Pat Rocca (who subsequently transferred it to Rocca after its incorporation). The land is situated in an area that, in 1963, was far from fully developed. It lies some 12 to 15 miles to the north of Adelaide to the east of Main North Road, in the suburb of Para Hills.

In 1963, Para Hills was planned as a new housing development area. It had been in existence for some time, but its progress had suffered a check by reason of the now legendary Reid Murray collapse: one of the Reid Murray subsidiaries had been active building houses in the area. The Roccas' Para Hills service station site was at the northern end of the proposed development; another service station had already been established at the southern end; there was no housing in the

immediate vicinity; and Bridge Road, on which the site abutted, was formed but not sealed. Although, of course, speaking generally, development in the area was inevitable, nevertheless the pattern, the rapidity, and the regularity, of that development was unpredictable.

Amoco was not the only supplier with whom the Roccas were in treaty. Somewhere near the end of 1963 they (I use the word "they", although negotiations were sometimes conducted by one, sometimes by two, and sometimes by all three) had met representatives of B.P., but their discussions had come to nothing. As the result of their talks with Amoco officers, it was decided that the Roccas would, to use a neutral phrase, join forces with Amoco in the establishing of a service station at the Para Hills site and the selling of Amoco's petroleum products. It was generally agreed that Rocca would be responsible for erecting the service station; that Rocca would enter into an engagement that it would sell from the service station only the petroleum products of Amoco; that Amoco would lend to Rocca certain plant and equipment to store and sell its products, and would instal that plant and equipment on the site; and that the two companies would both promote and advertise the service station as the vendor of Amoco products. The Roccas were insistent throughout that they would not part with the ownership of the site.

As part of this general agreement, which seems to have been reached about the middle of February 1964, the parties executed (if that is the right word) a Reseller Trading and Rebate Agreement. It was plainly not regarded as definitive, and was incomplete in a number of respects. I do not need, I think, to examine this agreement in detail, because it appears to have been rather in the nature of a formal declaration of intention and was, in any event, soon to be superseded by complete and far more formal documents. To my mind, it was regarded as a record of an understanding, and as an earnest given by Rocca to Amoco to bind that understanding. It seems to have been sought by Mr. Nelson, the South Australian Retail Sales Manager, so that he could send it to Head Office with his report submitted to obtain approval to proceed with the new reseller outlet. The

In the Supreme Court of South Australia

No.14

Reasons for Judgment of Supreme Court of South Australia on Issues 1 and 2 of Wells J. 12th April 1974 (continued)

agreement alludes to a period of ten years, and to a rebate of 3 pence per gallon on all petrol delivered to the premises.

On 19 June 1964, after several talks had been held between the Roccas and Amoco officers, Amoco and Rocca executed an agreement for lease and sub-lease: it was in the form of a master document (the agreement itself) with annexures. The annexures comprised plans and specifications, an equipment and loan agreement, a form of head lease, and a form of sub-lease. This is an important document, and was the first to create formally binding legal relations. It is necessary to examine it in detail because counsel disagreed both as to its interpretation and as to its significance and operation.

After reciting that Rocca ("the lessor") was registered as the proprietor of the site described (as to which something will be said later in this judgment), and that the Lessor "desire[d] to lease to the Lessee [Amoco]" the land outlined on an annexed plan "together with the improvements now and hereafter to be erected thereon ("the demised premises")" "and also to lease the demised premises from the Lessee by way of under-lease" the agreement provided for the performance of important duties by each of the parties.

Rocca agreed, at its own expense (subject to certain exceptions), to erect a service station fit for immediate occupation before 31 March 1965, in accordance with attached plans and specifications. Amoco was, however, at its own expense, to carry out the painting of specified items. Amoco was given rights of entry to inspect and test workmanship, and to instal the equipment lent under the Equipment and Loan agreement. Clause 3 is central to the agreement and reads:

"3. If the service station shall be completed by the Lessor on or before the 31st day of March 1965 in accordance with the stipulations and conditions hereinbefore contained:-

(a) The Lessor forthwith upon the completion thereof will grant and the Lessee will accept and execute a Memorandum of Lease of the demised premises for the term of

fifteen years from the date of completion of the service station or the 31st day of March 1965 whichever shall be the earlier with a right of determining the lease at the expiration of the first ten years of the said lease by giving three calendar months' notice of its intention so to do at a yearly rental during the said term of ONE POUND (£1) plus a sum equal to 3d. per gallon of all petrol (not including napthas distillates kerosene and other like products not customarily used in motor vehicles) delivered by the Lessee to the demised premises for sale; and

(b) the Lessee will grant and the Lessor will accept and execute a Memorandum of Under-Lease of the demised premises for a term of fifteen years less one day but subject to the right of earlier determination by the Lessee as set out in sub -paragraph (a) of this Clause at the yearly rental during the said term of ONE POUND (£1).

The said Memorandum of Lease and Memorandum of Under-Lease shall be in the forms annexed hereto and marked "C" and "D" respectively with such modifications as the parties may agree upon or circumstances may render necessary".

It was suggested in argument that the language of sub-clause (a) of Clause 3 is equivocal, and that it is uncertain whether a right of early determination was vested in the Lessor, the Lessee, or both. The drafting could, no doubt, have been improved upon, but I am of the opinion that the sub-clause impeached is free from doubt. Grammatically, the verb "grant" is placed in a position of ascendency, and it seems to me that the sense of it governs both the passage "Memorandum of Lease of the demised premises" and the passage "with a right of determining the lease". But if there were any doubt as to the correct construction of that clause, it would be set at rest, in my opinion, by a consideration of annexure "C" (form of head lease). The form of lease contemplated contains no reference to a right in the Lessor to determine the lease before the expiration of its natural term, but clause 8 of that form reads:

In the Supreme Court of South Australia

No.14

Reasons for Judgment of Supreme Court of South Australia on Issues 1 and 2 of Wells J. 12th April 1972 (continued)

"8. In case the Lessee shall desire to determine the term hereby granted at the end of the first or years thereof and shall give to the Lessor not less than three months' notice in writing of such its desire then immediately on the expiration of such or years as the case may be the present demise shall cease and determine but without prejudice to the rights and remedies of either party against the other in respect of any antecedent claim or breach of covenant".

and part of sub-clause (h) of Clause 3 of the annexed form of sub-lease provides:

"... and if for any reason whatsoever the Lessor's tenure of the demised premises is determined or surrendered this lease and the term hereby created shall automatically determine simultaneously therewith without notice or further act of the Lessor or the Lessee and without liability on the part of the Lessor".

Even if Clause 3 of the agreement for lease were ambiguous, the combined effect of the two passages just quoted, when read (as they must be) with that agreement, demonstrate, in my opinion, that it is Amoco alone in whom the right of early determination is intended to be vested.

It is clear that, in addition to what was covenanted for in the agreement for lease, the parties had arrived at a collateral arrangement, which was implemented from time to time, that Amoco was to lay out considerable sums on fixtures and equipment as well as bear certain other initial costs. The working drawings of the proposed service station were prepared at Amoco's expense by its staff in close consultation with the Roccas. The service station was, on 10 December 1964, given a grand ceremonial opening consistent with what Amoco would no doubt describe as its corporate image, and in preparation for that opening Amoco had made a fairly substantial initial outlay. Pumps, underground tanks, a hoist, oil bar, air and water reels, and other accessory equipment were installed. The first two Amoco appropriations (which included over $2000 for work and labour) made before the December opening

amounted to $7130. Between then and 1969 there were further appropriations. The total of all appropriations came to $18,995.

The parties continued to work under the agreement for lease for almost two years. Although it was recited in that agreement that Rocca was the registered proprietor of the land, the recital was inaccurate: at the date of execution, and for over a year afterwards, the land was in the name of Pat Rocca. On 6 July 1965 there was produced for registration at the Lands Titles office a memorandum of transfer from Pat Rocca to Rocca: the recital was thereafter true to fact.

On 19 May 1966, a head lease and sub-lease were executed. The habendum of the lease was expressed to be for a term commencing on 30 November 1964 and ending on 30 November 1979; power was given to Amoco, though not to Rocca, to cancel the lease after the expiration of ten years. The sub-lease was for a term of fifteen years less one day from 30 November 1964. I reserve for later consideration the terms and conditions of the lease and sub-lease. I pause only to record the terms of Clause 18 of the head lease, to which reference has already been made and which was referred to in argument. That clause reads:

> "18. The Lessor and the Lessee agree that this Lease is not in consideration for or dependent or contingent in any manner upon any other contract, lease or agreement between them and that the term, rental or other provisions of said Lease are not intended by said parties to be tied in with any other such contract, lease or agreement, but on the contrary this Lease and all of its provisions are entirely and completely independent of any other transaction or relationship between the parties".

I shall deal with that clause later in this judgment.

In June 1966 a further dual dispensing pump was installed and the location of an existing pump was changed. This work was undertaken upon the initiative and at the request of Rocca but at Amoco's expense.

In the Supreme Court of South Australia

No.14

Reasons for Judgment of Supreme Court of South Australia on Issues 1 and 2 of Wells J. 12th April 1972 (continued)

Some six months later (in January 1967) Rocca sought financial contribution from Amoco towards the expense of sealing the crossover between the service station and Bridge Road. The total cost of this improvement was $400, of which Amoco paid half.

In October 1967, Amoco, at its own expense and at Rocca's request, repainted the front, sides and canopy columns of the service station; the cost was $356.

Towards the latter half of 1968, discussions were held between the Roccas and Amoco officers on the subject of further expansion. It was pointed out to Amoco that customer demand at the Rocca service station tended to be concentrated at certain peak periods; that neither the service facilities nor the holding area was enough to cope with the peak demand; and that there was repeated banking up of customers, who suffered inconvenience. There was, therefore, a danger that customers would be lost to the rival service station at the north end of Para Hills and to Ampol who, it had been learnt, was planning to build another service station a few hundred yards north of the Rocca site. Once again, Rocca took the initiative and sought help from Amoco. As the result of the discussions, the parties agreed that the lease and sub-lease would be extended for a further five years in consideration of Amoco's effecting certain important alterations to the service station and increasing the then rebate of 2½ cents per gallon on Rocca's petrol purchases to 4 cents per gallon during the extended period. Formal extensions of lease and under lease were executed on 15 September 1969 and duly registered.

In October 1969 Amoco at Rocca's request moved some tank vent pipes to enable Rocca to build a tyre store.

Reference has already been made in this judgment to Amoco's appropriations for the purpose of the alterations and improvements just referred to. In addition to the tangible property provided, it seems to me that Rocca received, as the result of its association with Amoco, certain intangible benefits. There was considerable dispute as to the value of those benefits, but it can at least

be said that in providing them Amoco was acting consistently with a shared intention that Amoco was to treat the Rocca service station much as it would one of its Company owned service stations. On 18 May 1964, Mr. Trevorrow (Amoco's State Branch Manager) wrote a letter to Mr. Rocca senior in which he gave expression to that intention. The letter reads:

> "Further to your previous discussions with Mr. L.J. Nelson, it is confirmed that it is the intention of our Company to include your proposed service station at Para Hills in the sales promotions and sales aid activities which we may introduce from time to time, after you commence trading.
>
> This assurance is given to you on the understanding that you intend to operate this site, with regard to driveway service, merchandising and lubrication procedure, in accordance with the procedures laid down by our Company which have been explained to you and agreed upon.
>
> We are looking forward to a long and happy association with you in your new venture at Para Hills".

On the whole, I think Amoco honoured its undertaking. The expense of a gala opening in December 1964 (which comprised, inter alia, a three day "give away programme", a dressing of the site and extensive advertising and promotion in the press and by handbills) was shared by Amoco. From time to time, competitions were run for the benefit of Company-owned service stations: after the Rocca business got under way it was included in these competitions, although, of course, other privately owned service stations were not. Amoco representatives kept closely in touch with the Roccas, and discussed common problems as and when necessary. There was some dispute as to whether Amoco included the Roccas in a course run for the former's retailers: I am satisfied that the Roccas did not in fact attend such a course, but I am also satisfied that they could have done so if they had known about it, and had wished to do so. The issue on this point, however, though relevant is not vital.

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During the year 1971, the Rocca family were starting to chafe under the restrictions imposed by the trade tie, which at that time purported to bind them till 1984. The Roccas accordingly approached the officers of Amoco, seeking a review of the terms of the agreement. It is enough to say, at this stage, that talks between them came to nothing, and the Roccas were left unsatisfied. Accordingly, they embarked on negotiations with representatives of I.O.C. Whether those negotiations were undertaken in order to prod Amoco into favourably considering the review sought for, or whether the Roccas gave up all ideas of a review, and decided to emancipate themselves forthwith, does not clearly appear; what is certain is that the Roccas passed the Rubicon on Friday, 12 November 1971. On that day, at about 4 p.m., a letter from Rocca was left at Amoco's offices. That letter, which was signed by Pat and Jim Rocca, read:

> "We the proprietors of Rocca Bros. Motor Engineering Co. Pty. Ltd., and the registered proprietors of the property on which that business is conducted at 450, Bridge Road, Para Hills West, require you to remove your pumps and illuminated sign from those premises.
>
> This must be done by 11 a.m. on Monday the 15th day of November 1971. In the event of you not complying with this notice, it is our intention to remove the pumps and sign ourselves and we may hold your company responsible for the cost of doing so".

On 15 November 1971, Amoco's solicitors replied saying it would take legal proceedings unless Rocca undertook not to act in breach of the underlease. Rocca failed to give any such undertaking, and early on Tuesday, 16 Novemner 1971, began to do what it had threatened to do; workmen continued with painting and the exchange of pumps all day. In the meantime, Amoco had issued its writ, and had taken out a summons for immediate relief, which was returnable before me at 3 p.m. By about 4 p.m. an interim injunction, effective forthwith, had been made, but it was by then too late to prevent most of the change-over from being completed because most of the painting had been

done, all five Amoco pumps had been removed, and five I.O.C. pumps had been erected in their place of which four had been connected. I have no doubt that Rocca deliberately speeded up the conversion in order to render the situation as difficult as possible for a Court to rectify by interlocutory orders. On the following day, however, interlocutory injunctions based upon mutual undertakings, went some way towards restoring the previous order of things, and the question for me now is whether orders for something like the full range of injunctions and declarations sought should be made, or whether the whole trade tie must be declared unenforceable.

The summary of events just concluded represents, in the main, facts not, or not greatly, in controversy. It will, in due course, become necessary to advert to some of the more controversial issues in the case, and to discuss a body of expert evidence so far not mentioned. Before turning to those issues and that evidence, however, it will be helpful to formulate the principles of law which must govern my decision in this matter.

There is, I think, no real dispute that if the covenants in the sub-lease are enforceable, then Rocca is in breach of several of them and, subject to counsel's submissions as to the form of order, the injunctions and declarations sought must issue. Certainly counsel for Rocca did not suggest otherwise. But fundamental to the resolution of the case is the so-called doctrine of restraint of trade, its development generally and, in particular, over the last decade, and its operation in the social, commercial and economic conditions of South Australia today. I therefore move to consider the case law on the subject.

A large number of decided cases were referred to by counsel, and their expositions during argument I found most helpful. Those parts of our unwritten law that derive their strength and structure from the deeply felt needs and tendencies of the community, and that are manifested in the broad principles and precepts of public policy, are to be found in a comparatively few leading judgments which, in their day, were acknowledged as supreme achievements of the judicial process. Each of those judgments is characterized by a

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masterly survey of past law, a discernment of the need to bring a host of precedents within the compass of a single formula, and an authoritative exposition of principle that not only represents the culmination of past developments but supplies the impetus for progress during succeeding generations. In the area of restraint of trade one would be safe in asserting that the first of such cases was Mitchell v. Reynolds (1711) 1 Peere Wms. 181 (compare the remarks of Lord Kenyon in 1793 in Davis V. Mason (1793) 5 T.R. 118, 120: 101 E.R.69, 70: and of Tindal C.J. in Horner v. Graves (1831) 7 Bing. 735, 741: 131 E.R. 284, 286). For the next two centuries there is not, I think, a single reported decision in which Mitchell v. Reynolds (supra) is not treated as the fons et origo of the law on the subject; other authorities were seen simply as applications of the principles enunciated by Lord Macclesfield. Nevertheless, pressures for change were inevitably felt from time to time; common law and equity developed along slightly different lines; the range of business interests and the facilities for travel and for communication increased enormously. In 1875 the Judicature Acts resolved conflicts between Common Law and Equity, and soon afterwards, in 1894, came the Nordenfelt case [1894] A.C. 535 in which Lord Macnaughten was responsible for the next exhaustive review of the authorities and a courageous generalization. A group of important House of Lords cases soon followed - Mason v. Provident Clothing and Supply Company Limited [1913] A.C. 724, the Adelaide Steamship case [1913] A.C. 781, the North Western Salt Co. case [1914] A.C.461, Morris v. Saxelby [1916] 1 A.C. 688 and the McEllestrim case [1919] A.C. 548 - but in none, I apprehend, did their Lordships depart from the principles formulated by Lord Macnaughten, though some elaboration was undertaken.

But the tempo of social, commercial and economical change had greatly quickened, new forms of restraint were devised, and were no sooner devised than they were challenged; and in 1968 another extensive review was felt to be necessary when the Esso case [1968] A.C. 269 reached the House of Lords. In particular, the relationship between the doctrine of restraint of trade (which is essentially part of the law of contract) and the land law led to an examination of many cases

(especially those concerning restrictive covenants) to which it had never seemed obvious that the doctrine had had any application. From reports of those cases, and from the authorities referred to and discussed in them, I have endeavoured to extract the principles by which I should be guided, and, without more, I set them forth below in a series of propositions.

1. There is a public policy as to freedom of trade and a public policy as to freedom of contract; it is the Court's task to reconcile the demands of those two policies where they conflict; Herbert Morris Ltd. v. Saxelby [1916] 1 A.C. 688, 716.

2. The public policy as to freedom of contract requires that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be enforced by courts of justice: Printing and Numerical Registering Co. v. Sampson (1875) L.R. 19 Eq. 462, 465; and English Hop Growers Ltd. v. Dering [1928] 2 K.B. 174,181.

3. The public policy as to freedom of trade ordains that it is in the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and in the interest of the community that every individual should have that freedom; accordingly, at common law, every member of the community is entitled to carry on any trade or business he chooses with other persons and in such manner as he thinks desirable in his own interests; and inasmuch as every right connotes an obligation, no one can lawfully interfere with another in the free exercise of his trade or business, unless there exist some just cause or excuse for such interference: Adelaide Steamship Company case [1913] A.C. 781, 793, 795; the Petrofina case [1966] 1 Ch 146, 180.

4. Before a contract can be impeached on the ground that it is contrary to public policy because one or more of its covenants are in unreasonable restraint of trade, it must clearly appear that there was vested in the

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covenantor, before the contract was concluded, a freedom of the appropriate kind capable of being infringed or burdened: the Esso case [1968] A.C. 269, 309.

5. In particular, a person buying or leasing land for the first time had no previous right to be there at all, and hence had no right to trade there; when he takes possession of that land subject to a negative restrictive covenant with respect to trading he gives up no right or freedom to trade which he previously had, and hence is unable to claim that that right or freedom has been unreasonably restrained: the Esso case, supra, at page 298.

6. Whether there are other circumstances to which the doctrine of restraint of trade does not apply has yet to be determined. (Mr. Jacobs (for Amoco) advanced an argument relative to this part of the law based on the particular facts of the case which I shall consider in detail later).

7. In general, unless a contract is vitiated by duress, fruad or mistake, its terms will be enforced, though unreasonable or even harsh or unconscionable; a contract that is in undue restraint of trade, however, is not unlawful or invalid and may, if there is no other impediment, be lawfully performed, but it will not be enforced: the Esso case, supra, at page 295.

8. The doctrine of restraint of trade is not confined in its application to particular classes of case: the categories of restraint of trade to which the Common Law applies its sanctions are not closed: the Esso case, supra, at pages 295, 306, 331.

9. But, at any given stage of a community's development, there are always a number of contracts or provisions of contracts embodying restraints of trade that, under contemporary conditions, have passed into accepted and normal currency of commercial or contractual or conveyancing relations and that, moulded by the pressures of negotiation, competition

and public opinion, may prima facie be presumed to be reasonable and hence enforceable; and, speaking generally, before a Court calls upon the relevant party to justify a contract or a provision of this kind, the Court must be persuaded that there is some special circumstance warranting the intervention of the Court: the Esso case, supra, page 332-3.

10. The question whether a restraint of trade is unreasonable and the contract in which it is to be found should be held unenforceable is ultimately one of public policy (the Esso case, supra, at page 324), and is a question for the Court, to be determined after construing the contract and considering the circumstances existing when it was made (the Adelaide Steamship Company case, supra, at page 797): accordingly, the question is not one of fact upon which evidence is admissible of the actual or probable consequences of performing the particular contract under review - ibid, page 797.

11. Among the circumstances fit for consideration by the Court are the structure, the growth and the organization of the industry when, and with respect to which, the impugned contract was made; the commercial advantages and disadvantages likely to be gained and suffered by the parties by virtue of the contract in general, and the restraint in particular; and the relative bargaining positions of the parties, each to each when the contract was concluded: the Petrofina case, supra, per Diplock L.J. passim; and the Esso case, supra, at page 300.

12. All restraints of trade of themselves, if there is no just cause or excuse for their existence, render the contract in which they are embodied (subject to rules of severence) unenforceable, but the impugned restriction will be justified if it is held by a Court to be reasonable - reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public: the Nordenfelt case, supra, at page 565.

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13. There are, in truth, not several criteria, but one criterion, namely, whether it is in the interests of the community that the restraint should, as between the parties, be held to be reasonable and enforceable; but in order to arrive at a conclusion as to reasonableness it has been found practical and convenient to apply three tests: first, whether the restraint, at the time it was imposed, went further than to afford adequate protection to the party in whose favour it was granted; second, whether it was, at that time, in the interests of the party restrained; and third, whether, if the restraint passes the first two tests, it was, at that time, contrary to the public interest: the Esso case, supra, at pages 300 and 324.

14. The doctrine of restraint of trade is one to be applied to factual situations with a broad and flexible rule of reason (the Esso case, supra, at page 331): subject to what is said about onus of proof in paragraph 15 below, the Court ought not to hold a contract unenforceable unless the defendant makes it plainly and obviously clear that the plaintiff's interest did not require the defendant's restriction, or that the public interest would be sacrificed if the proposed restraint were upheld. In particular, if the contract was reasonable at the time it was concluded, the Court is not bound to look out for improbable and extravagent contingencies in order to make it unenforceable: the Nordenfelt case, supra, at pages 566 and 574.

15. It appears to have been established - at all events as a general working rule - that, once the question of undue restraint of trade has been fairly raised, the onus of establishing that a restriction is no more than reasonable in the interests of the parties is on the person who seeks to rely on it; if that person discharges that onus, the onus of proving that the restriction is against the public interest generally lies on the party who impeaches the restriction: Morris v. Saxelby, supra, at pages 700, 706 and 708.

Before dealing with the cardinal issues in the case it will be convenient to turn now to certain subsidiary issues arising from the review of fact and law just completed.

Counsel for Rocca (Mr. Elliott) cross-examined at length and led a large body of testimony in order to show, if I understand his contentions aright, that the Roccas were the victims of over-reaching on the part of the Amoco officers with whom they dealt - more precisely, that, by suppressio veri and misrepresentation falling very little short of fraud, those officers deliberately allowed the Roccas to arrive at a total misunderstanding of the nature of the lease and sub-lease.

Mr. Rocca senior and his two sons united in deposing to their having been induced to believe that the term of the trade tie was not fifteen but ten years - perhaps less - and that the lease-sub-lease arrangement was only "Amoco's way of doing things" and was, in substance, no different from what is sometimes called the straight trade tie - in other words, the solus agreement in which the creation of interests in land find no place.

It must be borne steadily in mind, when endeavouring to decide how that evidence is to be used and what weight it can bear, that, so far as the correspondence, the testimony and the pleadings show, the Roccas have never once alleged fraud, misrepresentation, mistake, or duress, nor have they invoked the plea of non est factum or put forward an allegation that resembles that plea.

It did not distinctly appear - I should certainly not be prepared to find - that the Roccas or any of them were attempting to deceive the Court: every now and again each of them did seem to me to be protesting too much, but, on the whole, they were trying, I think, to give the best narration they could of the events leading up to the execution of the lease and sub-lease. But I formed the clear impression that, sub-consciously at all events, their several recollections were greatly coloured by their indignation at Amoco's refusal, in 1971, to rewrite the terms of the lease and sub-lease. It may well be that, in 1964, they did not pause and examine in detail the terms of the agreement for lease or, some two years later,

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the lease and sub-lease. But I find myself totally unpersuaded that the Roccas were incapable of looking after themselves, or that they failed to do so because they were bemused or misled by the tactics of the Amoco officers. What, to my mind, presents an insuperable obstacle to the claim that the Amoco officers imposed upon the Roccas is the evidence pointing clearly to the conclusion - and I so find - that before the agreement for lease was executed the Roccas were, to the knowledge of the Amoco officers, referred to a firm of solicitors for advice as to the undertaking upon which they were about to embark. I am willing to assume that the person who in fact advised the Roccas was a clerk in the solicitor's office. In my view, however, it is not the skill and assiduity with which legal advice was tendered to the Roccas that is significant, but the knowledge by Amoco officers that the Roccas were obtaining advice. The significance of that knowledge becomes apparent when the circumstances in which the agreement for lease was executed are considered. At that time, the Roccas and Amoco were negotiating for agreement as to the terms on which, on the one hand, Roccas would accept some sort of trade restriction in return for supplies of petroleum products from Amoco and, on the other hand, Amoco would, in return for a trade tie, furnish to the Roccas petroleum products for sale at the service station on favourable conditions that included a rebate. Each side had certain strengths but was also, to some extent, vulnerable. The Roccas had one in their team who had served his apprenticeship in a garage and was able to set up in the business of executing mechanical repairs; they had available a promising site; and they had a reasonable capital on which to draw: but they realized that it was, to all intents and purposes, impossible to set up a service station unless they could interest one of the major oil companies in becoming their supplier. The Company had substantial resources and a flexibility of approach, but realized that it could not expand unless, in the face of competition from other oil companies, it could find retailers willing to accept a trade tie in consideration of Amoco's becoming their sole supplier. In those circumstances, one would suppose that each side would be careful to avoid anything that could be regarded with suspicion or distrust by the other side. But, notwithstanding these facts, which are

not really in dispute, Mr. Elliott urged me to arrive at a finding which (stated bluntly) amounted to this: that notwithstanding that, in discussions between the Roccas and Amoco's officers, it was agreed that the initial term would be ten years, with a right of renewal, vested in each party, for a further five years, and that the trade agreement would be a straight trade tie, Amoco set out to impose upon the Roccas by producing a draft agreement for lease in which there was reference to a proposed term of fifteen years, and pursuant to which the effective trade tie would be embodied in covenants contained in a sub-lease that was part of a lease-sub-lease arrangement. Now, it is true that Mr. Nelson reported, in his submission dated 19 February 1964 to Amoco head office (referred to above), that "Rocca Bros. have agreed to us securing the site by way of a lease-lease-back agreement for a period of 10 years with a right of renewal for a further 5 years." It may be that the Amoco head office construed that as implying that the right of renewal was to be given to Amoco alone. But even if it was not so understood, the head office were not bound to accept the proposal in its entirety, or reject it in its entirety. It was open to Amoco to answer what was, in effect, an offer by a counter offer. There is no suggestion that Amoco snatched at a bargain. The evidence is incontrovertible that the draft agreement for lease was in the hands of the Roccas' solicitors. It is impossible to be certain whether all three Roccas attended the solicitor's office to discuss the draft; perhaps only one or two did. What is clear is that a letter dated 6 May 1964 was sent by the Roccas' solicitors to Amoco's solicitors drawing attention to certain matters in the draft in such a way as to establish conclusively, to my mind, that their client or clients had been consulted as to its contents. The lease-sub-lease arrangement adverted to in the agreement for lease and the term of years proposed for that arrangement were not secreted away. The most casual examination, whether by perusal or by listening to the draft's being read out loud, would have disclosed the lease-lease-back arrangement and the proposed term as outstanding features of the intended trade tie.

I do not know - I do not need to know - precisely what advice was asked for and what was given, but I have no hesitation in rejecting the

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contention that the Roccas were overreached, imposed on or misled, that they were the victims of sharp practice, or that Amoco snatched at a bargain. Indeed, from their demeanor and appearance in the box I conclude that the Roccas would have been quite a formidable team of negotiators. It is consistent with my conclusion, and inconsistent with the tenor of their complaint, that (as the evidence clearly shows) resentment of the fifteen year term, and of the lease-sub-lease arrangement, was not strongly felt until 1968, when Rocca applied to Amoco for assistance to withstand the challenge from the Ampol station, and the memorandum of extension was executed.

But the matter ought not, I think, to rest there. When the evidence of the Roccas as to the negotiations was first reached, Mr. Elliott told me he relied on a dictum of Lord Reid in the Esso case (supra) to justify its admissibility and to control the way in which it should be used. That dictum, which appears at page 300, runs:

> "Where two experienced traders are bargaining on equal terms and one has agreed to a restraint for reasons which seem good to him the court is in grave danger of stultifying itself if it says that it knows that trader's interest better than he does himself. But there may well be cases where, although the party to be restrained has deliberately accepted the main terms of the contract, he has been at a disadvantage as regards other terms: for example where a set of conditions has been incorporated which has not been the subject of negotiation - there the court may have greater freedom to hold them unreasonable".

I allowed Mr. Elliott to tender his evidence de bene esse, but having heard argument upon it and considered more fully Lord Reid's remarks and the context in which they were spoken, I am of the opinion that the evidence is of no great use in resolving the issues before me. It seems to me likely that Lord Reid was referring to certain situations giving rise to contracts of the kind commonly spoken of as contracts of adhesion: compare Diplock L.J. in the Petrofina case (supra) at page 181. If one party has such an ascendency over another that he is able virtually to dictate

terms to which the other party is, in the circumstances, obliged to submit, then I have no doubt that a Court will be quick to seize on, and to reject, restrictions that are deemed unreasonable. Courts have from time to time acknowledged directly or indirectly the relevance and weight of the unequal bargaining powers of the parties to a contract. No doubt Lord Moulton had such an inequality in mind when delivering himself of the well-known "pessimi exempli" dictum in Mason v. Provident Clothing and Supply Co. [1913] A.C. 724, 745, and it was manifestly the cause of the outrageous contract in Horwood v. Millar's Timber and Trading Company Limited [1917] 1 K.B. 305 which moved the Court of Appeal to such indignation (see, for example, the judgment of Scrutton L.J. at pages 316-319).

The premise that a person in a position of exceptional power carries exceptional responsibility is not, of course, new in our law. A business that, as it were, stands at the gateway of commerce is, according to the doctrines of the common law, affected with a public interest, and the owner of it must submit to having his charges limited to what is reasonable and no more, because his business ceases to be juris privati. This was stated by Hale L.C.J. some three hundred years ago in his work De Portibus Maris, 1 Harg. Law Tracts 78. Some of the material passages read:

> "... If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the king, ... or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be juris privati only; as if a man set out a street in new building on his own land, it is now no longer bare private interest,

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but is affected by a public interest". (The emphasis is mine).

This statement of the law by Lord Hale was cited with approval and acted on by Lord Kenyon in Bolt v. Skennett (1800) 8 T.R. 606: 101 E.R. 1572 and by Lord Ellenborough in Aldnutt v. Inglis 12 East 527: 104 E.R. 206 (cp. Iveagh v. Martin [1961] 1 Q.B. 234). The old common law learning is not directly applicable to the facts of this case, but it shows that for a long time our law has recognized that there may be circumstances where, because a business has, in fact or by law, achieved a monopolistic or quasi-monopolistic status, it must carry extra responsibility towards the public because it is affected with a public interest. That principle seems to me to furnish at least a useful analogy for present purposes, inasmuch as some businesses, because of a combination of favourable economic circumstances, are, in a sense, able to exact a toll from all who have dealings with them, in other words, to insist upon compliance with a set of contractual conditions the contents of which are determined by them alone, and are not the outcome of free chaffering. A company that is so placed, and that uses its position of dominance to exact covenants that restrict freedom of trade must, I think, expect to find its contracts scrutinized by courts in the manner adumbrated by Lord Reid.

The conclusions that I draw from Lord Reid's speech, and from the examination undertaken above of the bearing of the comparative bargaining powers of the parties on the issue of reasonableness of restraint are that the details of the course of bargaining between the parties are only of use insofar as they happen to reveal the economic and commercial strength of the parties, each to each, and the power that one may have to force upon the other acceptance of a given set of conditions.

The evidence in the case before me discloses that though, speaking generally, Amoco's commercial might dwarfed the Roccas', the Roccas held out successfully for many conditions that were regarded by them as important: they refused to negotiate on the basis that they would sell the subject land; they refused to consider a loan secured by a mortgage; they demanded and obtained treatment

similar to that meted out to company owned service stations; they negotiated a not inconsiderable rebate; and they persuaded Amoco to commit itself to what may be termed a substantial investment in the service station. The subsequent history, already narrated, of the commercial relationship between the parties confirms my assessment of how each party stood with respect to the other, because, for one reason or another, the Roccas were able to win the co-operation of Amoco on several occasions. I have formed the clear view from the testimony of the Roccas and the manner in which they gave it that, while it may be conceded that several of the covenants in the sub-lease would have proved onerous if they had been enforced to the letter, or occasion had arisen for such enforcement - and I shall have to consider them as a body later in this judgment - they were not originally challenged by the Roccas because at the time it did not seem worthwhile or expedient to do so, and not because they wanted to, but felt that an attempt would have been fruitless.

Accordingly, I shall bear in mind, when considering the reasonableness of the restraints, the respective bargaining powers of the two parties - viewing the Roccas as, in effect, one party and the Amoco officers (with the backing of their Company) as the other - as disclosed by the circumstances as a whole. I shall be guided (inter alia) by my understanding of Lord Reid's dictum cited by Mr. Elliott.

Three segments of evidence received special attention from counsel: the evidence led from Amoco officers (past and present) as to the method by which, in part at least, the proposals for entering into trade relations with Rocca were examined and analysed; the evidence of Dr. Moffat (a senior lecturer in Economics) who gave an appraisal of the first mentioned body of evidence; and the evidence of Professor Grant (a professor of Applied Economics) whose opinions were directed to the issue whether the terms of the lease and sub-lease, tested against economic laws and principles, were inimical to the public interest. The first two segments will be examined together now, the third when I move to consider the defendant's case later.

When a company such as Amoco is called on to

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determine whether to open a service station and lend it financial support, it will need to have before it adequate relevant information, and will be obliged to make commercial evaulations and important business decisions. I do not, however, conceive it to be a Court's ultimate function in a case such as this to judge, with the benefit of hindsight, whether a given company in such a position chose well or ill; whether its suppositions, hypotheses or conclusions were sound or unsound. A Court does not, for the purpose of administering the common law doctrine of restraint of trade, sit in judgement on the business acumen of this company or that company. Its task is to decide whether, in all the circumstances obtaining at the relevant time, the impugned covenants were reasonable in the light of the common law's objection to the sterilization of a person's capacity to work (see per Lord Pearce in the Esso case (supra) at page 328). It may be that some of the research carried out by the parties concerned provide useful evidence of relevant circumstances. But a Court should not, I apprehend, adopt the role of a business or economic or accountancy expert, though evidence from such experts may help it to perform its own function.

When, early in 1964, the Rocca proposal came before Amoco directors in Sydney they had for consideration an inter-office memorandum from Mr. Nelson (the Adelaide Sales Manager) containing a history of Rocca, a survey of the Para Hills area and its prospects, an estimation of sales over the next four years, a report of the Salisbury Council's intentions as to permits for building, an account of the Roccas' credit rating, and a set of recommendations - first, that there should be a rebate of three pence per gallon; second, that the site be secured by a lease-lease-back agreement for ten years with a right of renewal for five years; third, that certain equipment shown on a schedule, should be lent to Rocca. The memorandum was supported by the reseller Trading and Rebate agreement (referred to earlier), a report on the "new account", an area map, photographs of the proposed Rocca site and the competitive site, schedule of equipment to be lent, a layout plan of the service station, Certificate of Title, the tentative approval of the District Council of Salisbury, a letter requesting approval from mortgators for the intended lease and sub-lease, a plan of subdivision and an M.T.P.A. report. I have

referred to the contents of the inter-office memorandum in some detail to indicate the scope and character of the information furnished to Amoco. Amoco would naturally have had to evaluate not only the economic factors of the situation, but also many business risks that could not have been characterized as purely economic. In carrying out that evaluation, Amoco would, no doubt, have taken into account not only the special facts relevent to the Roccas, not only its South Australian experience, but also the experience gained by it in other States of the Commonwealth and, it may be, in America. The business risks would, to a greater or less degree, have been problemmatical, and the approach to decisions with respect to them would have been largely pragmatic. To take but one example at random; the state of development of the Para Hills community was, in 1964, far from advanced. That it would, at some time, in some or all of its areas, progress was likely; but when, how rapidly, and in what areas that progress would occur was largely speculative. To arrive at even a reliable appreciation of the total situation at Para Hills would, in my view, have required much wider and deeper research than Amoco were reasonably able to give it in the time available.

To assist in gauging the profitability of entering into an arrangement with the Roccas, the economics and planning section at Amoco headquarters prepared an economic survey referred to throughout the case as a determination (or calculation) of profitability index. It is not (for reasons to be given shortly) necessary for me closely to analyse the calculation or the method by which it was performed; it is, I think, sufficient for me to say that from certain primary statistical facts the officers examined the likely future cash flows from the project over the years following, and determined that at the end of a period of 15 years the project would yield 10.2% profitability (after tax). The profitability from other periods, of course, also came under review. The whole calculation took into account all items of original investment, a time-weighted average of gasoline sales (experience showed that estimated sales for the fourth year sufficiently approximated that average), an adjustment reflecting the ratio of premium petrol sales to regular petrol sales, annual cash return per U.S. gallon, and annual

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costs and expenses per U.S. gallon. As far as I am able to judge the primary statistical facts on which the calculation was based were reasonably included, and nothing was unreasonably excluded. I was not, of course, asked to find that those facts were justified by evidence or, indeed, to examine any material from which they were extracted. They were not seriously - at all events, in my view, not successfully - impugned, and it would be unfair to suppose that they represented arbitrary or fabricated information. But I assume no more than that, having regard to the source from which they came, and the use to which they were originally put, those facts were regarded by Amoco as sufficiently reliable for their purposes, and that they were, in fact, probably capable of being justified within reasonable limits of tolerance.

What was done with the profitability figure of 10.2% with respect to a period of fifteen years and how that figure was regarded were explained by Mr. Tibbles, Amoco's Economic and Planning Manager, whose evidence, speaking generally, I accept. The relevant passages from his testimony read:

"H.H. Q. Perhaps you can tell me in one sentence: I can see in a general way the method of calculation of all this up to date; you have got your 10.2 extended profitability index, what do you do with it?

XN: Q. I take it that the result is regarded as an evaluation of the project. A. This is economic evaluation done by the department. It would then be forwarded to the Marketing Department. In the normal course of events giving them an indication of the profitability of the project. The current practice, and I believe it was practice at that time, was that this together with other documentation was presented at a Committee Meeting consisting of the Managing Director, various other Directors, the Marketing Department and the Economic Planning Department. The project is then discussed, its various facets, the profitability is indicated and then the company makes a decision whether to proceed or not depending amongst other things on the profitability that the project shows.

Q. What, at that time, was regarded as acceptable profitability? Can you say that? A. I wasn't

there at the time. I believe there was some continuity within the Department and my understanding is the figure of 10 per cent was considered as the normal criteria of acceptance. There is a basis why I believe I can say this with some confidence. The object of determining about the PI rate of return is perhaps two fold. One to indicate whether a project should go or not, and this relates to the cost of capital that the company estimates, its estimated cost of capital and this was and has been assessed at approximately 10 per cent. If a project is not as great as 10 per cent then the company will not be able to raise funds to support such a project and therefore other things being equal should not venture into this deal. The second aspect of a PI rate of return is to compare it to other alternatives. If there are limited funds available it could be used and has been used to rank priorities for particular projects with limited capital. Those with a higher PI rate of return meriting more consideration than those with a lower PI rate of return.

.....

XN: Q. So that as this stands it was within what I might call the norm of acceptable propositions on this result. A. Yes.

Q. Taking all the existing figures and applying a ten year term instead of a 15 year term I think you have calculated approximately what the PI rate of return would be. A. Yes, I did a calculation. The figures were not identical because at ten years I made an assumption of recovery of some of the equipment. In this particular evaluation it was assumed that only working capital was recovered at the end of the project life so that I have added some figure back in and I believe that I have a number in front of me. As I recall it was approximately 8.6 per cent.
REFERS TO NOTE. That is correct."

The calculation was subjected to a careful scrutiny by Mr. Moffatt, the Lecturer in Economics. Mr. Moffatt was plainly competent, conscientious, and reliable. I have no hesitation in accepting

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his evidence; indeed, I do not think it was seriously contested. Cross-examination revealed one or two errors of a minor character, and here and there adjustments were made, but, in my view, they in no way detracted from the soundness of his central opinions, which were - basically - two; that two or three ingredients used in the company's calculation were critical inasmuch as a comparatively minor variation in one or more would cause a marked change in the profitability figure; and that, at all relevant points, Amoco had adopted figures that reflected an extremely cautious or conservative approach. By adopting other figures, which may roughly be said to represent a sanguine attitude, Mr. Moffatt demonstrated to my satisfaction that, with respect to the same period of fifteen years, a similar calculation could yield an estimated profitability figure of the order of 17%. It must be borne steadily in mind, however, when contrasting Mr. Moffatt's calculations and reasoning with Amoco's evaluation that the former took two weeks plus thinking time to produce his result, and it is hardly an exercise of my power to take judificial notice if I state that if Amoco (or any other company) was forced to ponder its decision on such matters for such a length of time its commercial operations would grind to a halt.

Mr. Moffatt did not for a moment suggest, far less contend, that he spoke otherwise than as a theoretical economist. I think I fairly summarize what he put to the Court in this way: he was saying (in effect), "The Company's calculations, given the basic statistical facts, are valid as far as they go, but they are conservative; if I were doing the job for Amoco I should treat the figures they used and produced as somewhere near the lowest end of an imaginary scale, and I should balance it by producing another calculation the results of which would be at the highest end, which would reflect a more hopeful approach. Both sets of figures would then go to the company executive as part of the material on which they would arrive at a business decision". I think Mr. Moffatt was right; I think the company's calculation was on the conservative side; there is no evidence that another or other similar calculations, based upon more optimistic primary figures, was or were considered by them. But a conclusion from that finding, taken alone or in conjunction

with the other relevant circumstances of the case, that the company was unreasonable in choosing a fifteen year period by no means inevitably follows. Putting the matter at its highest in favour of the defendant, I am of the opinion that the evidence as to the calculation of the profitability index is just another circumstance to be taken into account with many others in determining reasonableness under the principles relating to restraint of trade.

Both on principle and authority (see, for example, the Petrofina case, supra, at pages 167-168) the enforceability of the trade tie can only be rightly determined by judging the covenant embodying that tie in the light of the bearing upon it of all other covenants in the lease relative to the scope and manner of the use of the subject land, in general, and of the trading, in particular, permitted to, or demanded of, the covenantees. Before doing so in the case at bar, however, it is necessary to reach a conclusion upon an important submission made by Mr. Jacobs as to the actual operation of the other covenants. In the Esso case (supra) at page 303, Lord Reid, speaking of the provisions of "the Mustow Green agreement", said:

> "It is true that if some of the provisions were operated by the appellants in a manner which would be commercially unreasonable they might put the respondents in difficulties. But I think that a court must have regard to the fact that the appellants must act in such a way that they will be able to obtain renewals of the great majority of their very numerous ties, some of which will come to an end almost every week. If in such circumstances a garage owner chooses to rely on the commercial probity and good sense of the producer, I do not think that a court should hold his agreement unreasonable because it is legally capable of some misuse".

Mr. Jacobs placed great reliance on the likelihood that "commercial probity and good sense" would be exhibited by Amoco, and submitted that it would be wrong to assume that the conditions categorized by Mr. Elliott (in his address to me) as "unnecessary" or "unnecessarily stringent", would be enforced to the letter; those conditions (Mr. Jacobs contended) were only included in case Rocca acted irresponsibly

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or maliciously, and were not likely to be used to claim a forfeiture on technical grounds if Rocca was acting responsibly and in good faith in his running of the business. It was pointed out that Rocca on several occasions were in breach of clause 3(d) (by which Rocca was, in effect, forbidden to make permanent alterations without the prior written consent of Amoco) and Amoco gave not the slightest sign of wishing to invoke clause 4(i), the forfeiture clause. I am of the opinion that if a mitigating effect is to be imparted to the covenants of the sub-lease by attributing to Amoco commercial probity and good sense of the kind referred to by Lord Reid, a clear distinction must be drawn between those terms that directly and immediately control the day to day trading activities of Rocca (which primarily receive the protection of the restraint of trade doctrine), and those giving to Amoco an assurance that the service station will retain its character as an efficient Amoco outlet if Rocca fail as traders, or, without warning, seek to abandon the business. The former, to my mind, clearly lend character to the trade tie; the latter may be regarded more as ultimate safeguards to investment.

The clauses in the lease and the sub-lease (other than the term of each) to which some form of objection was taken by Mr. Elliott are as follows:

" MEMORANDUM OF UNDERLEASE

3. (d) Not to commit nor suffer waste to be committed upon additions to the buildings, structures and equipment now situated or structures, nor make any permanent alterations in or on the demised premises, and not to erect on said premises any buildings thereon, without first obtaining the written consent of the Lessor.

(e) Not to assign, mortgage or encumber this lease, or sublet or license or part with possession of the demised premises or any part thereof.

(g) To carry on and conduct in a proper manner in and upon the demised premises during all lawful trading hours the business of a petrol service station only and not to

use same for any other business or purpose whatsoever and not during the continuance of this lease to cease to carry on the said business without the prior written consent of the Lessor.

(i) To purchase at least 8000 gallons of petrol and at least 140 gallons of motor oil from the Lessor in every month during the term of this lease.

4(a) The Lessor agrees to sell to the Lessee and deliver to the demised premises at the Lessor's usual list prices to resellers at the time and place of delivery, the Lessee's entire requirements of petroleum products. Delivery shall be made in quantities of not less than the Lessee's average weekly requirements calculated over the immediately preceding six weeks. Deliveries may be made at any such time or times as the Lessor may in its absolute discretion determine and the Lessee shall pay the Lessor in cash for products delivered at the time of delivery of such products.

(b) In the event of the Lessor being unable for any reason whatsoever which is, in the sole opinion of the Lessor, beyond its control to supply petroleum products as required under this lease, the obligation to supply such petroleum products shall be suspended for the period during which the Lessor is unable so to supply and the Lessee shall be at liberty to supply himself from other sources with sufficient petroleum products but only until such time as the Lessor shall notify him that it is prepared to resume such supply and the Lessee shall not hold out or offer for sale such other petroleum products as the products of the Lessor.

(c) Nothing in this lease shall impose any obligation upon the Lessor to sell or supply any such petroleum products to the Lessee until he shall have paid for any such products already supplied to him by the Lessor and otherwise observed and performed the terms and conditions of this lease, nor shall a refusal on the part of the Lessor so to supply products be deemed a breach of this lease so

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as to release the Lessee from his obligations hereunder to purchase exclusively from the Lessor.

(h) That this lease and the rights of the Lessee hereunder are subject to all the terms and conditions of the lease under which the Lessor is entitled to the demised premises and the Lessee will not do or suffer to be done upon the demised premises any act, matter or thing which if done or suffered to be done by the Lessor would constitute a violation of any of the said terms and conditions and if for any reason whatsoever the Lessor's tenure of the demised premises is determined or surrendered, cancelled or otherwise terminated, this lease and the term hereby created shall automatically determine simultaneously therewithout without notice or further act of the Lessor or the Lessee and without any liability on the part of the Lessor.

.....

MEMORANDUM OF LEASE.

9. In case the Lessee shall desire to determine the term hereby granted at the end of the first ten years thereof, and shall give to the Lessor not less than three months' notice in writing of such its desire, then immediately on the expiration of such ten years the present demise shall cease and determine but without prejudice to the rights and remedies of either party against the other in respect of any antecedent claim or breach of covenant".

In general, Mr. Elliott categorized those clauses as unduly harsh, or as quite unnecessary, or as unduly restrictive or stringent. They were (he said) consistent with what he maintained had been the imposition practised by the Amoco officers on the Roccas, and when read, both singly and cumulatively, with the habendum of the sub-lease (which was of course linked with that of the head lease), led inexorably to the conclusion that the restriction on Rocca's freedom was unreasonable. I should perhaps mention here that counsel were at issue as to whether I ought to judge reasonableness of the length of the tie according to the circumstances

obtaining at the date of the agreement for lease (that is, 1964), or according to those obtaining at the date of the lease and sub-lease (that is, 1966). I shall defer the resolution of that issue till later: I content myself at this stage with saying that, whatever the contents of the impugned clauses, in my opinion they cannot be fairly and finally appreciated in total isolation.

Clause 3(d) appears to me to be not remarkable in any way. No doubt clauses as to restrictions on alterations vary in substance and form from draftsman to draftsman and according to individual needs, but there is nothing in the clause before me, in my opinion, that appears unreasonable or is symptommatic of harsh or oppressive treatment. Reference has already been made to several breaches of this clause by Rocca which were wholly disregarded by Amoco.

The covenant not to assign contained in clause 3(e) is absolute in form. Mr. Jacobs alluded in passing to the possibility that this covenant would, in any event, be read subject to some modification implied by virtue of the doctrines of equity. I am of the opinion that it would not be so modified. Equity's power to relieve against forfeiture is one thing (see Landlord and Tenant Act 1936, sec. 10) but I do not know of any statutory provision in force in South Australia similar to the sec. 19 of the United Kingdom Landlord and Tenant Act 1927 which provides that consent to assigning or underletting shall not be unreasonably withheld, or of any principle of equity that would have a similar operation. Notwithstanding, however, that this covenant cannot, strictly speaking, be read down in the manner contended for, it falls, in my opinion, into that class of covenants under which the covenantor could fairly rely upon the commercial probity and good sense of Amoco, and not into that class of covenants that directly and immediately control the Roccas' ordinary trading activities.

In his assault upon clause 3(g), Mr. Elliott fortified his argument by reference to passages in the Court of Appeal's judgments in the Petrofina case (supra) in which a similar clause attracted the strictures of their Lordships. For example Diplock L.J. at page 189 said:

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"Whether he trades at a loss or not, he undertakes to continue to carry on the business for the full duration of the agreement. Many factors may operate in the course of twelve years or more to make the respondent's trade at the filling station unprofitable. Better or cheaper products may be discovered. New or improved highways may divert the motor traffic from passing the filling station, other filling stations may be opened in the vicinity - even by the appellants themselves. The price at which the respondent must sell the appellants' products was fixed by them - a provision lawful in itself at the time the agreement was made. The agreement contained no provision for the price at which the respondent was to buy. No doubt there is an implication that the price was to be reasonable, but this is an illusory safeguard where the sale is not to an ultimate consumer but to a person who is himself a seller and has to cover his overhead expenses and running costs. Yet however great his losses, he is prohibited from giving the business up".

It must be conceded that some of his Lordship's misgivings as to the future of the Martin business are applicable, mutatis mutandis, to the case before me, and I must therefore bear them in mind. But there are not unimportant differences between the circumstances of the Petrofina case (supra) and those of this case. There is here no question of a total gallonage that must be sold before the term can be permitted to terminate; there is no provision entitling Amoco to dictate the price at which Rocca (as distinct from other Amoco outlets) may sell the Amoco products to the public; Amoco was (see clause 4(a)) obliged to sell its products to Rocca at Amoco's "usual list prices". Mr. Elliott submitted that the first part of the covenant had the effect of prohibiting the Roccas from adding to the service station a business or undertaking that may reasonably and usefully be run in conjunction with the service station, such as a cafe. No doubt the clause would preclude the operation of a business that had no real connection with the running of a service station, but I am far from convinced that the cafe would be prohibited. The modern service station frequently incorporates a small delicatessen or cafe designed to cater for transport drivers and other way-farers, and if the Roccas had wished to

follow suit I should need powerful authority to persuade me that such an extension was denied them.

It may, however, be asserted that if clause 3(g) were enforced to the letter, Rocca could be required to continue even if it was trading at a loss, or was crippled by strike action, or its members were incapacitated by illness or accident. No doubt, in certain circumstances, insistence upon such literal compliance would materially restrict freedom of trading, in that Rocca could be forced to persist in a business that was plainly a failure when a move into another trade, or the same trade elsewhere, could yield a satisfactory result. But there is something unreal, to my mind, in the spectacle, posed to me in argument, of a company with the interests and ramifications of Amoco, solemnly insisting on one of its service station proprietor's persevering in a business that was doomed. Even if the cause of the business's decline was the proprietor's unjustifiable neglect or default, I can see no commercial advantage in pursuing an empty claim on the covenant. Either the business could be salvaged without undue expense, or it could not. If it could, Amoco would doubtless salvage it; if it could not, it would be commercially pointless to do other than terminate the lease and start afresh. Be that as it may, it is, I apprehend, when weighing Mr. Elliott's submissions on this clause, important to bear in mind that clauses not unlike clause 3(g) have found their way into common use: for example, the Australian Encyclopaedia of Forms and Precedents (Volume 8 at page 297) carries as a standard clause for "Lease of shop, and premises for specific trade, tenant to carry on - ....." the following:

> "(9) To carry on specific trade - Not without the previous consent in writing of the landlord to carry on or suffer to be carried on in or upon the demised premises or any part thereof any trade or business whatsoever other than that of a [specified trade] and at all times of the year during the usual business hours of the locality to keep the demised premises open as a [first class] shop for carrying on the said business in its several branches and to use his best endeavours to develop extend and improve the said business

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and not to do or suffer to be done anything to injure the connexion or goodwill of such business". (The emphasis is mine).

The English counterpart of this authority contains the same clause in the same context. It seems to me that there is much to be said in favour of the view that this clause falls within Lord Wilberforce's description of a provision in a contract that "... under contemporary conditions, may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations", and, as such, to have "assumed a form which satisfies the test of public policy as understood by the courts at the time ....." (the Esso case, supra, at pages 332-333). I remind myself, however, that when I finally determine reasonableness I must weigh the circumstances (including all potentially relevant covenants) as a whole.

Clause 3(i) appears odd until its history is understood. When the agreement for lease was entered into, the form of sub-lease annexed to that agreement contained an identical clause except that instead of the figures "8000" and "140" there were blanks (and, indeed, someone had written the words "? not applicable" in pencil alongside the uncompleted clause in the margin). At that time, as Mr. Nelson's inter-office memorandum disclosed, the Adelaide based officers of Amoco had estimated sales for 1966 at the figure 80,000 gallons (Imp.) of petrol and 1400 gallons of motor oil. When the time came to execute the formal lease and sub-lease, it was found that sales had reached 96,000 gallons in the first year of operation. That achievement was in excess of the expectations of Amoco's Adelaide officers and greatly in excess of the expectations of those at Amoco headquarters who were concerned with the project. Accordingly, although it could with some justification have been said to be rather severe if 8000 gallons a month had in fact been the figure demanded of Rocca in 1964, it is common ground that no gallonage was stipulated for till 1966, and by then 8000 was not other than in accordance with reasonable expectations. It is, in my opinion, nothing to the point that the lease and sub-lease purport to be retrospective in their operation.

The objection to clause 4(a), in Mr. Elliott's

submission, was that it was unnecessary; and that, because there was no obligation on Amoco not to supply a competitor in the vicinity, it was (more especially when read with the other clauses) "very hard". Mr. Elliott also denounced the right given to Amoco to insist on immediate cash payments for deliveries. In my opinion, there is little force in those submissions. What Mr. Elliott contemplated is, no doubt, theoretically possible, but again I see something unreal in the suggestion that Amoco's would be disposed to use this covenant in conjunction with a deliberate fostering of another proprietor tied to Amoco who was near enough to constitute a serious threat to the Roccas' trade. If I am to judge the tendency of every impugned covenant, I am constrained to say that, given a contract that is not otherwise obnoxious to the doctrine of restraint of trade, any tendency that a covenant like 4(a) might have to frustrate trade in general, or Rocca's trade in particular, would be likely to be minimal. The power given to Amoco to insist on cash on delivery would again, in my view, be a protective measure, and most unlikely to be insisted against a responsible service station proprietor. Still, I shall not overlook this clause as part of the total picture.

The rights and duties given and imposed by clause 4(b) are by no means unusual, and clauses in like form have attracted the attention of Courts. Mr. Elliott drew my attention to a passage in Lord Pearce's speech in the Esso case, supra, at page 329 which reads:

> "If Esso had assured to the garage proprietor a supply of petrol at a reasonable price, come what may, in return for the garage proprietor selling only Esso petrol, it might be that the contract would have come within the normal incidents of a commercial transaction and not within the ambit of restraint of trade. But Esso did not do this. They hedged their liability around so that they had an absolute discretion in the event inter alia of a failure in their own sources of supply, whether or not Esso should have foreseen it, to withhold supplies from the garage proprietor (leaving him with the cheerless right in such a situation to seek

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supplies elsewhere); and then at a later stage it would seem, if and when they were prepared to supply him once more, they could hold him for the duration of the contract he owed them a contractual obligation to continue to keep his garage open (or find a successor who would do so on like terms). When these contracts are viewed as a whole the balance tilts in favour of regarding them as contracts which are in restraint of trade and which, therefore, can only be enforced if the restraint is reasonable".

I was asked by Mr. Elliott to apply Lord Pearce's remarks (with all necessary modifications) to clause 4(b), to denominate it as harsh and oppressive, and to treat it as strongly confirmatory of his contention that the covenants in the sub-lease, regarded cumulatively, were in unreasonable restraint of trade. I acknowledge the force of Mr. Elliott's arguments, and agree that if deliveries by Amoco are suspended, the right left to Rocca to obtain petroleum products from other sources would, in many situations, rightly be termed "cheerless". But I observe that even where the supplier could fix its own price (and I have already pointed out that under clause 4(a) Amoco had no such right), Lord Pearce expressed his conclusion about the impugned clause in somewhat guarded terms: "When these contracts are viewed as a whole" (he said) "the balance tilts in favour of regarding them as contracts which are in restraint of trade and which, therefore, can only be enforced if the restraint is reasonable". (The emphasis is mine). Probably the most forceful adverse criticism of the clause that can be made is that in the event of a failure in Amoco's own sources of supply that Amoco ought reasonably have foreseen, that company has, in effect, an uncontrolled discretion to withhold supplies from Rocca, leaving them the burdensome task, at short notice and for an indefinite period, of satisfying their needs elsewhere. It must be borne in mind, however, that if Amoco imposed on itself an absolute duty to keep supplies up to its numerous retail outlets, the prospect facing it, if its own supplies failed unexpectedly and through no fault of its own, could also be described as cheerless. The exigencies and uncertainties of international commerce are such that it is not surprising to find

Amoco reserving for itself ample protection from some of the consequences of such a failure. I am of the opinion that I shall give clause 4(b) its proper place in my determination by treating the trade tie as closely, though not decisively, affected by the operation of that clause.

Mr. Elliott asked me to regard clause 4(c) as linked in intention and operation with clause 4(a). I think he is right; but although those two provisions certainly enable Amoco to be strict as to payment of outstanding accounts, they do no more than reserve a right that, according to my understanding of commercial practice, most wholesalers in comparable positions would ordinarily reserve for themselves.

The significance of clause 4(h) was put by Mr. Elliott in this way: clause 4(h) should be read with clause 9 of the head lease; if Amoco exercised its right to determine the head lease after ten years, Amoco could set up a competitor "and Rocca would be left in jeopardy". I am not sure that I entirely follow this submission. If Amoco elected to determine the lease at the end of ten years, then, putting aside consequential questions, such as disputes over fixtures, the Rocca family would be left, with respect to the land, in the same position as they were in before 1964 - with the freehold numbered among its interest. Moreover, I find it difficult to reconcile a complaint that the trade tie is too long, with an assertion that a premature termination of that tie at the end of ten years would leave the Roccas abandoned.

Clause 9, of course, figures prominently in Mr. Elliott's broad submission that a fifteen year trade tie of the kind disclosed by the evidence, binding on Rocca for the full fifteen years, but binding on Amoco only for ten unless it elects to continue for the further five, is unnecessary and unfair, and hence unreasonable. That submission will be considered later in the judgment.

The last of the preliminary matters that fall for consideration at this stage is the question adverted to above, namely, whether the date at which relevance of circumstances is to be judged is the date of the execution, in 1966, of the lease

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and sub-lease or the date of the execution, in 1964, of the agreement for lease (or perhaps some even earlier date). Mr. Elliott put it that the date was 19 May 1966 (the date of execution of the lease and sub-lease) and could not conceivably be any other. Mr. Jacobs submitted that from a practical point of view the date should be the date of the agreement for lease, that is, 19 June 1964. It is perhaps confusing to state the question as entailing a simple choice between one date and another. There can be no doubt that the covenants relied on by Amoco and objected to by Rocca are contained in the sub-lease executed in 1966, and in one sense, therefore, there is no dount as to the fundamental date - it is 19 May 1966. But the circumstances to be considered by me are the circumstances relevant to the question of the reasonableness of the restrictions embodied in those covenants and there is, to my mind, nothing that bears more closely on the character of the lease and sub-lease of 1966 than the nature of the bargain struck in 1964, and incorporated into the agreement dated 19 June 1964 for lease and sub-lease. The plain commonsense of the matter is that the lease and sub-lease of May 1966 did no more than clothe in strict conveyancing form the arrangement entered into by the parties on 19 June 1964, and implemented by them in the meantime. The interdependence of the 1964 agreement and the two transactions is made even clearer by the provision in both lease and sub-lease that the term created by each is to commence on 30 November 1964, a date that was ten days before the official opening of the station erected in pursuance of clause 1 of the agreement of June 1964. And, of course, specific performance of the 1964 agreement could have been insisted on at any time.

In my opinion, the true view is this. Where covenants embodied in a written agreement are impugned as being in unreasonable restraint of trade, a court will ordinarily confine itself to ascertaining and weighing the relevant circumstances obtaining at or about the date when the agreement was executed. But a written agreement may not represent the beginning of a business relationship between the parties. It may be a renewal of a pre-existing agreement, written or unwritten; it may formally incorporate for the first time terms and conditions relative to a business undertaking which have been observed by the parties during the life

of the undertaking. In such cases, I apprehend, the purview of circumstances properly regarded as relevant for the purpose of judging the enforceability of the formal agreement will encompass those obtaining when the parties first embarked upon the undertaking. More especially will this be so if the later agreement purports to be retrospective to the commencement of the undertaking.

It follows, in my opinion, that I must examine all circumstances relevant to the trading venture, in which Amoco and the Roccas joined, that was initiated in the early months of 1964, became definitive in June 1964, and was placed upon a fully formal basis in May 1966. I ought not to exclude the events and circumstances of 1964 and 1965 simply because the lease and sub-lease happen to have been executed in the following year. At the same time, I should make it clear that I do not wholly equate the situation in the present case to that which would have existed if, from the beginning, the parties had operated under a formal lease and sub-lease without the intervening agreement for lease.

Mr. Jacob's first proposition on the primary issues related to the question whether the lease and sub-lease ought to take effect according to their tenor.

Mr. Elliott urged me to find that the two-fold conveyancing transaction of lease and sub-lease was a sham or device designed to place Rocca artificially in a disadvantageous position with respect to the land; because if the lease and sub-lease are to be read strictly (Mr. Elliott pointed out) Rocca had, for a moment of time, no right to the possession of the land and, in particular, had no right to trade there; and, accordingly, it could then be argued (pursuant to authorities referred to later in this judgment) that the doctrine of restraint of trade had no application. But, in Mr. Elliott's submission, the Court should construe the lease and sub-lease as in truth creating no more than a trade tie that is equivalent, for the purposes of applying the doctrine, to a straight solus agreement. To that submission Mr. Jacobs offered two replies. The first (one of fact) was that the lease-sub-lease formula was overt recognition of Amoco's having an

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interest in the site and business over and above the interest it would have had in Rocca's business if the parties had created a simple tie disengaged from any interest in land. It was (said Mr. Jacobs) indisputable that Amoco had helped to design the service station; had largely furnished and equipped it; had agreed (at Rocca's instance) to including the service station in Amoco promotions as though it were a company-owned service station; had given a substantially higher rebate than was customary; and had joined with Rocca in accepting a clear risk that the new venture would not succeed or would not succeed as well as was hoped. Not one of those facts or circumstances (which could be said to give commercial justification for seeking the security afforded by the lease-lease-back arrangements) was present in the Petrofina case, in the Esso case (both supra), or in Regent Oil Co. v. J.T.Leavesley Ltd. [1966] 2 A.E.R. 454. But, according to Mr. Jacobs, the matter does not rest there. He pointed out that none of the cases that are said to support the defendant's case deal with what Mr. Jacobs described as a grass roots situation. I use that phrase because that was the language used in argument, but I prefer to abandon it forthwith because it is too vague for proper analysis. The substance of the argument appears to be this: that none of the cases referred to were concerned with a business that, at the time when the impugned arrangement was made, had not been started; that, for all practical purposes, no venture could have been undertaken in this case without an arrangement of the kind disclosed by the evidence; that, in short, the parties had concurred in establishing the service station in the "Amoco image"; and that the whole course of events down to the confrontation last year supports the commonsense and justice of Amoco's claim that in return for what they contributed to the joint venture it was reasonably entitled to the sort of security represented by the lease-lease-back arrangement. Is it to be supposed (Mr. Jacobs rhetorically asked) that Amoco would have done what it did, especially in the 1968 extension deal, without the protection of a lease?

Those are, in my opinion, cogent, though not necessarily conclusive, arguments. It is not, of course, necessary to decide any such thing in this case, but I should have thought there was some force in the contention that provisions governing the

actual working (as distinct from covenants protecting the business from encroachments by a retiring partner) of a partnership or trading agreement, formed for the purpose of carrying out some joint venture, were right outside the scope of the doctrine of restraint of trade. Where two parties join forces in a commercial enterprise, bringing to it what they can of assets, labour and skill, it would, to my mind, smack almost of mala fides for one to say, some years later, when that enterprise had been successfully launched and established: "These terms are too hard on me; I am bound for too long; release me from the bargain that I negotiated and voluntarily assumed for the express purpose of this venture". Mr. Jacobs did not have to go as far as that (because the arrangements between Amoco and Rocca clearly did not make them partners or quasi-partners), and I do not expressly decide that the law is as posed above. But I do not hesitate to affirm that the willingness of two persons to combine in a business venture not previously in existence is a fact that clearly tends to establish the reasonableness - and hence the enforceability - of an agreement as to how they will conduct themselves while the venture is on foot.

Mr. Jacobs's second reply was based on the House of Lords decision in Regent Oil Co. Ltd. v. Strick [1966] A.C. 295. The central issue in that case (which was an income tax appeal) was whether Regent, as a dealer in oil, was entitled to deduct, in computing its profits for income tax purposes, certain premiums or lump sum payments which were calculated on the basis of estimated gallonage to be supplied to the retailer during the term of the retailer's lease. The retailers held under a lease-lease-back arrangement similar to that in the present case. Counsel for the appellant presented (inter alia) to their Lordships the following arguments (see pages 302 and 303):

> "(3) Form itself does not inhibit any court from deciding whether in all the circumstances of the case expenditure is made on revenue or capital account. It is to be remembered that this is a commercial case and therefore is not to be approached in the way a conveyancer might do. (4) On the facts considered in their context these lease and sublease

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agreements are nothing but a continuation of acknowledged and accepted trading methods, and therefore the payments are to be considered as ordinary marketing costs incidental to and part of the day-to-day business of selling. The lease and sublease are nothing more than a vehicle for the day-to-day transaction of paying rebate which the dealer would otherwise have had to pay. It cannot be said that the appellant was at any time interested in obtaining an interest in land. To adopt language to be found in earlier cases, these payments were "an outlay in a business": per Lord Sumner in John Smith and Son v. Moore; the agreements were 'ordinary commercial contracts made in the course of carrying on their trade; .... contracts for the disposal of their products': per Lord Macmillan in Van den Berghs Ltd. v. Clark".

It appears to me that the attack mounted against the arrangement in Strick's case was closely analagous to that pressed by Mr. Elliott. In each case the contention was that the lease-lease-back arrangement was no more than a vehicle or medium for giving effect to an agreement the true commercial character of which was different from its apparent conveyancing character. The answers given by their Lordships were unequivocal, and, for the purposes of the case before me, helpful. At page 312 Lord Reid said:

> "The essence of this new form of tie is that the garage owner grants to the oil company a lease of his premises (or at least of that part containing the petrol pumps and storage tanks) for the agreed lump sum payment plus a nominal rent of £1 per annum. On the same day the oil company then grants to the garage owner a sub-lease of the same premises for the period less three days, the consideration for the sublease being the same nominal rent of £1. But the sublease contains covenants or conditions whereby the garage owner is bound to buy the petrol which he needs for resale from that oil company and from no one else. The net result is that no money passes except the agreed lump sum and the oil company gets its tie. But this machinery is not a sham. There is no difference from the old form of a tie by

agreement so long as all goes well: but if the garage owner defaults this new form of tie gives the oil company a better way of enforcing its rights by bringing the sublease to an end and standing on its rights under the lease".

Lord Pearce's answer was to the same effect (page 336):

"This indication of a capital expenditure is not diminished by the argument that the wholesalers might have obtained the substance of what they wanted by a revenue payment and without purchasing an interest in the land. They did not do so. Instead they chose to enter into these particular arrangements which were not shams but genuine commercial transactions. They entered into them in order to satisfy insistent customers who were anxious to produce genuine transactions which would render the sums paid to them capital receipts in their hands. There seems no justification for regarding these transactions as other than in fact they were, or for treating them as anything but acquisitions of leases for premiums with the object of obtaining trade ties".

Lord Upjohn was even more explicit (page 340):

"He [counsel for the appellant] therefore invited your Lordships to say that this lease and sublease procedure was no more than a cloak which you must pierce when you would find that the true nature of the transaction was no more than a perfectly ordinary trading arrangement which provided a rebate over a long trading period. He submitted that it matters not whether the tie was for three months or twenty years. That was only a measure to fix the premium by an arithmetical calculation to work off the rebate estimated upon the anticipated gallonage over the agreed trading period.

My Lords, I am quite unable to accept these submissions. No one has suggested that the transaction of lease and sublease was a sham. It was a real transaction representing the

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realities of the situation which, in this buyer's market, some tough dealers were able to impose upon Regent in its anxiety to maintain, and no doubt if possible to expand, its sales of petrol in this country. Pausing there, I may add parenthetically that I cannot see any conceivable difference for any relevant purpose from an anxiety merely to preserve and maintain Regent's share of sales of petrol in this country and an anxiety to increase their sales if possible. It is all part of the fight to remain in the market. These transactions were not a mere cloak for a trading operation. Of course, in a sense the whole operation was intended to promote trade because Regent realised that exclusivity was the only way of remaining in the market and they must give a corresponding consideration to a dealer who was willing to buy exclusively the products of Regent for a period. So in the end both parties had their eyes solely upon trade. But that does not entitle the court to disregard the agreements that the parties have made with a view to carrying out their arrangements and it is impossible to disregard the four leases and to dismiss them as a mere cloak. It was not merely a matter of form. These transactions were as a matter of substance and reality forced upon Regent to their regret by these few tough dealers as the price of the exclusive tie. It is therefore necessary to examine those transactions to see whether Regent is entitled to succeed in its claim that these lump sum payments were in fact in the nature of a revenue expenditure being really in the nature of rebates".

I remind myself that reasoning by analogy always carries its own perils. But the situations in Strick's case and in the case before me are strikingly similar. Just as the dealers in Strick's case found themselves obliged to produce lease-lease-back arrangements to meet a genuine commercial need, so, in my view, did Amoco. It may, I think, fairly be said that the need to be met by Amoco was the need for greater security resulting from a greater contribution. In my opinion, therefore, the lease and the sub-lease are to be given their ordinary effect in law

according to their tenor. I should add that in reaching that conclusion I have placed no reliance on clause 18 of the head lease: it seems to me that it neither adds to, nor detracts from the intrinsic operation of the two documents.

Mr. Jacobs's next proposition followed naturally upon the establishment of the first. Given a lease and a sub-lease disengaged from each other, neither the sub-lease nor the lease is open to challenge, according to Mr. Jacobs, because the case of Cleveland Petroleum Co. Ltd. v. Dartstone Ltd. and anor. /1969/ 1 A.E.R. 201 and several weighty dicta in the Esso case, supra, show that in those circumstances the doctrine of restraint of trade has no application. To appreciate the strength of this argument it is necessary to examine closely the circumstances of the Cleveland Petroleum case, supra. The facts were these: A Mr. Sainsbury was the owner in fee simple of the County Oak Service Station. On 1 July 1960 three separate transactions were concluded: first Mr. Sainsbury (who at all material times wholly owned and controlled the company called County Oak Service Station Ltd.) granted a lease of the entire premises to Cleveland Petroleum Co. Ltd. for 25 years. A £50,000 premium was paid and a nominal rent of £10 a year was reserved. Second, the plaintiffs granted an under-lease of the same premises to County Oak Service Station Ltd., which was for a period of 25 years less 3 days at an amount of £20,000 a year. The under-lease contained covenants effecting the trade tie that was challenged. The under-lessees carried on the business of the service station for a while and then, with the consent of the plaintiffs, assigned to another company. Other assignments followed, and on 30 August 1968 the then under-lessees assigned the underlease to the defendant, Dartstone Ltd. Under the assignments, the defendant undertook to pay the rent and observe and perform all the covenants, agreements, and conditions on the part of the under-lessees contained in the under-lease. Mr. Gregory, who was the dominant shareholder in the defendant company, went surety for the company. On 30 September 1968, the defendants' solicitors wrote saying that they had been advised that the trade tie was void and proceedings followed, in the course of which an interim injunction was granted

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against the defendants. An appeal was taken to the Court of Appeal. The appeal was dismissed.

The outstanding feature of their Lordships' judgments is the absence from them of any attempt to determine the reasonableness of the covenants that were undoubtedly in restraint of trade. Further, it does not appear that their decision rested upon the defendant's having come to the subject land in the character of assignee as distinct from original lessee: I cannot believe that if the original sub-lease was regarded by their Lordships as in restraint of trade they would have excluded it from their consideration. In my opinion, it is difficult to avoid the conclusion that the Court of Appeal held that, in the circumstances, the doctrine of restraint of trade had no application whatsoever. But I find some difficulty in deciding what circumstances were regarded by the Court as material to their decision. One would have thought that nothing would have been simpler than to say: County Oak Service Station Ltd. (which, incidentally, is Mr. Sainsbury under another name) came to these premises by virtue of the sub-lease and of nothing else; dicta in the Esso case (supra) make it clear that to restrictive covenants contained in the sub-lease the doctrine of restraint of trade can have simply no application; and the final assignee can stand in no better position than the person in whose shoes he stands. But their Lordships, although in agreement as to the result, do not seem to have adopted that reasoning.

After stating the facts, Lord Denning began by adverting to the principles discussed in the Esso case (supra) pursuant to which a distinction may be drawn between a man who is already in possession of the land before he ties himself to an oil company, and a man who is out of possession and is let into it by an oil company. In the latter case, Lord Denning stated, the tie is good. He then referred to certain salient passages taken from the speeches in that case of Lord Reid (at page 298), Lord Morris (at page 309), and Lord Pearce (at page 325). He then continued:

> "It seems to me that in this court, on an interlocutory application, we should go by

those sayings in the House of Lords. We should hold that when a person takes possession of premises under a lease, not having been in possession previously; and on taking possession, he enters into a restrictive covenant tying him to take all his supplies from the lessor, prima facie, the tie is valid. It is not an unreasonable restraint of trade. Such was the case here, because County Oak Service Station, Ltd., did not, so far as we know, have possession before the underlease of 1st July 1960. So the tie in the original underlease was valid. In any case, however, it is to be observed that the defendants took possession themselves with their eyes open. They knew that there was this restrictive covenant on the land and nevertheless entered into this assignment binding themselves to it. Prima facie it is valid". (The emphasis is mine).

It is to be observed that the learned Master of the Rolls appears to have placed emphasis on the failure of the evidence to show that County Oak Service Station Ltd. had possession before the under-lease of 1 July 1960.

Russell L.J., in agreeing with Lord Denning, added a few brief remarks of his own:

"I would only add for myself that I am prepared to assume that County Oak Service Station, Ltd., was in fact running this garage before July 1960. If it was so doing, it plainly could only have been doing it under a bare licence from Mr. Sainsbury, who could not otherwise have granted the lease for petrol pumps and so forth to the plaintiffs. I agree that the injunction should stand". (The emphasis, again, is mine).

Salmon L.J. also agreed with Lord Denning, but in adding a qualification to his judgment, adverted again to the question whether the evidence showed that County Oak Service Station, Ltd., was carrying on business at the time of the lease and sub-lease. He said:

"I agree, but for my part I do so on the basis that as far as the evidence goes, there is

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nothing to show that the County Oak Service Station, Ltd., was carrying on business as a petrol filling station at the premises in question prior to 1st July 1960. On that basis it appears that its right to trade on the premises derives only from the lease which contains the restrictive covenant. It is unnecessary to express any concluded view as to what decision I might have reached had it been shown that this company, wholly owned and controlled by Mr. Sainsbury, had been carrying on business at the petrol filling station prior to 1st July 1960, or that these covenants were devised for the purpose of taking advantage of the dicta which were pronounced by the House of Lords in Esso Petroleum Co., Ltd. v. Harper's Garage (Stourport), Ltd." (Once more, the emphasis is mine).

I must confess that these judgments leave me distinctly puzzled. On the one hand, there seems to have been no doubt that County Oak Service Station, Ltd., was no more than the alter ego of the original tenant in fee simple of the service station, Mr. Sainsbury. If that is true, and if in restraint of trade questions, courts are anxious to base their judgments on commercial realities, there should have been not the slightest difficulty in "piercing the corporate veil" and holding that the sub-lessee in the person of Mr. Sainsbury was originally, in principle, and in fact, in full possession of the service station, and could not be said to have been "let into" possession of the service station by Cleveland Petroleum; but if the Court had reasoned in this way, there are at least grounds for supposing that they would have arrived at the opposite conclusion. Lord Denning, for instance, as I pointed out above, emphasises the importance of the company's not having had possession before the under-lease of July 1960. Russell L.J., in assuming that the company was, in fact, running the garage, based his assumption on a supposed "bare licence" from Mr. Sainsbury, which, in effect, was in no way different from the assumption adopted by Lord Denning. Salmon L.J. pointed out that there was no evidence that the company had been carrying on business at the premises in question in July 1960. The reasoning that appears to have been adopted by their Lordships

involves, it is true, an extreme example of the doctrine in Salomon v. Salomon [1897] A.C. 22 but I find it difficult to resist the conclusion that if Mr. Sainsbury had been the sub-lessee their Lordships would have found considerable difficulty in applying the reasoning of the House of Lords in Esso's case (supra). At the same time, it is surprising that the Court of Appeal rested its decision upon such a highly technical ground in an area of the law where technicalities are supposedly anathema.

Mr. Jacobs invited me to hold that the Cleveland Petroleum case (supra) authorised and required me to reach the conclusion that Rocca had been "let into possession by the oil company on the terms that [it was] to tie [itself] to that company" and that therefore the tie must be good, because it is outside the purview of the doctrine of restraint of trade. I have considerable sympathy with that submission because it does seem on the face of it to represent the commonsense of the basic commercial situation in the Cleveland Petroleum case (supra), but I have reluctantly concluded that it would need a higher authority than this Court to hold that the law was as he contended. In the face of the reservations expressed by their Lordships in the Cleveland Petroleum case (supra), I am unable to take this short cut to a conclusion which would, if adopted, resolve the issues in this case quickly and decisively. I must, I think, assume that Rocca was not, in the sense in which the House of Lords has used these words, "let into possession". It follows that, for the purposes of my examination of the circumstances, I must also assume that the doctrine of restraint of trade applies in the circumstances of this case. Mr. Jacobs meets this assumption with a further argument which, as I understand it, may be expressed thus: When their Lordships in the Esso case (supra) affirmed that a retailer who seeks to take a lease of land, knowing that the only lease available to him is a lease with a restriction, must take what is offered or seek a lease elsewhere, and that public policy does not excuse him from honouring such a contract if it is freely entered into (see the Esso case, supra, at page 309), they were stating, not an ultimate principle, but a rule derived from such a principle. The ultimate principle may (Mr. Jacobs submits) be put in this

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way: that where a person is desirous of setting himself up in a particular trade but has as yet no business in that trade, and faces a commercial situation in which it is not practicable for him even to commence trading as he wishes unless he accepts from one of the major oil companies an agreement containing a restriction of the kind under review in the present case, then (adopting the words of Lord Morris in the Esso case, supra, at page 309) in no rational sense can it be said that when he entered into that agreement he was entering into a contract that interfered with his individual liberty of action in trading, because, ex hypothesi, he was not in possession of any such liberty. In such a case, it could be said of that person, just as it was said by their Lordships of the person who accepted the lease with the restriction, that he does not fetter his future by parting with a freedom he possesses, but seeks to claim a greater freedom than that which he possesses or has arranged to acquire (compare Lord Morris in the Esso case, supra, at page 309). In brief, Mr. Jacobs maintained that a person who, if he wishes to commence trading, has no practicable alternative to accepting a lease with a restriction, is, in the contemplation of the law relating to the restraint of trade, in no different position from one who, having the same wish, has no practicable alternative to entering into an agreement with a trade tie.

The argument seems to me logical and attractive. It is reinforced by the recognition that none of the cases in which a trade tie was held by the Court to be too long, or in which a trade tie was made to pass the test of reasonableness, concerned a covenantee who bound himself to deal exclusively with an oil company by means of an agreement that marked his entry into the business of petrol retailer. If a given commercial undertaking is made possible only by a particular form of agreement then, assuming the respective bargaining powers of the parties not to be disproportionate, there would seem to be something strange about a public policy that would allow one party (if I may adapt the proverb invoked by Lord Macnaughten) to sup the milk, but reject the cow. Speaking only with the authority of a single Judge, I am inclined to the view that Mr. Jacobs's last argument, in substance, represents the law;

and, of course, if it does then - cadit quaestio. If I do not now endorse it unconditionally it is simply because possibly (I do not say probably) the clear-cut choice between obtaining a lease and being refused one is distinguishable from the choice between entering a trade with virtually no hope of success, and doing so with every hope of success: it is the word "virtually" that could conceivably make the difference. The circumstances providing the foundation for Mr. Jacobs's argument do, however, in my opinion, tend to the conclusion that the terms of the sub-lease should be held to be reasonable as between the parties; and I propose so to regard them. It seems to me that the reasoning that produces that tendency is closely allied with the reasoning discussed earlier in this judgment that is based upon the undertaking by the two parties of a joint trading venture. The absence of a previously existing service-station business is central to both.

In all the circumstances, therefore, it seems to me that although a formal decision in favour of Mr. Jacobs's last argument would end the matter, I ought, nevertheless, to assume that the doctrine of restraint of trade applies and to examine the lease, the sub-lease and all relevant circumstances, to determine (by posing the questions stated by Lord Reid in the Esso case supra, at page 300) whether the restraint went further than to afford adequate protection to Amoco; whether it can be justified as being in the interests of Rocca; and whether it must be held for any reason contrary to the public interest.

The submission from the plaintiff that Amoco, in 1964, had clear commercial interests fit for protection by covenants in restraint of trade was based upon matters and considerations similar to those propounded by Diplock L.J. in the Petrofina case, supra, at pages 188 and 189. His Lordship there said:

> "The interests of the appellants in selling as large a quantity of their petroleum products as they can is one which they have a right to have protected. The main ultimate consumers of their products are the public who purchase petroleum products at filling stations on the highways. The appellants have an interest in inducing owners and occupiers of filling

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stations to stock and sell their petroleum products to the public in as large quantities as possible. A filling station, like all retail distribution points from which the customer collects his own goods, has only a limited potential market dependent upon such factors as the number of motorists living in the vicinity, the amount of motor traffic on the road on which it is situated, and the nearness and location of other filling stations. At any given filling station a larger quantity of the appellants' products is in any event likely to be sold if theirs are the only petroleum products on sale than would be the case if the products of other oil companies were also on sale there. Furthermore, the economic incentive to the proprietor of the filling station to sell as much as he can of the appellants' petroleum products is reduced if he has alternative products of a similar kind to sell. All contracts whereby a filling station operator undertakes to purchase all his requirements of petroleum products from a particular oil company are not in my view necessarily unenforceable as being in restraint of trade. Whether they are or not depends on whether the restrictions imposed by the particular contract on the operators' liberty in the future to trade with consumers of petroleum products or with other oil companies do not exceed in duration or character what is reasonably necessary to promote the sale of the oil company's products".

Mr. Jacobs asked me to apply that passage, mutatis mutandis, to the case before me, and I am of the opinion that it would be reasonable to do so. I think, moreover, that Lord Denning's appraisal (in the same case at pages 173-174) of the task facing a late-comer to the world of one brand selling may also be regarded as generally applicable to Amoco's position in 1964 (except that it cannot be described as a "comparatively small company").

> "Now, if these solus agreements had been challenged ten or twelve years ago, when they were first introduced into this country and were few in number, I think the early ones might well have been held unreasonable

> because the company which introduced them was really seeking to protect itself from competition from its rivals and nothing else. But the solus agreements were not challenged then; and they have become so numerous that the picture is reversed. If a comparatively small company like Petrofina is to obtain an entry into the trade, it must be able to protect its own outlet for petrol lest it be swallowed up by its giant rivals; and a reasonable way of protecting its outlet is by a solus agreement. I hold, therefore, that it is not every solus agreement which is automatically bad. If it is to be held unreasonable, it must be for something more than the restriction on obtaining petrol supplies".

I draw the clear inference from the evidence of Pat Rocca in this case, that the Roccas were well aware that Amoco was new to the market, and was, on that account, likely to offer them a better deal than the well established oil companies.

But the matter does not rest there. I have already referred to the benefits received under the bargain with Amoco, and in particular the unusually high rebate. It is essential for me to weigh the consideration provided by each party in order to satisfy myself that the bargain was not lopsided. A factor in agreements of this kind that has previously led courts heavily to discount the benefits received by one party is the power of the other party to fix the prices at which the petroleum products were to be supplied to the dealer. The attitude of courts to such a power has been conveniently summarised by Jacobs J. in Tasman Dry Cleaners Pty. Ltd. v. Diamond [1960] N.S.W.R. 419, at 421-422:

> "I come then to Mr. Bannon's argument that the agreement in restraint of trade is bad because it would bind the defendant in circumstances where the reasonable return to the defendant from the contract, which reasonable return would be the circumstances in which the defendant agreed to enter into the restraint of trade, would be denied to the defendant. This, it is argued, could come about in the following way: it would be open to the

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plaintiff company to fix a current list of charges at such a figure that a return of 25 per cent thereof to the defendant would not be a return which would compensate the defendant for the restraint of her other trade into which she had entered. Mr. Bannon also referred to the fact that under clause 12 of the agreement no percentage was fixed for dyeing and repairing and he sought to apply the same argument in regard to that, namely, that there was no certainty of a return to the defendant of such degree that it was fair that she should enter into the restraint of trade. For these propositions he has referred me to the decision of the High Court in Peters American Delicacy Co. Ltd. v. Champion (1928) 41 C.L.R. 316; 34 A.L.R. 317. In that case it was held that the injunction should go against the respondent, who was the retail seller of ice-cream and who had entered into a contract not to purchase from other sources than the appellant. The matter dealt with concerned the prices and it is to be noted that it was not really argued in the case that a fluctuation in price at the discretion of one party to the contract would not be sufficient to bring down the validity of the restraint in regard to purchases from other sources. It was held in that case that in fact the price to be paid by the retailer was subject to constant re-negotiation so that at no stage could the retailer, the respondent, be bound to a contract in which the price was unsatisfactory to him and under which he could not obtain the supplies from another source. Although this point was not argued because of concessions made by the parties, nevertheless it was made clear by the decision of the majority of the court that it was of the view that a unilateral power to alter prices, coupled with an inability of the other party to be free to obtain supplies elsewhere if the prices so altered were not satisfactory to him, would be an unreasonable restraint of trade.

The same principle is implicit in the decision in Peters American Delicacy Co. Ltd. v. Patricia's Chocolates and Candies Pty. Ltd. (1947), 77 C.L.R. 574. It was there held that the restraint against purchasing ice-cream

from other sources was valid because it only subsisted as long as the Peters Company should be willing to supply ice-cream and so to supply under circumstances where the price was a negotiated one between the parties. Upon the construction adopted by the majority in the High Court, with Dixon J. (as he then was), dissenting upon this question of construction, the agreement meant that the respondent would be freed from the obligation not to purchase elsewhere if it could not obtain supplies from the appellant at a price which it was willing to pay".

(Compare what Diplock L.J. says on the same topic in the Petrofina case, supra, at page 189).

I have already pointed out that the sale by Amoco to Rocca of petroleum products was to be effected at the "Lessor's usual list prices" so that, in my opinion, it cannot be claimed that Amoco had, as Tasman Dry Cleaners had in the case just cited, a power unilaterally to determine what was payable at a figure that might not yield a reasonable return to the particular covenantor in question.

Bearing in mind the benefits that the parties received from the agreement, and the absence of any power in Amoco to vary the rebate from that inserted in the agreement, or to fix, otherwise than in accordance with clause 4(a) of the sub-lease, the prices at which Rocca was to get its supplies, I may, I think, now review briefly the circumstances most worthy of note in order to answer the first two of Lord Reid's questions posed above.

At the time when the parties first entered into binding legal relations (June 1964), there was no service station and no service station business in existence. For the Roccas, the chance of establishing a service station business that was capable of surviving and developing in the current commercial situation was almost non-existent, unless they were prepared to submit to a substantial trade tie. For Amoco (which had begun its operations only in 1962) the possibility of breaking into the trade of distributor of petroleum products was also virtually non-existent unless it

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could make it worthwhile for sufficient retailers to undertake the task of managing its outlets under the policy of one brand selling. The Roccas had the land, adequate skill, and some money. They steadfastly declined to conclude an arrangement pursuant to which they would be obliged to sell their land or to accept a direct loan. Amoco had the supplies, the organisation for distribution, the knowledge and experience of what was needed to set up a service station, and the power to help in numerous ways. The Roccas were new to the business; so (comparatively speaking) was Amoco; each needed the co-operation of the other. Amoco furnished substantial aid to the Roccas for the purpose of setting up the service station, both financially and in other ways, and relinquished its attempts to induce the Roccas to sell their land or to accept a direct loan; it undertook to pay to the Roccas a rebate that was materially higher than normal; it agreed to treat the new service station in the same way, speaking generally, as it was accustomed to treat its own company owned service stations; and, of course, it undertook to provide petroleum products. The Roccas acceded to an arrangement comprising a lease and sub-lease which gave Amoco some real security for its initial (and further) outlets, a trade tie for 15 years (determinable by the company in 10 years), and the terms and conditions of the lease and sub-lease that included the particular clauses analysed earlier in the judgment. There was no agreement for retail price maintenance, and no power reserved to the company to sell to the Roccas at prices other than its usual list prices. I am satisfied that Amoco and the Roccas joined in the arrangement in 1964 because it then seemed to them the best that could be arrived at in the circumstances for promoting their respective commercial interests. Before entering into that arrangement, it was necessary for both parties to evaluate substantial business risks. Each had a compelling interest to be right and not to be wrong as to the seriousness of those risks. Each had an interest in knowing its own business. If the criticism be levelled against Amoco that, in the light of subsequent events, it can be seen to have been over cautious, the reply can be offered that in 1968, when the Ampol service station was set up nearby, Rocca found itself in a situation of some difficulty, and if Amoco had not

then come to its aid might have entered upon distinctly lean times. But, in truth, I do not think that the questions posed can be directly answered by any survey of post-1966 events in retrospect. Essentially what I am required to do first is to decide whether the terms and conditions of the lease and sub-lease, paying particular regard to the circumstances obtaining in 1964 as well as those obtaining in 1966 can be regarded as reasonable as between the parties. I move, therefore, to weigh the last and most important fact - the length of the term, which ipso facto determines the length of the trade tie. Mr. Elliott unhesitatingly conceded that the period to be considered was fifteen, not twenty, years, and to my mind that concession was rightly made. What happened when the original term was extended can have little or no bearing on the reasonableness of the 1966 arrangement.

Now I desire at the outset most emphatically to reject the suggestion that there are, as it were, currently acceptable or standard terms that must be held proper for certain categories of agreement, and that any longer term automatically renders the trade tie unenforceable. Every case must depend on its own circumstances. That this is so clearly appears from a passage in the speech of Lord Wilberforce in the Esso case (supra). At page 340, his Lordship said:

> "For what the court is endeavouring to ascertain is <u>whether it is unreasonable for Esso in relation to Esso's interest in selling petrol on this location, to bind Harper's to it in the way that Harper's is bound for the period of the tie</u>; or whether, in the public interest of preserving liberty of action to Harper's Ltd., they ought not to be held in the fetters which they have accepted. There appears to me to be enough in the evidence to show that, on Esso's side, to secure a tie for this period was a legitimate commercial objective; and that as regards Harper's, no public policy objection existed against holding them so long bound. On this point it is I think legitimate to draw support from a number of decisions in various jurisdictions where restrictions of various kinds, over comparable periods, have been upheld (see

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British America Oil Co. v. Hey (5 years); Candies Proprietary Ltd. (3 years); Ampol Petroleum Ltd. v. Mutton (3 years); Shell Co. of S.A. Ltd. v. Gerran's Garage Ltd. (5 years); Great Eastern Oil Co. Ltd. v. Chafe (3 years). I should add that I must not be taken either as suggesting that the periods mentioned are maximum periods, or as expressing any opinion as to the validity f ties for periods intermediate between five years and 21 years such as, for example, existed in the Petrofina case (12 years)."

(The emphasis is mine).

Compare Lord Pearce at page 326.

Fifteen years is no doubt a substantial period. If this case had concerned an established service station business, and the terms negotiated by the parties did not reflect with some accuracy the circumstances and interests of Rocca and Amoco respectively, and did not represent, on the part of each, the provision of substantial consideration; if, in brief, the impugned arrangement did not provide the legal foundation for a new venture, jointly undertaken, in an area whose rate and pattern of development was uncertain to a marked degree, I might have regarded fifteen years as too long a period. On a mature consideration of all the circumstances of this particular case, however, I have come to the conclusion that the term is reasonable as between the parties, and that, subject to the question of the public interest generally, should be upheld.

Lord Reid's third question leads me to a consideration of Professor Grant's evidence. Mr. Elliott relied upon this evidence to make good Rocca's claim that the arrangement under review was unreasonable in that it was obnoxious to the public interest. It is, of course, beyond dispute that a conclusion in favour of the restriction in response to Lord Reid's first two questions is no obstacle to a conclusion adverse to the restriction in response to the third, and for that proposition Kores Manufacturing Co. Ltd. v. Kolok Manufacturing Co. Ltd. /1959/ Ch 108 is sufficient authority.

Professor Grant was an impressive witness who

obviously combined depth of learning with wide practical experience, and I accept him as an honest and able expert witness. Professor Grant's proposition, which he put to the Court with commendable simplicity, can, I think, be fairly summarised in this way: He began by stipulating that in putting forward his thesis he was looking at the general interests of the economy as a whole as opposed to the interest that any party to a solus marketing agreement might have. According to Professor Grant, he was assuming that a solus marketing agreement was a device having the effect of pre-empting a particular retail outlet to a specific supplier for the period of the agreement. The essential thing about such an agreement is that the retail outlet is denied or barred to other suppliers of petrol, and denied to future suppliers for at least the period of the agreement. It followed, said Professor Grant, that a solus marketing agreement has the effect of reducing competition, firstly, by the stabilising effect that it has on the market shares of existing wholesale suppliers, and, secondly, by restricting the access of potential suppliers to the retail market. He added that experience showed that the majority of solus marketing agreements are in fact renewed at the end of the tie period, so that where a retailer has once become tied to a particular company there is a very high probability that the tie will remain a permanent one so long as that particular outlet remains a profitable one and so long as those concerned are good operators. Professor Grant conceded, of course, that any new wholesaler, such as Amoco, may, of itself, account for only a relatively small share of the market in a particular geographical area, but the competing wholesale marketing companies, faced with a situation where some of their number impose trade ties on retail outlets, will naturally try to protect their own market situation by themselves undertaking or entering into tie agreements with resellers. The ultimate result, according to Professor Grant, is that all reseller outlets will become tied to existing oil companies. Turning his attention to the term of solus marketing agreements, Professor Grant asserted that if the term is relatively short -that is, not more than five years - then in any year there would be a certain percentage of the service station solus marketing agreemen ts coming up for renewal. The

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percentage could be of the order of 20%. While the general tendency would be for existing agreements to be renewed, there would still exist, in Professor Grant's opinion, some scope for those wholesalers who could profitably increase their market penetration by offering more favourable terms to resellers to do so. In other words, there would still be a certain degree of competition for retail outlets. If you go to the other extreme, Professor Grant continued, you find that the tendency is for oil marketing companies to have long term solus marketing agreements of the order of 15-20 years, and that they take every opportunity that presents itself to lengthen the unexpired term of agreements. In the result, the number of reseller outlets on the market for solus marketing arrangements within any one year will be correspondingly smaller. It followed, according to Professor Grant, that, given the normal tendency for the solus marketing arrangements to be renewed, it would become extremely difficult for a new oil marketing company to enter the market, bearing in mind that there are certain economics of scale in such an operation, and that it is difficult to start off in a small way unless the company knows it can grow rapidly to a reasonable size. In the result, therefore, the difficulty created by what Professor Grant described as long term solus marketing agreements is that a new wholesale marketing company, wishing to enter the market, would have to do so via the very expensive way of building its own retail outlets and licensing them to operate in a situation when there are probably already some unprofitable outlets in existence, and planning controls may restrict the erection of new service stations. In brief, Professor Grant maintained that the relatively long term solus marketing agreements would have the effect of restricting or restraining the entry of new firms into wholesale marketing, and thus reducing competition, and for this reason, as an economist, Professor Grant claimed that such agreements were not, in general, in the public interest.

Before weighing Professor Grant's evidence and determining whether, with its aid, Rocca has discharged the burden of demonstrating that the arrangement is contrary to public interest, I must lodge certain caveats as to the role played by the public interest and its twin brother public policy

in the judicial process.

In the leading case of Egerton v. Brownlow (1853) 4 H.L. cases 1 (10 E.R. 359) the question before the House was whether a condition subsequent, whose operation would depend on whether a beneficiary would acquire the title of Duke or Marquis of Bridgewater, was invalid. The condition was assailed as being contrary to the public interest, and their Lordships were called upon to consider the scope, purpose and justification of the law's appeal to public policy. At pages 195-198 (437-438) Lord Truro, after referring to the law's refusal to uphold dispositions of property that "have a tendency prejudicial to the public weal", and citing various authorities in support of the principle by which that refusal was dictated, turned his attention to more general matters. His disquisition furnishes assistance to me in my attempt to answer the last of Lord Reid's questions. His Lordship there said:

> "Some criticism has been made in relation to the language in which the principle has been expressed; exceptions have been made to the expression of 'public policy,' and it has been confounded with what may be called political policy; such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign States; with all which, as applied to the present subject, it has nothing whatever to do. Public policy, in relation to this question, is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.
>
> I shall, therefore, assume that a disposition of property by will, equally with a disposition in any other form, which has a tendency injurious to the public interest or good, the law will not uphold, and the law looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition: and if the law is to be practically applied,

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it cannot be administered with reference to the character of the individuals to whom the question may relate.

It has been said that this rule is too uncertain and vague to be capable of practical application by Judges, on account of the various opinions which may be entertained on the subject of public policy; but I think that that remark has no just foundation. There is no uncertainty in the rule that the law will not uphold dispositions of property and contracts which have a tendency prejudial to the public good; there, no doubt, will be occasionally difficulty in deciding whether a particular case is liable to the application of the principle; but there is the same difficulty in regard to the application of many other rules and principles admitted to be established law. The principle itself seems to me to be necessarily incident to every state governed by law. Judges who are charged with the duty of seeing that dispositions and transactions are not upheld and enforced which are contrary to the spirit of the law, must be presumed to take care not to apply the law to doubtful cases, so as unnecessarily to interfere with transactions which are the subject of judicial investigation. It is true, as I have before said, that remarks have been made upon particular cases as calculated to impugn the principle, when the point of doubt has really been whether the circumstances of the particular case brought it within the principle.

The facts, of which the tendency to affect the public interest is to be determined in this case, are these: a vast estate is given, and the continuance and permanency of the gift is sought to be made to depend upon the event of a certain title of peerage being obtained. The object, as declared, being to annex the estate to the title required; and the question is, has the hope of retaining an estate of £70,000 a year by the acquisition of the title referred to, any tendency to influence the devisee to a conduct which may be inconsistent with his public duty as a subject, and prejudicial to the public good? This question

relates to the tendency of the hope upon practical conduct.

Now, my Lords, the materials for arriving at a sound conclusion upon the question must be gathered from a consideration of the political and social state of the country". (The emphasis is mine).

In accordance with that authority I hold myself bound to act and abide by (inter alia) the following principles:

(1) I am not to investigate the question whether, in the circumstances proved by the evidence, some public mischief will or will not, in fact, occur.

(2) I am not to consider the character of the individuals to whom the arrangement as a whole in fact applied.

(3) I am to regard the general tendency of an arrangement of the kind proved.

In deliberating upon matters concerning the public interest I prefer to use Lord Truro's phrase "public policy in relation to the administration of the law", and to try to assess the relation that public policy has with "the tendency of [the impugned provision] upon practical conduct". It is apparent to me, from what Lord Truro said, that public policy in relation to the administration of the law cannot rest upon considerations and tendencies arising out of or observable in only one segment of the community. Lord Truro spoke of the political and social state of the country. I read that passage, in its context, as indicating that questions of public policy must be determined by considering the tendency that the impugned provision (or agreement or other conduct) has upon the practical conduct of those in the community capable of being affected by it paying due regard to every feature or section of that community's life at the relevant time. I should add, I think, that in speaking of "the ... political state of the country" his Lordship was not, I apprehend, referring to the political views of the government or of any sections of the public, but rather to the established customs, institutions, conventions

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and principles by which affairs of State (including the legislative process) are conducted. It follows, in my opinion, that while no feature or section must be overlooked, none can be allowed to attract exclusive attention. When considering the tendency of the fifteen year trade tie I must plainly have regard to its economic effects, but I cannot hold myself confined to these. Nor, in judging those effects, can I permit myself to become adherent to a particular economic policy. I must consider the immediate as well as the long term effects. I must bear in mind the commercial interests of all sections of the public concerned, and in particular the welfare and convenience of the motoring public and the motiring industry (including employers and employees). In general, insofar as they may be relevant, I must consider all tendencies that the arrangement, whilst in operation, may have to affect the established institutions upon which the safety, the welfare and the happiness of our society rests. I must never forget that our law is in favour of enforcing contracts, just as it is in favour of upholding freedom of trade.

Professor Grant deposed, in examination in chief, to the tendencies that long term solus agreements had to affect detrimentally the public interest. He was, of course, speaking as an economic expert, and identified the detrimental effect as a reduction in competition between wholesalers for existing and new outlets. He did not - he did not purport to - relate his argument to any other consequence of the solus agreements than the long term economic effects. Even if his evidence in chief were taken at face value he would have offered no opinions (and again I say he did not purport to do so) upon aspects of our community not directly linked with its economic life, and I should ordinarily have been left to consider them in conjunction with his evidence.

But, in any event, I have not been persuaded that his evidence can have a decisive effect upon economic considerations because, in my opinion, it must be read subject to two important qualifications that were disclosed by his cross-examination.

The first of those qualifications relates to

the renewal rate of short term agreements as compared with that of long term agreements. He had deposed in examination in chief that, speaking generally, there was a high renewal rate; he had also indicated that short term agreements (that is, of up to five years) were not inimical to the public interest. Cross-examination on this topic is recorded as follows:-

"Q. In speaking yesterday of the tendency of the solus agreements to reduce competition, am I right in thinking that you say that that result comes about because of the reduced turnover in sites, broadly speaking?
A. That is correct. There is a reduced availability of sites, a reduced opportunity to compete.

Q. I understood you to say that it has been a feature of the system that there is a tendency to renew the agreements?
A. That is correct.

Q. A strong tendency?
A. I am only going on second hand knowledge here, I have not the evidence, but my understanding is that 80% to 90% are automatically renewed.

Q. Looking firstly at the renewal rate of that order, whatever other explanations there may be for it, it does tend to suggest two things which I shall put to you; firstly, that so far as the wholesaler is concerned, the station is operating satisfactorily and maintaining a good turnover with the public.
A. It does.

Q. And so far as the retailer is concerned, it tends to suggest that he is satisfied with the relationship that he has with the wholesaler?
A. That is correct. I think the rate of acceptance of renewal is probably higher, the shorter the term of the agreement.

Q. That really leads me to what I wanted to ask you, because you have drawn in your evidence some distinction between a short term, say up to 5 years, and a longer term of

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say from 15 to 20 years?
A. Yes, or beyond.

Q. But so far as the effect upon turnover of sites is concerned and bearing in mind what you have just said, the greater the propensity to renew the short term agreements, the criticism, if it is a criticism, that you make of the system in that it tends to reduce competition, does not really depend on the length of the term at all.
A. That is not my submission. I have been submitting the opposite, that it does tend to depend on the length of the term.

Q. I am putting to you the contrary. The tendency to reduce competition arises because sites tend not to become available.
A. Yes.

Q. And the fact that they tend not to become available, occurs in a very large number of cases - that is right isn't it, irrespective of term. In other words, they are renewed.
A. Yes, I must assent to that.

Q. And indeed, the shorter term is renewed perhaps even more than the longer term.
A. That is probably correct.

Q. What I am putting to you, if that is the situation, the basis for your criticism is simply the non-availability of sites, irrespective of term?
A. No,it is the renewal of the term which is the important thing.

Q. I fail to understand what you said, if the sites don't become available, irrespective of term, the length of the term has really not much bearing.
A. Let us assume that 80% of agreements are in fact extended. If all agreements are 15 year agreements, then every year one fifteenth of the total number of agreements in existence will come up for renewal and 80% will be accepted. But if the agreements are 5 year agreements, then every year one third will come up for renewal, assuming that the same applies, 80% will be accepted, and you don't

get the same arithmetical answer in each case.

.....

Q. Would this be the situation, taking what Mr. Jacobs has put to you, that this tendency at all events to renew the shorter agreements, does encroach to some degree on your thesis that the market is pre-empted in this way?
A. I will concede that".

It seems to me, with all respect, that although Professor Grant was obviously right when he said " .... you don't get the same arithmetical answer in each case ....", nevertheless in the light of the practical experience of the renewal rate of short term agreements the answers that he speaks of, for practical purposes, would be markedly closer to one another than the answers based on purely arithmetical calculation. If this is so, then, putting the matter at its lowest, the tendency to reduce competition between the oil companies for retailers by no means increases in proportion to the rise in the term of the trade tie.

But the observations just made must be considered in conjunction with a further passage, taken from Professor Grant's cross-examination when some questions were being directed to him as to various types of solus market arrangements. The relevant passage reads:

"Q. Yes, the distribution side (that is, when a solus arrangement was being observed) was made easier, and you could organise transport and lay out capital assets in circumstances where you might not do it before.
A. Correct.

Q. Now those by and large carried corresponding benefits to the public?
A. If the cost reductions were in fact passed on, they could be beneficial to the public.

Q. So it carried, at all events, the capacity to benefit the public, and it depended whether those costs reductions reached the public as a price reduction?
A. Correct.

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Q. Then you say the next step is that there is a short tie, which you have defined as something in the nature of 3 to 5 years?
A. Yes.

Q. Now at this stage there is at all events the possibility of an undesirable side effect in that by pre-empting the market you lose a measure of competition of one kind?
A. Yes.

Q. But what you are saying is that a 3 to 5 year tie produces undesirable side effects to only a small degree, and probably an insignificant degree?
A. Well the side effects are counter-balanced by the advantages you get by the efficient operation of a solo marketing system.

Q. So what it comes to is this, that at some point of time theoretically the longer tie (you say) outweighs or tends to outweigh the benefits, whatever they are, derived from the solus tie?
A. Just one minor elaboration there. It outweighs the additional benefits from the efficient working of the solus market tie because we can go right back to the stage where there were no agreements between the reseller and the marketing company save that the marketing company states if you market my petrol you market only that petrol. It is a stipulation. That stipulation does produce much or most of the benefits of the solo marketing system. As you increase the tie, you may eliminate some of the changes that would take place. At the same time you are reducing the competition in the market by pre-empting the reseller status.

Q. Introducing a term in our solus agreement allows the benefits of solus marketing system, whatever that might be, to exist, but adds a further tendency, would you say, towards a lowering in efficiency.
A. It could lead in this direction, yes.

Q. It can lead in that direction?
A. Yes.

Q. In any given situation it becomes a question of fact, of degree. At what point this reduction in efficiency affects the public to such an extent that it wholly outweighs the benefits of the solus tie.
A. I think that is an excellent summing up, yes.

Q. But where you draw the line is something that I imagine economists could be very reluctant to attempt.
A. It is very difficult, because one is never sure whether one is in complete possession of all the facts of the situation.

Q. Primarily, what you say is the public interest that is affected in this way by introducing a tie is simply the reduction in efficiency with the comparative absence of stimulation from competition.
A. Yes.

Q. That is tied entirely to that?
A. Yes".

The modifications thus imported into Professor Grant's evidence leaves me uncertain of its precise effect in the case at bar. It would be safe to say that, in general, the longer the term of the trade tie the greater would be the tendency to reduce competition, but I see the difficulty of deciding at what point the reduction in efficiency outweighs the benefits derived from the solus tie as most formidable. I should be justified, I apprehend, in finding that there is at least a reasonable possibility that a fifteen year trade tie of the kind proved in this case is contrary to the public interest, but I find that I am far from persuaded that the restriction is, in fact, contrary to that interest. Moreover, I cannot overlook the need indicated by Egerton v. Brownlow (supra) to canvass other than purely economic questions of the kind mentioned above. In all the circumstances (especially those obtaining in 1964), and bearing in mind where the onus lies, I find that Rocca has not established that the arrangement in dispute in this case was, in 1966, contrary to the public interest.

I should now, I think, before turning to the

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the orders that ought to follow my decision, gather together the various strands running through this judgment which, perforce, has become regrettably long.

It has never been disputed that, taking the sub-lease at face value, Rocca has, at all material times, been in substantial breach of those covenants in it that constitute the trade tie. The parties have gone to trial on the substantial issues relating to restraint of trade and on those issues I am of the opinion that the plaintiff is entitled to succeed.

I should have been prepared to hold, if it was essential for the purpose of deciding the case, that the doctrine of restraint of trade had no application to the arrangement as it was concluded between the parties both because the lease and sub-lease must take effect according to their tenor and Rocca came to the service station by virtue of the sub-lease; alternatively, because the two parties were embarking on a new venture in circumstances in which Rocca were, for practical purposes, debarred from doing so unless Amoco joined in that venture. I have, however, assumed that the arrangement was subject to the doctrine of restraint of trade, and have proceeded accordingly. I take the view that the covenants embodying the trade tie were reasonable as between the parties, in the sense that the restrictions afforded no more than adequate protection to Amoco and were in the interests of Rocca, and that they have not been shown, for any reason, to be contrary to the public interest.

It follows that questions of severance do not arise, nor do any of the consequential questions referred to in the issues.

I accordingly answer the questions formulated in the issues as follows:

1. Although my opinion is otherwise, I have treated him as so entitled.

2. No.

3. Does not arise.

4. Does not arise.

5. Does not arise.

My conclusion is that the covenants in the sub-lease are enforceable and that Amoco is entitled, speaking generally, to the injunctions it claims. The plaintiff's costs must be taxed and paid by the defendant.

I shall hear counsel on the form of the orders.

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No. 15

No.15

Judgment of Supreme Court of South Australia 21st April 1972

JUDGMENT OF THE SUPREME COURT OF SOUTH AUSTRALIA

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1526 of 1971

BETWEEN:

AMOCO AUSTRALIA PTY. LIMITED Plaintiff

- and -

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. Defendant

JUDGMENT

BEFORE THE HONOURABLE MR. JUSTICE WELLS
FRIDAY THE 21ST DAY OF APRIL 1972

THIS ACTION coming on for trial before the Honourable Mr. Justice Wells on the 14th, 15th, 16th, 17th and 22nd days of December 1971 and the 1st, 2nd, 3rd, 4th and 7th days of February 1972 in the presence of Mr. Jacobs, Q.C. and Mr. Angel of Counsel for the plaintiff and Mr. Elliot, Q.C. and Mr. D.H. Wilson of Counsel for the defendant

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AND the Court having reserved judgment AND the same standing for judgment this day in the presence of Mr. Jacobs, Q.C. and Mr. Angel of Counsel for the plaintiff and Mr. Johnston, Q.C. and Mr. G. Hollidge of Counsel for the defendant IT IS THIS DAY ADJUDGED DECLARED AND ORDERED:-

1. THAT Memorandum of Underlease Registered No. 2775160 is not unenforceable by reason of it being in restraint of trade.

2. THAT Memorandum of Lease Registered No.2775159 is not unenforceable by reason of it being in restraint of trade.

3. THAT the defendant be restrained during the continuance of the said Memoranda of Lease and Underlease and any extension thereof from doing whether by itself, its agents, servants, workmen or otherwise howsoever the following acts or things or any of them, that is to say:-

(a) from acting on its notice in writing dated the 12th day of November 1971 and from removing or otherwise interfering with any of the plaintiff's pumps or the plaintiff's illuminated sign each and all situate on the land comprised in the said Memorandum of Lease being portion of the land comprised and described in Certificate of Title Register Book Volume 3337 Folio 148 pursuant to the said notice;

(b) from constructing or erecting or using or suffering to be constructed or erected or used any pumps or signs or other service station equipment whatsoever that relates to the trading in petroleum products (other than Castrol lubricants) in the said Memoranda of Lease and Underlease except in accordance with the terms thereof;

(c) from using or suffering to be used other than in accordance with the terms and provisions of the said Memoranda of Lease and Underlease any of the plaintiff's underground tanks or the plaintiff's air and water reel or other service station equipment whatsoever of the plaintiff presently situate in or on the land comprised in the said Memorandum of Lease;

(d) from making any permanent alterations in the demised premises comprised in the said Memorandum of Underlease connected with any operations or intended operations of I.O.C. Australia Pty. Ltd. or of any other wholesale supplier of petroleum products (other than the supplier of Castrol lubricants) in breach of the defendant's covenant contained in paragraph 3(d) of the said Memorandum of Underlease;

(e) from licensing or parting with possession of the demised premises comprised in the said Memorandum of Underlease to I.O.C. Australia Pty. Ltd. or to any other wholesale supplier of petroleum products connected with any operations or intended operations of I.O.C. Australia Pty. Ltd. or of any other wholesale supplier of petroleum products (other than the supplier of Castrol lubricants) in breach of the defendant's covenant contained in paragraph 3(e) of the said Memorandum of Underlease;

(f) from directly or indirectly, buying, receiving, using, selling, storing or disposing of or permitting to be bought, received, used, sold, stored or disposed of or at or upon the demised premises comprised in the said Memorandum of Underlease or any part thereof any petroleum products not actually purchased by the defendant from the plaintiff, in breach of the defendant's covenant contained in paragraph 3(h) of the said Memorandum of Underlease;

(g) from displaying in, on or outside the demised premises comprised in the said Memorandum of Underlease any advertisement or sign relating to trading in petroleum products (other than Castrol lubricants) supplied by a wholesale supplier which shall be objected to by the plaintiff, in breach of the defendant's covenant contained in paragraph 3(l) of the said Memorandum of Underlease.

4. THAT the defendant at its own expense:-

(a) do forthwith remove or cause to be removed

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Judgment of Supreme Court of South Australia 21st April 1972 (continued)

all pumps and equipment owned by or in the possession or power of I.O.C. Australia Pty. Ltd. presently erected or constructed or otherwise howsoever situate without the consent of the plaintiff on the land comprised in the said Memorandum of Lease;

(b) do reinstall, reinstate and restore or cause to be reinstalled, reinstated and restored on the land comprised in the said Memorandum of Lease pumps and equipment the property of the plaintiff which were installed on the said land immediately prior to the 15th day of November 1971.

5. THAT the plaintiff recover against the defendant such damages to be assessed as the plaintiff shall have sustained by reason of breaches by the defendant of the covenants of the said Memorandum of Underlease or by reason of conversion of or trespass to the goods or property of the plaintiff by the defendant.

6. THAT pursuant to Order 41 Rule 7 of the Supreme Court Rules all acts to be done in obedience of the orders hereby made shall be done within 11 days from this day.

7. THAT during the period mentioned in paragraph 6 hereof the Order herein of the Honourable Mr. Justice Wells made on the 18th day of November 1971 shall remain in full force and upon the expiration of the said period the said Order shall be discharged unless an appeal be duly instituted by the defendant to the High Court of Australia.

8. THAT pursuant to Order 70 Rule 6 of the High Court Rules the time within which an appeal may be brought to the High Court of Australia be extended to one calendar month from this day.

9. THAT pursuant to Order 58 Rule 8 of the Supreme Court Rules the time within which notice of appeal to the Full Court of this Court must be served be extended to one calendar month from this day.

10. THAT the defendant do pay to the plaintiff its costs of this action to be taxed.

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AND the parties may be at liberty to apply.

BY THE COURT

MASTER

If the within named Rocca Bros. Motor Engineering Co. Pty. Ltd. neglects to obey this judgment and the orders hereby made by the time herein limited, it will be liable to process of execution for the purpose of compelling it to obey such judgment and orders.

THIS JUDGMENT was obtained by Piper, Bakewell & Piper of 80 King William Street, Adelaide. Solicitors for the plaintiff.

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Reasons for Judgment of Bray C.J.

7th August 1972

No. 16

REASONS FOR JUDGMENT OF BRAY C.J.

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. v. AMOCO AUSTRALIA PTY. LIMITED

This is an appeal from a judgment of Wells J. dated the 21st April 1972, whereby he granted certain injunctions in an action brought by the respondent against the appellant in respect of breaches of the covenants contained in a memorandum of underlease from the respondent to the appellant and declared that the underlease was not unenforceable as being in restraint of trade.

I will adopt the phraseology of the learned judge and refer to the parties as 'Rocca' and 'Amoco', except where it is necessary to refer to individual members of the Rocca family or to distinguish the company from the individuals.

There is no real dispute about the primary facts. Indeed, a statement of agreed facts was

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handed in at the commencement of the trial.

In 1963 the Rocca family, the important members of which for the present purposes are the father and two sons, were minded to establish a service station at Para Hills. In that year the land in question at 450 Bridge Street, Para Hills West (hereinafter called 'the land') was purchased by Pat Rocca, one of the sons. Para Hills was then in the course of development, or, it might be more accurate to say, about to be developed. The Roccas had discussions with representatives of another oil company, but eventually they came to terms with Amoco, then just entering the South Australian field as a marketer of petroleum products. The only economically practicable way for Amoco to do this was to establish its own tied service stations. The appellant company was incorporated in February 1964, though the land in question was not transferred into its name until July 1965. Negotiations between the Roccas and Amoco proceeded. At some time, the learned judge thinks about the middle of February 1964, Rocca and Amoco signed an undated document described as a reseller trading and rebate agreement, but this was partly in blank and I agree with the learned judge that it has little significance except as part of the history.

On the 19th June 1964 an agreement for lease and underlease was executed by Rocca and Amoco. It recites erroneously that Rocca was at that date the registered proprietor of the land. Its terms, briefly stated, were as follows -

1. Rocca would, on or before the 31st March 1965, erect a service station on the land in accordance with specifications to be supplied by Amoco at its own cost and expense except that Amoco was to do certain painting.

2. An equipment loan agreement was to be executed between the parties in the form annexed to the agreement. I may say that that agreement was executed by Rocca - not apparently by Amoco - on the same day. It specifies the equipment to be lent and it is, I think, apparent from the two agreements that it was intended that Amoco should

install it on the land at its own cost, as in fact it did. The equipment loan agreement provided for cancellation by either party on 30 days notice.

3. If the service station should be completed on or before the 31st March 1965, Rocca would grant and Amoco would accept a lease of the land for 15 years from the date of completion or the 31st March 1965, whichever should be the earlier, "with a right of determining the lease at the expiration of the first ten years" at a yearly rental of £1, plus three pence a gallon for all petrol (not including certain allied products not customarily used in motor vehicles) delivered by Amoco to the premises for sale.

4. Amoco would grant and Rocca accept an underlease for the land for 15 years less one day, subject to the right of earlier determination by Amoco just mentioned, at the yearly rental of £1.

5. Both lease and underlease were to be in the forms annexed "with such modifications as the parties may agree upon or the circumstances may render necessary."

The forms are annexed to the agreement. They make it plain, if the words of the agreement themselves did not do it, that the right of determination at the end of the ten years was to be vested in Amoco only. There were, however, certain blanks in these documents. The amount of the rebate, as it is called, perhaps inaccurately, was left blank, but no doubt the figure of threepence per gallon could be supplied from the agreement. More importantly, perhaps, the form of underlease contains a clause providing for the purchase by the underlessee of minimum monthly quantities of petrol and oil. Not only were the blanks in this clause not filled in, but the clause itself was struck out of the form and the words 'Not applicable', preceded by a question mark, were written in the margin opposite the clause by someone - it does not clearly appear by whom.

The service station was duly erected at a cost to the Roccas of about £12,000, but they did much of the work themselves and obtained materials

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cheaply and it is contended for the appellant that it would have cost very much more to have had the service station built by a contractor.

The Amoco equipment was installed. Its cost, including the cost of the installation, was fixed by Amoco at $7,775, (I may add that in some of the documents American and not Australian, dollars and gallons are referred to, but I will use Australian figures throughout unless the contrary is stated). The service station was opened on the 10th December 1964. Besides the initial equipment, Amoco spent other moneys on the project. The total of these up to the end of 1969 is estimated at $18,995. There was, however, as I understand it, no contractual obligation to supply anything beyond the initial equipment.

On the 19th May 1966 the lease and underlease were executed. In each case the term was expressed to run from the 30th November 1964. These documents, except as hereinafter mentioned and with some formal alterations, correspond to the forms annexed to the agreement, with the blanks filled in to correspond with the agreement itself and the commencing date mentioned. It is important, however, to note that the minimum quantity clause in the underlease, although struck out in the form annexed to the agreement, binds Rocca to purchase at least 8,000 gallons of petrol and 140 gallons of motor oil from Amoco each month. It will be necessary to make more specific reference to some of the covenants in these documents later, but it should be stated now that one of them binds Rocca to purchase its supplies exclusively from Amoco.

It should be added also that the underlease seems to take in at least some of the items covered by the equipment loan agreement. No point, however, was made on any discrepancy between the lists in the two documents and I am prepared to assume that the underlease covers and protects equipment, the value of which, including the cost of installation, amounted in June 1964 to $7,775.

Things went well until 1968. It was found then that the facilities and the holding area were not enough to deal swiftly with customers at peak periods and a rival service station in the area was mooted. Rocca approached Amoco for help.

The lease and sublease were extended for a further 5 years in consideration of Amoco effecting certain alterations to the service station and increasing the rebate from 2.5 cents (threepence) per gallon to 4 cents per gallon. The extensions were executed on the 15th September 1969.

It was found by the learned judge that, in addition to its covenanted obligations, Amoco treated Rocca as if it were a company owned station rather than a privately owned station by providing it with certain benefits in the way of sales promotions, sales aids, advertising etc.

In 1971 Rocca was, as the learned judge finds, "starting to chafe under the restrictions imposed by the trade tie". It tried unsuccessfully to re-negotiate the terms of the underlease. It then entered into negotiations with I.O.C., another oil company. On the 12th November 1971 Rocca sent a letter to Amoco requiring the latter to remove its pumps and signs from the premises by 11 a.m. on the 15th November 1971 and stating that in default Rocca would remove these articles itself. Amoco did not comply. Rocca began the removal: simultaneously Amoco commenced these proceedings. Interlocutory injunctions were granted holding the status quo in many respects and the order under appeal contains the appropriate injunctions to restrain breaches of the underlease on the assumption of its validity.

Owing to the urgency of the matter pleadings were dispensed with and it was directed that the action should proceed on the basis of agreed issues as under -

"1. Is the defendant entitled to assert that the covenants contained in Memorandum of Underlease No. 2775160 or any of them are in restraint of trade, and unenforceable?

2. Are the covenants contained in Memorandum of Underlease No. 2775160 or any of them an unreasonable restraint of trade and unenforceable?

3. If the covenants in Memorandum of Underlease No. 2775160 or any of them are unenforceable is the whole of the said Memorandum of Underlease void?

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4. If the said Memorandum of Underlease is void is Memorandum of Lease No. 2775159 also void?

5. All questions of consequential relief for either party arising from the resolution of the above issues shall be deferred for later consideration."

The learned judge, as I understand him, answered question 1 in the affirmative. It might be more accurate to say that he assumed that it should be so answered. At any rate, he certainly answered question 2 in the negative and that made it unnecessary for him to consider any further questions. It was agreed at the bar before us that if we disagreed with him, or, more precisely, if we thought that the proper answers to the first two questions were 'Yes' in each case, we should announce our conclusions without making any formal order and leave it to the parties to consider what should be done about the last three issues.

During the hearing it was argued on behalf of Rocca that it had been overreached in the course of the negotiations that the whole lease/sublease machinery was a sham, that Rocca was under the impression at the time the agreement was executed, and presumably also at the time the lease and sublease were executed, that the term was for ten years, not fifteen, and that Rocca understood that the lease/sublease apparatus was merely Amoco's way of framing a contract for the sale of petrol with a tie and a rebate. The learned judge found against these contentions and they were not proceeded with before us.

Similarly, Mr. Fisher for Rocca conceded that the proper date at which to consider the reasonableness of the restraint was June 1964 when the agreement was executed.

The issues before us are thus now reduced to three:-

1. Is the transaction one to which the doctrine of restraint of trade applies at all?

2. If it is, were the restraints imposed by the underlease reasonable in the interests of the parties, a phrase which is susceptible of

various interpretations to which I refer later.

3. If they were, were they reasonable with reference to the public interest?

It was agreed, and it is trite law, that the onus is on the covenantee - i.e. here Amoco - to prove that a restraint of trade is reasonable in the interests of the parties: but that, if it succeeds in doing that, then the onus is on the covenantor - i.e. here Rocca - to prove that the restraint is unreasonable in the public interest.

The case concerns what recently accepted terminology describes as a solus agreement - i.e. an agreement binding a retailer to take all his supplies from one source. The application of the general principles of the law relating to restraint of trade to such agreements in relation to the retailing of petrol has received much attention in England in the last six years. In Petrofina (Gt. Britain) Ltd. v. Martin & Anor. 1966 Ch. 146 Diplock L.J., as he then was, said at pp.179-180:

> "'Solus' agreements are contracts of a type introduced into this country during the last fifteen years .... Solus agreements, generally associated with a loan or mortgage, have come before the courts on several occasions in recent years. The question whether they were unenforceable as being in restraint of trade was not raised in any of these cases except on an interlocutory appeal ... where the matter was not decided ... The question, therefore, comes before us untrammelled by any direct authority, except" ... (the decision of the single judge in the instant case and of a single judge in another case subsequently referred to, the Esso case, which ultimately went to the House of Lords).

But we are not, in South Australia in 1972, in that untrammelled state. There is the decision of the Court of Appeal in the Petrofina case itself, there is the decision of the House of Lords in Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. 1968 A.C. 269, and the decision of the Court of Appeal in Cleveland Petroleum Co. Ltd. v. Dartstone Ltd. & Anor. 1969 1 All E.R. 201. These three

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decisions throw considerable light on the problems involved in the present case. They focus attention on the crucial factors involved in the solution of these problems. They raise some questions which do not, in my view, permit at the moment of authoritative answers. They have been the subject of learned discussion and controversy, see, for example, Heydon, The Restraint of Trade Doctrine at pp.53-77. It is, of course, necessary to bear in mind in the background a much wider range of authorities, both in time and space, but, in my view, the fate of this appeal must largely turn on the views this court takes of the proper application of the rationes decidendi of those three cases to the present facts. I do not expect that the decision of this court will provide more than a temporary authority in this field and I am anxious to express myself no more widely than is necessary for the purposes in hand. Before I begin my own analysis, however, I should pay tribute to the thoroughness of the exposition of the facts and the law, and of the application of the latter to the former, in the judgment of the learned trial judge, a tribute the force of which is in no way discounted by the fact that I have the misfortune to differ fron some of his conclusions. The argument, too, before us was thorough and able on each side and I acknowledge my indebtedness to both senior counsel.

The first question is whether the covenants in the underlease are removed altogether from the operation of the law about restraint of trade because they are contained in a lease and not in a mere contract. The learned judge, as I read his reasons for judgment, thought that the respondent's arguments on this question were formidable and attractive, but, nevertheless, for the purpose of his judgment he was prepared to assume that the law relating to restraint of trade did apply to this transaction. However, the point was taken strongly before us by Mr. Jacobs for the respondent and we must deal with it.

It is, I think, clear that the mere fact that a transaction restrains trade on a particular piece of land, as opposed to the creation of a personal restraint operating on a covenantee generally or within a certain geographical locality, cannot take the transaction outside the operation of the

doctrine, see the Petrofina case per Diplock L.J. at pp.185-6, the Esso case per Lord Reid at pp. 297-8, per Lord Morris of Borth-y-Gest at p.311, Lord Hodson at pp.316-7, Lord Pearce at p.325. But in the latter case three of their Lordships did express the view that there can be no question of unenforceability for restraint of trade if the party restrained gives up no freedom which he formerly had, as in the case of a man who buys or leases land subject to a covenant restraining his trading activities on that land. In such a case, it is said, he is not relinquishing any freedom which he previously had, for he had previously no right to go on to the land at all, let alone to trade on it, see per Lord Reid at p.298, Lord Morris at p.309, Lord Pearce at p.325. Lord Hodson, it seems to me, was doubtful about the generality of this proposition, see at pp.316-7 and at p.319, and Lord Wilberforce, as I read his speech, rejected it and preferred a different test.

He thought that certain transactions 'may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations' (p.333), If so, there might be a strong prima facie case that such transactions do not offend against public policy. Nevertheless his Lordship said (p.333):

> "Absolute exemption for (query 'from'?) restriction or regulation is never obtained: circumstances, social or economic, may have altered, since they obtained acceptance, in such a way as to call for a fresh examination: there may be some exorbitance or special feature in the individual contract which takes it out of the accepted category: but the court must be persuaded of this before it calls upon the relevant party to justify a contract of this kind."

In the Esso case itself there was no question of the sale or lease of any land. There were two separate restraints under consideration in contracts relating to two separate garages, one for 4½ years and one for 21 years, but the one for 21 years was supported by a mortgage. Their Lordships held the first restraint valid and the second unenforceable. The fact that some of the objectionable covenants were contained in a mortgage did not save them.

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In one sense, therefore, it seems to me that what Lord Reid, Lord Morris and Lord Pearce said about covenants connected with the sale or lease of land was obiter.

I must confess, if I may say so with respect, that if the matter were res integra for me, I would be much impressed with the view of Lord Wilberforce. It does seem difficult, to my mind, to see how a public policy against restraint of trade can be ousted by the form of the transaction. I can understand a conclusion that a particular transaction was not contrary to public policy because, inter alia, it did not deprive the covenantor of any freedom he previously possessed. I find it, however, difficult to reach the conclusion that public policy in relation to trade, granted the general existence of such a public policy, can never arise for consideration at all because of the technical form of the document containing the restraint. It is, perhaps, noteworthy that in Pharmaceutical Society of Great Britain v. Dickson 1970 A.C. 403 at p.440 Lord Wilberforce could say, with reference to the Esso case:

> "Recently this House restated this generality of principle by reference to the practical working of the restraint, irrespective of its legal form."

The High Court in Buckley v. Tutty 46 A.L.J.R.23 at p.29 cited the passage from Lord Wilberforce's speech in which this sentence was included and prefaced the citation by saying:

> "There is both ancient and modern authority for the proposition that the rules as to restraint of trade apply to all restraints, howsoever imposed, and whether voluntary or involuntary."

Certainly it would appear at first sight odd if, when X, the owner of two adjoining plots of land, sells one to Y and retains the other and the parties make separate and independent covenants restraining the trade of each in identical terms, and to an extent which would render the covenants unenforceable if the doctrine applied, the covenant of the vendor should be unenforceable because it restrained him from a previous freedom

to trade on the land retained while the covenant of the purchaser should be enforceable because he had no previous freedom to trade on the land sold, cf. Heydon cited above at p.56.

But, without deciding that the doctrine enunciated by the majority in the Esso case is binding on this court, I am content to assume for the purposes of the present case that it represents the law because I do not think that the present case falls within it for two reasons.

The first is that the covenants in the underlease impose not merely negative, but positive obligations. They bind Rocca not only not to buy its petrol supplies from anyone else and to take the whole of them from Amoco, but to keep the petrol station open during all lawful trading hours during the whole currency of the lease; as to this see the Esso case per Lord Reid at p.298, per Lord Pearce at p.327. The transaction not only restrained the freedom of Rocca to trade on the land in certain ways. It bound it to trade on the land in a particular way.

But, far more importantly than this, it is not, in my view, correct to say that Rocca was merely submitting to a restraint on a freedom which it never previously had, if we look at the commercial realities of the situation as opposed to the technicalities of it, as, in a matter where public policy is at least potentially involved, we surely should. I dismiss from consideration the facts that at the time of the agreement in June 1964 Pat Rocca was the registered proprietor of the land and that the company only became the registered proprietor subsequently. We must take it, I think, that at the time of the agreement the company was entitled to be registered: at any rate, Amoco would, in my view, be estopped from disputing its title and it was not seriously contended otherwise. That being so, it seems to me that immediately before the execution of that agreement Rocca had a freedom to trade on the land as owner: and immediately thereafter it had a freedom to trade on the land in accordance with the underlease as an underlessee in equity, assuming that the parties had become lessee and underlessee respectively in equity on the signing of the agreement. If, which is probably the preferable construction, these

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equitable rights did not spring into existence until the completion of the service station, then the rights of Rocca as the freeholder remained until that date and its rights as underlessee commenced as from that date. In either event, the rights of Amoco as lessee in equity and of Rocca as underlessee in equity sprang into existence at the same time by force of the agreement, or by force of the agreement plus a subsequent event, i.e. the opening of the service station. Indeed, my view would not be different if we were to have regard only to the common law, as opposed to the equitable, rights of the parties and looked only at the actual execution of the lease and underlease on the same day. Any scintilla temporis or notional interval of time between the taking effect of the lease and the taking effect of the underlease, however important it might be for the technical purposes of the law of real property, ought not, in my opinion, to be allowed to obscure the commercial realities of the situation for the purpose of the application of a doctrine based on public policy in relation to commerce.

This is a convenient point at which to consider the Cleveland case referred to above. There an individual was the freeholder. He gave a lease to an oil company for 25 years in consideration of a premium of £50,000. The oil company granted an underlease to a company in which the freeholder had a predominant interest for 25 years less 3 days. The underlease contained a trade tie. It was assigned to a series of assignees. The last of such assignees repudiated the tie although it had undertaken to observe and perform all the covenants in the underlease. The Court of Appeal dismissed an appeal against the grant of an interlocutory injunction restraining the ultimate assignee from acting in breach of the covenants. Their Lordships applied the doctrine of the majority in the Esso Case. No doubt that doctrine would apply in its full force to the assignee who never had any right to go on to the land or trade on it until it took the assignment with the obligation to observe the covenants in the underlease.

However, the case does not seem to me to have been decided principally on that point. The

decision was subjected to an acute analysis by the learned trial judge, with which I agree. I will not repeat His Honour's reasoning or his citations from the judgments. Briefly, he thought that the decision turned on what he called 'an extreme example of the doctrine in Salomon v. Salomon 1897 A.C. 22', on the distinction, in short, between the individual and the company. The company had never been free to trade on the land before it was granted the underlease. Rocca, for the reason I have given, stands in a different position or must be taken so to stand. Even so, Lord Denning M.R. said in the Cleveland case at p.203:

> "We should hold that when a person takes possession of premises under a lease, not having been in possession previously, and on taking possession, he enters into a restrictive covenant tying him to take all his supplies from the lessor, prima facie, the tie is valid. It is not an unreasonable restraint of trade."

From this it might seem that the law about restraint of trade was not being excluded, but applied. Moreover, to entitle him to an interlocutory injunction a plaintiff only has to establish a prima facie case, not a final one.

Whatever the correct interpretation of the Cleveland case, I cannot regard it as an authority binding me to hold that an owner of land who grants a lease of it and then simultaneously takes an underlease of it is getting from the underlease a freedom for the first time to trade on the land within the meaning of the majority doctrine in the Esso case. And I think that if I had been sitting in the Cleveland case I would have been strongly tempted to pierce the corporate veil.

There are three additional matters to be discussed before leaving this preliminary topic invoked in the first question I posed above. The first concerns clause 18 of the lease, the others possible variants of the Esso doctrine put forward by Mr. Jacobs.

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Clause 18 of the lease reads as follows:-

"The Lessor and the Lessee agree that this Lease is not in consideration for or dependent or contingent in any manner upon any other contract, lease or agreement between them and that the term, rental or other provisions of said Lease are not intended by said parties to be tied in with any other such contract, lease or agreement, but on the contrary this Lease and all of its provisions are entirely and completely independent of any other transaction or relationship between the parties."

His Honour said that he placed no reliance on clause 18. He said:

> "It seems to me that it neither adds to, nor detracts from, the intrinsic operation of the two documents."

Nor did Mr. Jacobs present any argument on it. Once again, if I am right in thinking that the commercial realities of the situation should be looked at for the purpose of deciding whether or not the underlease restrained any freedom on the part of Rocca to trade on the land which it formerly possessed, such a clause could not prevent the exercise.

Mr. Jacobs argued that the lease and the sub-lease should take effect according to their tenor. I find it difficult to appreciate the precise significance of that. Of course, they do so take effect except to the extent to which public policy forbids that they should. But in an interesting argument he contended that when their Lordships in the Esso case were speaking about a previous freedom to trade on the land, they meant an economic freedom rather than a legal freedom and that if it was economically impossible, or practically so, for Rocca to open a service station on the land without entering into a trade tie of this kind, whether with Amoco or anyone else, it was not depriving itself of any freedom it previously possessed by submitting to that tie. I agree that this is an important consideration on the question of reasonableness, but I do not agree that this is a correct exposition of the

majority doctrine in the Esso case. When Lord Reid says at p.298:

> "A person buying or leasing land had no previous right to be there at all, let alone to trade there, and when he takes possession of that land subject to a negative restrictive covenant, he gives up no right or freedom which he previously had."

and when Lord Morris says at p.309:

> "His freedom to pursue his trade or earn his living is not impaired merely because there is some land belonging to someone else upon which he cannot enter for the purposes of his trade or business. In such a situation (that is, that of voluntarily taking a lease of land with a restrictive covenant) it would not seem sensible to regard the doctrine of restraint of trade as having application.",

it seems to me that their Lordships are speaking of legal right and legal freedom, not of economic feasibility.

Finally, Mr. Jacobs boldly contended that the doctrine should have no application to the case of a land owner who enters for the first time on the business of a petrol retailer and who has no other practicable way of doing it except by entering into an agreement with a trade tie. I think he reinforced this by saying that in a case like this, where Amoco, too, was entering the South Australian field in this type of business for the first time, the relation between the parties was more like that of quasi-partners engaged in a joint venture than that of supplier and reseller. Once again, though I think these matters bear on the question of reasonableness, they cannot, as I see it, exclude all consideration of the doctrine of restraint of trade. I think this for the reasons I have just given: nor is this contention, as far as I can see, supported by any auth rity. If the field of the potential application of the doctrine of restraint of trade is restricted at all, it can only be, surely, to the extent of the principle enunciated by the majority of the House of Lords in the Esso case and, if this case does not come within that principle as so stated, I think we would certainly not be warranted in extending it by analogy.

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In my view, therefore, the law relating to contracts in restraint of trade does fall to be considered here and I pass to the question of reasonableness.

The first matter that arises for consideration here is how the question should be posed.

There is high authority for saying that 'for a restraint to be reasonable in the interests of the parties it must afford no more than adequate protection to the party in whose favour it is imposed', Herbert Morris Ltd. v. Saxelby 1916 1 A.C. 688 per Lord Parker of Waddington at p.707. See also Brightman v. Lamson Paragon Ltd. 18 C.L.R. 331 per Isaacs J. at pp.337-8, McEllistrim v. Ballymacelligott Co-operative etc. Society 1919 A.C.548 per Lord Birkenhead L.C. at p.563.

From this it might appear that the only thing to be considered is whether the bounds of reasonable protection to the covenantee are exceeded and that it is immaterial what benefit the covenantor gets out of the transaction in return for the restraint. What has been said with regard to the adequacy of the consideration is in line with this. In Mitchell v. Reynolds 1 P.Wms. 181, which is, of course, the very fons et origo of the modern doctrine of restraint of trade, Parker C.J. thought this was an important matter. Indeed, his final point in deciding in favour of the plaintiff was that 'the restraint is exactly proportioned to the consideration' (p.197). But, says Heydon, above cited at p.20:

> "One vexed issue that was settled during the nineteenth century was that the courts would not investigate the adequacy of the consideration provided for a restraint."

Nevertheless, authority is not wanting for the converse proposition that the interests of the covenantor are also to be regarded, cf. Heron v. The Port Huon Fruitgrowers' Co-operative Assoc.Ltd. 30 C.L.R. 315 per Isaacs J. at p.335, in particular in the sense that the court will take notice of what he gets in return for submitting to the restraint. In the Esso case Lord Reid was prepared to treat the question of whether the restraint would be justified as being in the interests of

the party restrained as a separate question apart from the question of whether the restraint went further than to afford adequate protection to the covenantee, see at p.300, and Lord Pearce was prepared to turn the wheel full circle with regard to the consideration. He thought the court must have regard to it (p.323).

Another difficulty is, to my mind, created by the frequent use of the word 'legitimate' in describing the interests of the covenantee, see, for example, the Esso case per Lord Reid at p.301 and per Lord Morris at p.312, the Petrofina case per Lord Denning M.R. at p.173. Clearly in this context the word 'legitimate' does not mean 'lawful', otherwise one would be arguing in a circle if we assume that contracts objectionably in restraint of trade are not lawful. I think the word 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 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.

It is with considerable hesitation that I endeavour to frame a criterion, but it is right that I should state the principles which I intend to apply to the case.

I think the balance of the authorities is in favour of the proposition that the test as between the parties, leaving aside the wider question of the public interest generally, is whether the restraint goes no further than to afford reasonable protection to the covenantee, meaning by that 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. To this the amount of the consideration may, I think, be relevant in the sense that, if, in the case of a commercial bargain, the covenantee has parted with money or money's worth, he is prima facie entitled to receive an adequate quid pro quo and, indeed, the quid pro quo for which he has stipulated, if that is reasonably proportionate to what he has parted with.

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But I think, with all respect to those who think otherwise, that if the restraint goes beyond what is reasonably necessary for the protection of the covenantee understood in that sense, it is no answer to say that the covenantor would be unjustly enriched if the contract were not enforceable. In Treitel's Law of Contract 3rd Ed. the learned author says at p.385:

> "A worldwide restraint contained in a contract for the sale of the village store would be unreasonable however much both parties wanted to enter into it and even if the buyer had paid a million pounds for it."

I would agree, if the worldwide restraint went beyond what was necessary to protect the buyer's investment, the economic quid pro quo, in return for which he had given the million pounds, as it certainly would if he had acted out of mere caprice. I suppose the answer to any complaint on the part of the buyer of the village store would be that the seller is not relieved of the obligation of the covenant for his own sake but for reasons of public policy.

I approach the question of reasonableness between the parties on this case on that basis. I agree with Mr. Jacobs that Amoco had here both proprietary and commercial interests to be protected, proprietary interests in the sense of the protection of its investment of $7,775 in the land, and commercial interests in the sense of its interest in selling as much of its products as it could and in selling them through service stations, and that means, under modern conditions, tied service stations, with the advantages that that involves, including continuity of output and the other factors mentioned by Mr. Jacobs. No-one suggests that all solus agreements are unenforceable or all trade ties bad. Amoco is entitled to reasonable protection of its legitimate interests in these respect which, as I have said, on the trading side means its interest in making a reasonable profit from its enterprise, not an extortionate one, though no-one suggests that Amoco's profits from this venture were extortionate.

Since the situation has to be judged as at

at June 1964, Amoco is not entitled to protection in respect of moneys subsequently spent on the land over and above money spent for the original provision and installation of the equipment. Nor is it to the point to reproach Rocca with ingratitude in view of its appeal to Amoco in 1968. We are not now concerned with the effect of the extension of that year. Nor does it matter that it proceeded to remove Amoco's pumps with indecent haste: if the covenants are not enforceable, it was entitled to do that: if they were, Amoco has its remedy. If, to adopt the picturesque phrase cited by the learned judge, Rocca was supping the milk and rejecting the cow, I suppose the answer is that as long as it was supping the milk it was ex necessitate accepting the cow, and that when it rejected the cow it rejected further milk supplies as well. But these considerations are not, as I see it, relevant.

And, lest it should be thought that I have overlooked it, I recognise that there is a public policy involved in preserving the sanctity of contract as well as in preserving the freedom of trade and that the courts will not lightly assume that when two business men bargain on equal terms it knows the interests of one of them better than he knows it for himself. Nevertheless, the law relating to contracts in restraint of trade remains and it is for us to apply it. Indeed, if the covenantor cynically bargains for something for himself in return for submitting to a restraint, which he has been advised is unenforceable, I know of no authority which would prevent him from subsequently repudiating the restraint.

It is time I proceeded to apply these principles to these facts. There are three main considerations, the duration of the tie, the nature of the covenants and the nature of the transaction. I deal with the last first. I have borne in mind that these restraints are contained in an underlease, not in a mere contract. I regard the lease/sublease arrangement as effecting some sort of security for Amoco's $7,775 investment in the land as well as for the due performance of the covenants relating to the tie and the conduct of the business. But I regard the proprietary side of the transaction as subordinate to the commercial side. The case is not to be approached as if it were a mere case of

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a solus agreement by which one side agrees to supply at a rebate all the petrol required by the other who in return undertakes to buy all his supplies from the first. Nevertheless, I think that is the salient, though not the sole, feature of the transaction and its raison d'être. I think this lease/sublease arrangement was a device, using that word not in any pejorative sense but merely as indicating the choice by Amoco of the conveyancing technique it regarded as most appropriate to procure and secure a tie over the service station, though also one which at the same time afforded some security for the cost of the provision and installation of the equipment.

Mr. Fisher points out that no petrol reseller tie of fifteen years has ever been held to be valid, apart from the Cleveland case in which the doctrine of restraint was held to be excluded. In the Petrofina case a tie of twelve years with onerous covenants and subject to continuance even after the twelve years until 60,000 gallons of the oil company's petrol had been sold, in the Esso case a tie of 21 years with a mortgage irredeemable over the 21 years, were held unenforceable. These are interesting parallels but the case is not to be decided from a mere comparison of the period in this case with the periods under consideration in other cases.

In support of its claim that a fifteen year tie was no longer than was necessary to afford it reasonable protection, Amoco called the witness Mr. Tibbles, its commercial and planning manager, who produced the document Ex.P.12, described as a determination of profitability index. In reply Rocca called the witness Dr. Moffatt, a senior lecturer in Economics in the University of Adelaide, who subjected Ex.P.12 to a destructive analysis. I regard this evidence as of considerable importance. The learned judge describes Dr. Moffatt as 'plainly competent, conscientious and reliable' and said that he had no hesitation in accepting his evidence. He thought that Dr. Moffatt was right in holding that the calculation in Ex.P.12 was on the conservative side. He took that into account as one of the relevant considerations. But, with respect, I do not think he attached sufficient weight to the circumstances surrounding Ex.P.12.

Ex.P.12 is not an easy document to understand; indeed it cannot be understood without expert exegesis. I do not reproach it for that. It purports to show that over a period of fifteen years the project would yield 10.2% of profitability after payment of tax. And the evidence of Mr. Tibbles is that the minimum rate of profitability over the term of the project which would make it worthwhile to Amoco was 10%. I do not propose to analyse Ex.P.12 in detail but some things about it are very significant.

First of all, it is dated 28th September 1964. It came into existence, then, three months after the agreement was signed on the 19th June 1964. Mr. Tibbles says that he was unable to locate amongst the Amoco records any earlier determination of profitability index on this project. It should be said that he did not prepare the document and those who did prepare it are no longer in the employment of Amoco. It is difficult to regard this document as determining the choice of the fifteen year term.

Next, the document is based on an estimated sale in the fourth year of the project of 72,000 American gallons or 60,000 Australian gallons. This figure is vital to the calculation. Now, the document Ex.P.8, the report of the retail sales manager of Amoco in Adelaide, the witness Mr. Nelson, to the general office of Amoco in Sydney about the project is dated the 19th February 1964; and in that Mr. Nelson estimated the total sales in the fourth year of the project at 96,000 Australian gallons per year, or 8,000 gallons per month. Someone in Sydney wrote under this estimate the words "Revised (4th year) 60,000 gallons" and, as I have said, Ex.P.12 is based on that figure. Yet the figure of 8,000 gallons per month, or 96,000 gallons per year, was apparently reached early in the history of the project, for the underlease in its form as executed on the 19th May 1966, i.e. not in the fourth year but halfway through the second year of the project, binds Rocca to purchase at least 8,000 gallons of petrol a month from Amoco. Mr. Tibbles says that if the figure of 115,000 odd American gallons, or 96,000 Australian gallons, had been used instead of the figure of 72,000 American or 60,000 Australian gallons the profitability rate would

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have been about 19%, though this calculation was not made by him personally. I have attempted some calculations myself. They do not reach 19% but they do produce a figure in excess of 15%. But the figure mentioned by Mr. Tibbles is far more likely to be right. In addition, Dr. Moffatt made several criticisms of the calculation. He pointed out that it had been assumed that the equipment would have no residual value at the end of the term. Though this might well be true of the tanks, I think that it was eventually conceded that the pumps at least would have some residual value, though probably not a large one. And he said that if had been doing the calculation he would have submitted alternative calculations based on different annual gallonages. I do not propose to enter into the details of his calculations. The learned judge said:

> "By adopting other figures, which may roughly be said to represent a sanguine attitude, Mr. Moffatt demonstrated to my satisfaction that, with respect to the same period of fifteen years, a similar calculation could yield an estimated profitability figure of the order of 17%."

I do not, with respect, quite see the point of the learned judge's comment that Dr. Moffatt had two weeks, plus thinking time, to produce the calculations which he gave to the court while Amoco could not afford to wait for such a time: for Amoco's own calculations were produced after the event anyhow.

Mr. Jacobs admonished us to avoid hindsight and I have endeavoured to do so. But although it is no necessary proof that a prediction was unreasonable at the time that it was made that it turns out afterwards to be wrong, it is at least a first step in that direction. He said that we should assume that when the Sydney office substituted the figure of 60,000 gallons for the figure of 96,000 gallons it was acting on an Australia-wide experience of service stations: but when the South Australian office made the calculation of 96,000 gallons it was, presumably, working on its South Australian experience of service stations and I see no reason why it should be assumed that Adelaide was more likely than Sydney to be wrong when it was

a South Australian service station which was the subject of the exercise. In short, I am forced to the conclusion that it was not reasonable to assume on the 19th June 1964, if Amoco did then assume it, something which, to my mind, the evidence fails to show, that the profitability rate on this venture over a period of fifteen years would be no more than 10.2%. On the contrary, I think that Amoco ought reasonably to have estimated on 19th June 1964 that the profitability rate over the period of fifteen years would be much higher, whether 15% or 17% or 19% or some intermediate figure.

That is not a decisive factor. It is necessary also to examine the individual covenants. The ones impugned at the trial are set out in the judgment of the learned judge. I propose to deal with those which I consider to be of major importance. Clause 3(e) of the underlease contains a covenant not to assign, mortgage, encumber, sublet, license or part with the possession of the demised premises or any part thereof. By reason of the combined force of sec.12(4) of the Landlord and Tenant Act 1936 and the decision of the Full Court in Martin v.Coultas 1911 S.A.L.R. 1, such a clause is now to be read in South Australia as if it contained a proviso that consent was not to be unreasonably or capriciously withheld. But even so, in the event of a failing business it might not be unreasonable or capricious for Amoco to withhold its consent to an assignment which might otherwise allow Rocca to make the best of a bad bargain or for Amoco to refuse consent to a sublease of portion of the land. Clause 3(g) compels Rocca to carry on the business during all lawful trading hours for the duration of the lease and not to cease to carry on the business without the written consent of Amoco, and clause 3(i) binds Rocca to the purchase of the minimum monthly quantities mentioned. All this compels Rocca to continue trading as a service station, even at a loss, unless released by Amoco. Clause 3(h) binds Rocca to buy all petrol, motor oil, lubricants and other petroleum products required for sale on the land exclusively from Amoco and forbids it to buy, receive, use, sell, store, dispose of or permit to be bought, received, used, sold, stored or disposed of at or upon the land or any part thereof

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any such products not purchased from Amoco, provided Amoco is able to supply the same. In return, by clause 4(a) Amoco agrees to sell and deliver at its usual list prices Rocca's entire requirements. But by clause 4(b) if Amoco is unable to supply for any reason whatever, which is in its sole opinion beyond its control, its obligation to do so is suspended and Rocca may during the period of suspension buy elsewhere, but must resume buying exclusively from Amoco as soon as it notifies Rocca that it is prepared to resume supply. Nevertheless, by virtue of clause 4(c) it is not in any case bound to supply Rocca unless Rocca has paid for all products previously supplied. It is, I think, unnecessary to expatiate on the possibilities of these clauses or the extent to which the smooth running of Rocca's business, and indeed its continued operation, is made dependent on the goodwill of Amoco. Unfavourable comment was made upon, and considerable importance attached to, a clause like clause 3(g) in the Petrofina case, see per Diplock L.J. at p.189, and a clause like 4(b) in the Esso case, see per Lord Pearce at p.329.

In addition, there is the right to determine at the end of 10 years, given to Amoco but not to Rocca, and a matter to which I attach some importance, the rebate payable by Amoco to Rocca is not proportioned to the price of petrol for the time being but is fixed for the duration of the term. Even if the price of petrol were to be doubled or quadrupled over the fifteen years, the rebate to Rocca would remain the same and its significance to Rocca in relation to the current price of petrol would steadily diminish. It is true that, conversely, Rocca might benefit if the price of petrol were to fall, but I do not think we are bound in this commercial field to blind ourselves to the process of inflation up to 1964 and the likelihood of its continuance thereafter as factors bearing on the reasonableness of this transaction in 1964. But if the rebate of 2.5 cents per gallon proved unremunerative to Amoco, it had the option, denied to Rocca, of determining the lease at the end of the tenth year.

Mr. Jacobs argued that it was not enough to look at the theoretical possibilities of abuse in relation to these covenants but that we ought to

have regard to the probability of Amoco turning those possibilities into realities and that Amoco was not likely to abuse its powers, since its interest in the profitable running of the service station was as great as that of Rocca. He found support for these propositions in the words of Lord Reid in the Esso Case at p.303, when he said:

> "It is true that if some of the provisions were operated by the appellants in a manner which would be commercially unreasonable they might put the respondents in difficulties. But I think that a court must have regard to the fact that the appellants must act in such a way that they will be able to obtain renewals of the great majority of their very numerous ties, some of which will come to an end almost every week. If in such circumstances a garage owner chooses to rely on the commercial probity and good sense of the producer, I do not think that a court should hold his agreement unreasonable because it is legally capable of some misuse."

No doubt the court should not attach much weight to purely fantastic possibilities. But, after all, commercial good sense could operate in different ways, depending on whether the times were good or bad. There are many circumstances in which Amoco's interests and Rocca's interests might diverge. The possibility of a harsh use being made of such covenants was clearly taken into account in both the Esso case and the Petrofina case and I refer to the references just made to the judgments of Lord Pearce and Diplock L.J. In McEllistrim's case above Lord Shaw said at p.588:

> "In order to test this question (i.e. the question of public policy) - and no less test can be satisfactory (the underlining is mine) - it is necessary to assume that these rules may be put in force against the appellant to the full extent and rigour of their terms."

When, in the Petrofina case, Diplock L.J. said at

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p.190 that the covenants in question 'seek to create a new commercial serfdom from which the defendant can obtain manumission only upon finding a substitute serf', I think he was referring to a serfdom created by what could be done rather than by what was likely to be done. In the startling case of Horwood v. Millar's Timber and Trading Co. Ltd. 1917 1 K.B. 305, an authority referred to, I think, with approval, and certainly without disapproval, in the Esso case, the learned judges seem to have concentrated on what the deed in question there permitted the moneylender to do rather than on what he had actually done or was likely to do, see per Lord Cozens-Hardy M.R. at p.311 and again at p.312, and per Warrington L.J. at p.314 where he said:

> "The man has put himself, one may say, almost body and soul in the power of this moneylender. Even in the most trivial incidents of life he cannot do as he pleases; he can only act in a way to which this moneylender will consent."

The conclusion I have reached is that the covenants in the underlease go beyond what was reasonably necessary for the protection of Amoco. Certainly Amoco, in my view, has not shown the contrary and the onus is on it. A shorter term would, in my view, have been adequate to afford ample protection to its proprietary interest in its investment: and a shorter term or less onerous covenants or both would, in my view, have been adequate to protect its commercial interests. I do not decide that a restraint for a shorter term but containing these covenants would necessarily be bad: or that a restraint for fifteen years with less onerous covenants, particularly when there was some provision for review and possible escape for Rocca at some point during the term, would necessarily be bad. All I decide is that, in my view, this restraint for this term with these coventnts is unenforceable.

That makes it unnecessary to consider the question of public interest.

I might add that Mr. Jacobs referred to the well known principles which govern the treatment by appellate courts of findings of fact by the

trial court. But the question of the reasonableness of any restraint is a question of law for the judge and not a question of fact for the jury, see Heydon above at pp.44-5 and the cases there cited. In the Petrofina case and the Esso case the appellate courts concerned had no hesitation in differing from trial courts or intermediate appellate courts on this question.

In my view the first two issues in the statement of issues should be answered as follows:

1. Q. Is the defendant entitled to assert that the covenants contained in memorandum of underlease No.2775160, or any of them, are in restraint of trade and unenforceable?
   A. Yes.

2. Q. Are the covenants contained in memorandum of underlease No. 2775160, or any of them, an unreasonable restraint of trade and unenforceable?
   A. Yes.

These affirmative answers are of necessity ambiguous because of the alternatives in each question between the covenants as a whole and any of them severally, but no other answers can be given since the question of severability has not yet been argued.

For reasons already given, the parties should be given an opportunity to decide what they want done about the remaining issues before the court makes any formal order.

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REASONS FOR JUDGMENT OF HOGARTH J.

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. v. AMOCO AUSTRALIA PTY. LIMITED

No. 1526 of 1971

According to a statement of facts agreed by both parties, and according to the evidence accepted by the learned trial Judge the appellant

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(which I will call "Rocca") and the respondent (which I will call "Amoco") entered into negotiations about February 1964 regarding the erection of a service station on land situated at 450 Bridge Road Para Hills West. In the course of negotiations the parties agreed:-

(i) That Rocca would erect a service station on the land;

(ii) That the parties would enter into an agreement for Rocca to sell from the service station only the petroleum products of Amoco;

(iii) That Amoco would lend to Rocca certain plant and equipment to store and sell its products, and would instal it on the service station site;

(iv) That the parties would both promote and advertise the service station as a vendor of Amoco's petroleum products.

On the 19th June 1964 the parties executed a memorandum of agreement. It recited that Rocca was the registered proprietor of the land. This was not in fact the case. At that time the registered proprietor of the land was Pasquale Antonio Rocca, and Rocca (the appellant) was first registered as proprietor of an estate in fee simple on the 27th of July 1965. The case proceeded on the basis that at all material times Rocca was entitled to be registered as proprietor, and no point turns on the fact that it was not so registered until 1965. The agreement provided for the execution by Rocca of a lease of the service station premises to Amoco and for Amoco to grant a sub-lease of the service station premises to Rocca, in forms annexed to the agreement; and for the parties to execute an agreement for the loan of plant and equipment by Amoco to Rocca, also in a form annexed to the agreement. The agreement provided for Rocca to erect the service station on or before the 31st March 1965, at its own expense except as provided in the agreement; and subject to the completion of the service station by that time, it provided that the term of the lease by Rocca to Amoco should be a period of 15 years from the date of the completion of the

service station or the 31st March 1965, whichever should occur earlier, "with a right of determining the lease at the expiration of the first 10 years of the said lease by giving 3 calendar months notice of its intentions so to do" at a yearly rental during the term of £1 plus a sum equal to 3d. per gallon of all petrol delivered by Amoco to the premises for sale. In fact the service station was completed on the 10th December 1964. The agreement went on to provide that Amoco would grant and Rocca would accept a memorandum of underlease of the premises for the full term of the lease less one day, "subject to the right of earlier determination" by Amoco as I have mentioned.

On the 19th June 1964 the parties also executed a document entitled "Equipment Loan Agreement", which provided for Amoco to lend certain plant and equipment to Rocca for the purposes of its business as service station proprietor. The equipment included tanks for the storage of petrol, pumps, a hoist for vehicles and other equipment. The agreement gave Amoco the right at any time within 30 days after the termination of the agreement to enter upon the premises and to remove the equipment; and Rocca agreed not to remove the equipment from the premises without Amoco's written consent. It was provided in the agreement that either party might terminate the agreement on giving 30 days notice in writing to the other. Between the month of June 1964 and December 1964, the respondent duly lent and installed the equipment at a cost of some $7,745.

As soon as the service station was completed it commenced operations with a "gala opening" in which Amoco assisted both in organisation and in publicity. Amoco provided petroleum products to Rocca which sold them as contemplated by the parties, and the promised rebate of 3d. per gallon, in the form of rent under the headlease, was duly paid; but the formal lease and underlease were not executed by the parties until the 19th of May 1966. The documents accord substantially with the forms annexed to the agreement of June 1964, but are not identical in terms. The case was argued however on the footing that the reasonableness or otherwise of Rocca's covenants must be tested from the viewpoint of the underlease having been

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entered into in June 1964. Provision was made in the headlease for payment by Amoco of a rent as agreed in June 1964, which gave Rocca an effective rebate of 3d. per gallon on the price of petrol purchased by it from Amoco in addition to the nominal £1 per year. The underlease contained provisions similar to those commonly found in agreements binding the proprietor of a service station to sell only one brand of petrol at the service station, commonly called solus agreements. It also contained covenants requiring Rocca to carry on the business of the petrol service station during all lawful hours; to purchase all petrol, motor oil lubricants and other petroleum products required for sale on the service station from Amoco, and not to sell or store such products from other sources on the premises; to purchase at least 8,000 gallons of petrol and at least 140 gallons of motor oil from Amoco each month; and not to assign, mortgage or encumber the lease or sub-let license or part with possession of the premises or any part thereof. This must be understood as meaning not do do so without the consent of Amoco, such consent not to be unreasonably withheld. The underlease included covenants by Amoco to sell to Rocca and deliver to the service station at Amoco's usual list prices to resellers at the time and place of delivery the whole of Rocca's requirements of petroleum products. Delivery was to be made in quantities of not less than Rocca's average weekly requirements calculated over the immediately preceding six weeks, and deliveries might be made at such time or times as Amoco might in the absolute discretion determine It was further provided that Rocca should pay for products delivered in cash at the time of delivery; but this last requirement was not enforced. The underlease went on to provide that in the event of Amoco being unable for any reason whatever which in its sole opinion was beyond its control, to supply Petroleum products as required under the lease, the obligation to do so should be suspended for the period during which Amoco was unable to supply, and thereupon Rocca was at liberty to supply itself from such other sources as it chose until Amoco notified it that it was prepared to resume supply.

After the execution of the lease and underlease, and their registration at the Lands Title Office, the transactions between the parties may

be summarised as follows:-

1. In June 1966 a further dual dispensing pump was installed on the service station site and an existing single dispensing pump was moved to a different position. The cost of this work was borne by Amoco.

2. In January 1967 an area known as the cross-over between the service station and the carriage-way of Bridge Road was sealed. Rocca paid the cost of this work but later Amoco paid $200 to Rocca as a contribution towards the expense.

3. By letter dated the 3rd October 1967, Rocca asked Amoco to repaint the front, sides and canopy of the service station. On the 19th October 1967, Amoco agreed for the painting to be done, and this was carried out at a cost to Amoco of $356.

4. In November 1968 as a result of negotiations between the parties Amoco installed on the service station site an underground tank of 5,500 gallons capacity and two additional pumps, and extended the driveway canopy and performed certain concrete works. Rocca by letter of the 27th November 1968 agreed to the extension of "our agreement" for a further period of 5 years on the express understanding that Amoco should effect these alterations and that the rebate be increased to 4c. per gallon for the extended period of 5 years.

5. On the 15th September 1969 the parties executed a document whereby they purported to extend the lease and underlease for periods of 5 years.

6. In October 1969 Amoco, at Rocca's request, moved tank vent pipes at the service station to enable Rocca to build a tyre store.

During 1971 Rocca approached officers of Amoco asking for a review of the terms of the agreement. No agreement was reached, and at about 4.00 p.m. on the 12th November 1971 (a Friday) Rocca handed Amoco a letter at Amoco's office,

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in which it required Amoco inter alia to remove the pumps and an illuminated sign from the service station by 11.00 a.m. on the following Monday, that is to say the 15th November 1971. By shortly before noon on that day Rocca had removed the cover of one of the pumps installed on the land by Amoco. By 10.40 a.m. on the following day, the 16th November 1971, a team of painters had moved into the service station and had started to re-paint it. By 4.00 p.m. on that day Rocca had removed or caused to be removed all five petrol pumps dispensing Amoco's petrol, and had replaced them with five petrol dispensing pumps with the markings of IOC Australia Pty. Ltd., a rival of Amoco, and had connected four of these pumps to Amoco's tanks.

This action was commenced by writ issued by Amoco on that day, and on the same day Amoco issued a summons for immediate relief, and obtained thereon an ex parte order in the nature of an interim injunction. Two days later, on the 18th November, Wells J., having heard counsel for both parties, granted an interlocutory injunction which in effect restrained Rocca from removing or otherwise interfering with Amoco's pumps and from erecting any further pumps or signs on the service station, and making certain orders to permit the carrying on of business on the service station site until the hearing. In view of the urgency of the matter the learned trial Judge made an order dispensing with formal pleadings and directed that the trial of the action should proceed on the basis of agreed issues, which were duly filed. The issues as agreed are:

"1. Is the defendant entitled to assert that the covenants contained in Memorandum of Underlease No.2775160 or any of them are in restraint of trade, and unenforceable?

2. Are the covenants contained in Memorandum of Underlease No.2775160 or any of them an unreasonable restraint of trade and unenforceable?

3. If the covenants in Memorandum of Underlease No.2775160 or any of them are unenforceable is the whole of the said Memorandum of Underlease void?

4. If the said Memorandum of Underlease is void is Memorandum of Lease No.2775159 also void?

5. All questions of consequential relief for either party arising from the resolution of the above issues shall be deferred for later consideration."

His Honour proceeded to set out a summary of the contentions of each party in the form of quasi-pleadings. They conveniently summarised the matters in issue. I have used them in considering the case and in preparing my judgment, but I will not now repeat them here.

His Honour reviewed the facts and the law in a lengthy and learned judgment, and concluded that the covenants in the underlease were binding upon the appellant. He declared that the underlease was not unenforceable by reason of its being in restraint of trade, and made a like declaration with regard to the headlease. He thereupon made a permanent injunction restraining the appellant from acts contrary to their covenants in the underlease. From this Judgment Rocca has appealed. The appeal in effect challenges the application by the learned trial Judge of the law to the proved or admitted facts.

Rocca did not seek to challenge the findings of fact upon which the learned trial Judge based his judgment. The appeal proceeded upon the basis that the tying covenants of the underlease are in unreasonable restraint of trade, both as being contrary to the interests of the parties, and contrary to the public interest; and are therefore unenforceable. The dispute resolves itself into three phases:

1. Do the tying covenants of the underlease constitute part of an agreement which is in restraint of trade?

2. If so, is the agreement one which falls within the ambit of the doctrine of Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd. (1894) A.C.535. (To which I will refer to as "the Nordenfelt doctrine")?

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and

3. If so has Amoco produced evidence to establish that the restraints were not more than were reasonably necessary for its protection?

I will deal with these questions in turn. First, then, do these tying covenants form part of an agreement which is in restraint oftrade? I think clearly it is. It is, in the words of Lord Macnaghten in Nordenfelt's case (at p.565) an "interference with individual liberty of action in trading". As Professor Heydon pointed out (85 L.Q.R. 229) Lord Macnaghten's classic statement of the common law doctrine of restraint of trade implies that a court need ask only two main questions: 1. Does the arrangement in question constitute an "interference with the individual liberty of action in trading"? And 2. If so can it be justified as reasonable? But, as the professor points out, it is now accepted that there is another question. Assuming there is a restraint, the court must determine whether it is of a kind to which the restraint of trade doctrine applies. If not, the contract is enforceable and the question of reasonableness does not arise.

It is obvious, I think, that not every contract which contains a restriction on individual liberty of action in trading falls within the scope of the Nordenfelt doctrine. The very concept of consideration passing from each party means that in every executory contract there is likely to be a detriment to both parties. Each party, ex hypothesi, will have limited his freedom of action in some way, either positively or negatively. It may be that he will agree not to do a certain type of act; it may be that he will agree positively to do a simple act such as for example to buy a particular article from the other party: or it may be that he will agree to perform a series of acts, such as to buy all his requirements of a particular commodity from a particular source. Even when he is merely agreeing to buy one article, he is limiting his individual freedom of action in the sense that he is no longer free not to buy that article. Where the future detriment to one of the parties to an executory contract consists merely of a payment of

money, he is no longer free not to pay the money. The requirement of his making a future payment is tantamount to a restriction on his freedom of action in the broad sense. Where, as in a vast number of cases, executory contracts relate to trade, it follows that in practically every such contract each party will in some degree restrict himself of his freedom of action in relation to trade and in that sense every executory commercial contract is a contract which to some extent goes in restraint of trade. But it is abundantly clear that not every such executory contract of a commercial nature is within the Nordenfelt doctrine. I pass on therefore, to consider the second question raised above.

Does the underlease constitute a contract which is within the Nordenfelt doctrine, that is to say unenforceable as against Rocca unless Amoco establishes that the restraints contained in it are no wider than was reasonably necessary for the protection of Amoco?

I personally think it is regrettable that the view expressed by Mocatta J. at first instance in Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (1966) 2 Q.B. 514 did not prevail. His Honour expressed the view in effect that the Nordenfelt doctrine did not apply in a case where a party entered into a contract which restricted his use of a plot of land, but which did not restrict his activities in general. Some of the very real difficulties which now confront the commercial community, and I may say judges who are called upon to solve their disputes, arise from the rejection of the view taken by Mocatta J. But the final decision in that case in the House of Lords ((1968) A.C. 269) establishes quite clearly that the Nordenfelt doctrine may apply to a contract whereby the owner of land enters into a contract restricting his use of a single plot of land.

Were it not now too late to do so, I would be happy to see some certainty introduced into this field of the law, by a limitation of the Nordenfelt principle to three classes of cases: First, an agreement in which a servant undertakes not to compete with his master after leaving his service (including cases such as Buckley and others

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Reasons for Judgment of Hogarth J. 7th August 1972 (continued)

v. Tutty (46 A.L.J.R. 23)); secondly, an agreement by a vendor of a business not to set up business similar to that which was sold to the purchaser; and thirdly, a trade association agreement between manufacturers or merchants for the purpose of regulating their trade relations as for instance by agreeing to restrict the output or to fix the selling price of a certain commodity. It seems to me that other principles applicable in the law of contract give ample protection to both contracting parties in other classes of contracts.

The editors of the Australian edition of Cheshire and Fifoot on Contracts (second Australian edition p.473) recognise a fourth category by which restraints are imposed upon (a) retailers or distributors; (b) licensees in respect of the manufacture, use or distribution of scientific formula or technical products; and (c) agents for the receipt of processed goods. They go on to say (p.474), "This is not an exhaustive enumeration". Lord Denning said in Petrofina (G.B.) Ltd. v. Martin (1966) Ch.146 at 169, "the categories of restraint of trade are not closed, and as methods of trading change, so the areas of restraint expand".

Where, then, is the line to be drawn? If the law had stopped short at the three clearly defined recognised categories of contract as falling within the scope of the Nordenfelt doctrine, well and good. But once the law strayed outside defined and recognised categories it seems to me that it embarked upon uncharted seas. Members of the House of Lords and of the Court of Appeal have attempted to define the criteria of contracts which are outside these categories but within the scope of the doctrine; but there has been a notable lack of agreement between them and of acceptance of their suggestions by writers in the learned reviews. One of the difficulties which faces the courts in such an attempt is to reconcile the cases where restrictions on freedom of action in commercial contracts are commonly accepted, and have been so accepted for many years. The courts have adverted to restrictions contained in a lease, and restrictions contained in a mortgage. So far as mortgages are concerned, until recently the emphasis has been upon an enquiry as to whether such a restriction constitutes a clog upon the equity of redemption.

But in the Esso case the House of Lords demonstrated quite clearly that a mortgage is subject to attack if it contains a provision which is in unreasonable restraint of trade. The House did not express any firm opinion on the question of restraints contained in a lease. Three of their Lordships (Lord Reid, Lord Morris of Borth-y-Gest and Lord Pearce) suggested that where a man who has no interest in a piece of land becomes a tenant subject to certain restrictions, it cannot be said that his contract is in restraint of trade since he is acquiring something, even though subject to the restrictions, which he did not have at all beforehand. But with respect it seems to me that this is a doubtful proposition. If it is proper to have regard to the means of a covenantor, to see whether a positive covenant on his part to continue to trade on leased land is such that it would restrict his activities in other fields from a practical point of view and so constitute a covenant in restraint of trade (as suggested e.g. by Lord Reid in the Esso case at p.297), then surely it could equally be said that a man who puts it out of his means from a practical point of view to undertake any further business when he accepts a lease with a restrictive covenant may be embarking on a contract which is a restraint of his freedom of action and consequently is in restraint of trade.

I think it is deplorable that in the supposed interests of public policy the law of contract in relation to commercial transactions is in a state of uncertainty in which not even the highest legal authorities can agree upon the ambit of the doctrine of restraint of trade. The commercial community is surely entitled to expect the law to speak with a clear voice on such a fundamental proposition. But for good or ill, it seems to me that the law is committed to its present course. The Nordenfelt doctrine may apply to contracts which merely regulate the use to which one piece of land may be put. Once this is accepted, it seems to me that the form of the contract in which the undertaking is given is irrelevant. It is the substance of the transaction which matters. It seems to me to be irrelevent, from the point of view of determining whether the contract is within the scope of the doctrine (though not necessarily as to its reasonableness or otherwise)

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whether the contract is in gross, or is contained in a mortgage, or in a lease. It may be that the doctrine does not in general apply in the case of a covenantor who, by the document which contains the covenant, acquires rights over the land which he would not otherwise have had; but where the substance of the transaction as a whole is to limit his use of his land, then this is to be regarded as being in restraint of trade and subject to the doctrine.

In the present case it is argued, that when Rocca became Amoco's sub-lessee, it was acquiring something which it did not have previously, namely occupation under the underlease, its occupation as owner in fee simple having been surrendered with headlease. But I think that the transaction must be looked at as a whole. The substance of the transaction was contained in the one agreement of June 1964 when Rocca was in possession; and apart from a scintilla of time, Rocca continued in possession as sub-lessee of Amoco. I think that the lease and underlease must be read together as all part of one transaction, and that from Amoco's point of view the transaction as a whole was designed to secure a solus trading agreement between itself and Rocca.

The learned trial Judge decided the case in favour of Amoco on the basis that if the tying covenants were in restraint of trade, they were no more than was reasonably necessary in the circumstances for Amoco's protection. He said however that he would have been prepared to hold if necessary for the purpose of deciding the case that the Nordenfelt doctrine had no application to the arrangement as it was concluded for two reasons: First because the lease and underlease must take effect according to their tenor and that Rocca came to the service station by virtue of the underlease; and further, because the two parties were embarking upon a new venture in circumstances in which Rocca was, for practical purposes, debarred from doing so unless Amoco joined in that venture. So far as the first point is concerned, with respect to the learned trial Judge it seems to me there is a conflict between this proposition (transcript p.113) and a proposition (transcript p.95) earlier in his reasons when he said: "I must, I think, assume

that Rocca was not, in the sense in which the House of Lords has used these words, 'let into possession'. It follows that, for the purposes of my examination of the circumstances, I must also assume that the doctrine of restraint of trade applies in the circumstances of this case". As I have said, it seems to me that both lease and underlease were the means of giving legal effect to one overall transaction, and under the terms of that transaction, Rocca was not let into possession of the property. As to the second point, it seems to me that the evidence does not go to the extent of establishing that Rocca would have been debarred from setting up a service station unless Amoco joined in that venture. The evidence discloses that Rocca had been in negotiation with the BP Company, one of Amoco's rivals; and presumably the fact that Rocca chose to deal with Amoco rather than BP is an indication that at that time Rocca considered Amoco's proposals were more favourable than BP's. But there were other companies with whom Rocca might have negotiated and might have obtained better terms than those offered by Amoco. I think it is impossible to say on the evidence that Rocca would not have been able to operate the service station had it not been for the opportunity offered by the transaction with Amoco. I conclude therefore that the solus covenants contained in the sub-lease are within the ambit of the Nordenfelt doctrine.

I turn then, to consider the last topic; whether Amoco has established that the restraints contained in the tying covenants are no wider than was necessary, in June 1964 for the reasonable protection of Amoco and its interests, both commercial and proprietary.

The onus is upon Amoco to establish the reasonableness of the tying and other onerous clauses in the underlease. I think that it is proper to have regard to the consideration passing from Amoco in determining the nature and extent of its interests which it seeks to protect. The onerous clauses in the underlease are set out and considered at some length in the judgment of the learned trial Judge. Broadly, they may be classed in two groups: First, the "solus" provisions, restricting Rocca to the sale of Amoco's petroleum products at the service station

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for 15 years, subject to the right of Amoco (but not Rocca) to terminate the lease at the end of 10 years; and secondly, the positive requirement that Rocca would continue to operate the service station during lawful trading hours throughout the term of the lease. Ultimately, I think that everything hinges upon the reasonableness or otherwise of the term of the underlease, the period of 15 years less one day. If that period is shown to have been reasonably necessary for the protection of Amoco and its proprietary or commercial interests, in the light of circumstances as they were known and could be foreseen in June 1964, then it seems to me that none of the other covenants of themselves, or all of them combined, would affect the reasonableness of the agreement. They are in aid of the effective operation of the lease during the period. The fundamental question is, is the period too long?

One of the difficulties which confront a party who seeks to justify as reasonable an agreement which is intended to extend over a number of years, is that by the time its enforceability is challenged witnesses who would have been able to give convincing evidence of the reasonable nature of the agreement when it was entered into may no longer be available. This may well have occurred in the present case. The challenge from Rocca came some seven and a half years after the agreement of June 1964, and nearly seven years after the service station had started to operate in terms of that agreement.

Evidence was given on behalf of Amoco in an effort to establish that, in the light of circumstances as they existed in June 1964, the contract was reasonable. At that time the area in which the service station was to be established was not a built-up area. The access road past the service station was not sealed and indeed was said to have been rough. There was a newly established housing settlement further to the north, and houses from this settlement were extending southwards towards the area in which the service station was to be situated. Once the access road was sealed, it would be fair to expect a good flow of traffic on it, as it would be one of the most direct routes between the housing settlement and the city. Evidence was given for Amoco of a practice whereby

a feasibility study is undertaken before the company commits itself to the establishment of a new service station, or before it concludes an arrangement for the supply of its products to an existing service station. This feasibility study involves a complex series of mathematical calculations which I followed with close attention in the course of argument, but which I will not describe in any detail at this stage. Amoco is not interested in a proposition which does not, over the intended period, produce a return of 10%. This is designed to secure a reasonable profit to Amoco, and recoupment over the period of its irrecoverable expenditure of a capital nature. Evidence was given for Amoco that experience in the United States had shown that, with a new undertaking, the monthly gallonage of sales of petrol tended to rise over the period; and that it was generally feasible to make an estimate over the whole period by basing calculations upon the assumed gallonage in the fourth year of operation. But this surely must be related to the length of the period which is under consideration. Mr. Nelson submitted a report to the Company's Head Office in Sydney, expressing the opinion that the expected gallonage from Rocca's service station would be 8,000 (imperial) gallons per month; but at Head Office this figure was amended to 6,000 American gallons, i.e. 5,000 imperial gallons per month, and a feasibility study (called a "profitability index") undertaken in September 1964 (that is to say some three months after the general agreement had been entered into between the parties) was based upon the lower figure. Obviously, the lower the expected gallonage, the longer the period during which the sales would have to continue in order that the required percentage should be reached. There is no evidence before the Court to show that it was reasonable on the part of Amoco to base its feasibility test on an assumed average monthly gallonage of only 5,000 imperial gallons. Indeed, when the lease and underlease came to be executed in May 1966, some eighteen months after the service station had started operations, experience had shown that a monthly gallonage of 8,000 gallons was achieved in the first year; but as I have already mentioned the underlease required Rocca to buy not less than 8,000 gallons of petrol per month from Amoco. This figure did

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Reasons for Judgment of Hogarth J. 7th August 1972 (continued)

not appear in the form of lease annexed to the agreement of June 1964; and a clause providing for a minimum purchase of an unstated amount was struck out from the printed form and the words "not applicable" and a question mark were written in the margin by some person unidentified. The added requirement on the part of Rocca to buy 8,000 gallons per month from Amoco was therefore something in the nature of a variation of the original agreement which might logically have been expected to lead to a corresponding variation in the term of the leases by a reduction of the period of both headlease and underlease. But this did not occur. This, however, is perhaps beside the point. The essential point is that it is for Amoco to establish that in June 1964 it was reasonably necessary in its own interests that it should be entitled to hold Rocca to its bargain for a period of 15 years. Based on an assumed average monthly sale of 5,000 gallons of petrol, the feasibility study of September 1964 showed Amoco a return of 10.2%, slightly over the minimum which that Company would have required. Had the evidence established that an average monthly sale of 5,000 gallons in the fourth year was a reasonable expectation at that time, this would have gone a long way towards establishing the reasonableness of the period of the tying covenants. But there is no explanation as to how this figure of 5,000 gallons was arrived at, nor does the evidence, in my opinion, justify the assumed monthly gallonage in the fourth year as a reasonable figure for the average over so long a period as 15 years. The only evidence on the proper estimate for the fourth year, that of Mr. Nelson, makes the 5,000 gallon figure appear unreasonable.

I think that it must follow from the foregoing that Amoco's own evidence showed that it was taking too pessimistic a view of the undertaking. It may well have been, of course, that it was proper in the circumstances to discount Mr. Nelson's expectations to take account of the fact that the service station had not been established and might not prove a success. But there is no evidence to support either that supposition, or the size of the discount.

In my view, therefore, the evidence led by Amoco falls short of establishing that the tying

covenants were reasonable as between the parties. This being so I think the appeal must be allowed. I do not find it necessary to consider the further question, whether Amoco has established that the agreement was reasonable in the interests of the general public.

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Reasons for Judgment of Hogarth J. 7th August 1972 (continued)

In my opinion the appeal should be allowed for the purpose of declaring that the tying covenants in the underlease are in unreasonable restraint of trade. I agree that the first two questions posed in the agreed issues should be answered "Yes". I would require to hear further argument on the consequences which follow from this decision.

No. 18

No.18

Reasons for Judgment of Walters J. 7th August 1972

REASONS FOR JUDGMENT OF WALTERS J.

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. v. AMOCO AUSTRALIA PTY. LTD.

JUDGMENT - WALTERS J.

I have had the advantage of reading the judgment of the learned Chief Justice. Notwithstanding the learned exposition by Wells J. of the law applicable to this case and his Honour's meticulous analysis of the facts, for the reasons set out in the judgment of the Chief Justice, I would allow the appeal and answer the first two of the agreed issues in the affirmative. Whilst I agree with the conclusions of the Chief Justice, I make some brief observations of my own.

In the view I take, the doctrine of restraint of trade applies to the tying covenants contained in the underlease, despite the fact that the appellant was not carrying on the business of a service station on the land in question at the time of the execution of the agreement for lease and underlease in June 1964, and even though it gave up possession of the land to the respondent, well knowing that restrictive covenants were to be placed on the land by the underlease.

It is my opinion also that the restraint imposed on the appellant, by reason both of covenants contained in the underlease and the term

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No.18

Reasons for Judgment of Walters J. 7th August 1972 (continued)

fixed by the underlease, went beyond what was reasonably necessary to afford protection to the proprietary and commercial interests of the respondent. I think that the covenants impugned by the appellant and the term of the underlease were cumulatively oppressive to an unreasonable degree, and that the restraint arising from the underlease should not therefore be enforced.

I do not think that I can usefully add to the reasons for judgment of the Chief Justice. I agree that the appeal should be allowed, and that Counsel for the parties should be heard on the question of severability.

No.19

Order of the Full Court of the Supreme Court of South Australia 7th August 1972

No. 19

ORDER OF THE FULL COURT OF SUPREME COURT OF SOUTH AUSTRALIA

SOUTH AUSTRALIA

IN THE SUPREME COURT
No. 1526 of 1971

B E T W E E N:

AMOCO AUSTRALIA PTY. LIMITED	Plaintiff (Respondent)
and	
ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD.	Defendant (Appellant)

BEFORE THE HONOURABLE THE CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE HOGARTH AND
THE HONOURABLE MR. JUSTICE WALTERS

MONDAY THE 7TH DAY OF AUGUST, 1972.

THIS APPEAL by the abovenamed defendant from the judgment of the trial Judge the Honourable Mr. Justice Wells given and pronounced herein on the 21st day of April, 1972 coming on for Hearing before the Full Court of this Court on the 19th, 20th, 21st, 22nd and 23rd days of June, 1972 UPON READING the Statement of Issues Files herein on the 10th day of December, 1971 and the Notice of Appeal herein dated the 2nd day of May, 1972

In the Full Court of the Supreme Court of South Australia

No.19

Order of the Full Court of the Supreme Court of South Australia 7th August 1972 (continued)

AND UPON HEARING Mr. Fisher Q.C. and Mr. Millhouse of Counsel for the defendants and Mr. Jacobs Q.C. and Mr. Angel of Counsel for the plaintiff the Court did reserve judgment AND the same standing for judgment this day THIS COURT DOTH ORDER that the appeal be allowed and that the orders of the learned trial Judge in the Court below be set aside and in lieu thereof:

1. That the question numbered 1 in the Said Statement of Issues namely "is the defendant entitled to assert that the covenants contained in Memorandum of Underlease No. 2775160 or any of them are in restraint of trade and un enforceable?" he answered "Yes."

2. That the question numbered 2 in the said Statement of Issues namely "Are the covenants contained in Memorandum of Underlease No. 2775160 or any of them an unreasonable restraint of trade and unenforceable? he also answered "Yes."

AND THIS COURT DOTH FURTHER ORDER:

3. That this action be referred back to the learned trial Judge for further consideration and alternatively or in addition that either party may be at liberty to make any application to this Court consequential upon this order.

4. That either party be at liberty to appeal to the High Court of Australia from this order.

5. That the application for leave to appeal to Her Majesty in Council do stand adjourned.

6. That the plaintiff do pay to the defendant its costs of the said appeal to be taxed.

7. That the defendant's costs relating to the restraint of trade issues in the original hearing before the trial Judge be the defendant's costs in any event and subject thereto that the question of the costs of the trial be remitted to the learned trial Judge for further consideration.

BY THE COURT

DEPUTY MASTER

THIS ORDER is filed by MESSRS. CLARK & PARTNERS of Aston House, 13 Leigh Street, Adelaide. Solicitors for the Appellant.

In the High Court of Australia

No.20

Reasons for Judgment of Sir Edward McTiernan, A.C.J. 11th October 1973

No. 20

REASONS FOR JUDGMENT OF SIR EDWARD McTIERNAN A.C.J.

Delivered 11th October 1973

AMOCO AUSTRALIA PTY. LIMITED

v.

ROCCA BROS. MOTOR CO. PTY. LTD.

JUDGMENT - McTIERNAN A.C.J.

I have had the advantage of reading and considering the reasons which have been prepared by Walsh J. and I agree with them.

I would therefore dismiss the appeal.

No.21

Reasons for Judgment of Menzies J. 11th October 1973

No. 21

REASONS FOR JUDGMENT OF MENZIES J.

AMOCO AUSTRALIA PTY. LIMITED

v.

ROCCA BROS. MOTOR CO. PTY. LTD.

The judgment appealed against is one whereby the Full Court of the Supreme Court of South Australia reversed a decision of Wells J. to the effect that a restraint of trade in favour of the appellant (Amoco) accepted by the respondent (Rocca) was reasonable. His Honour granted injunctions enforcing this restraint.

The restraint in question is one of a common kind, i.e., to ensure that the oil products of one company should, for a term, be the only products supplied from the service station of another company. Amoco is a supplier of petroleum products; Rocca is the owner of a service station. At the time when the preliminary agreement was made, Amoco - a United States company - was endeavouring to establish itself in Australia and Rocca was in s position to become the owner of a

piece of land suitable for a service station at Para Hills, a district outside Adelaide which was then about to be developed as a suburb. The restraint actually in question was effected by means of provisions in an underlease. Rocca, as owner, leased the site to Amoco for a term of fifteen years. Amoco granted Rocca an underlease for the same term less one day. The essence of the restraint was that Rocca would purchase from Amoco at a fixed rebate on current prices its full requirements of petrol and oil for sale at the service station and would not, except in special circumstances, sell at that service station the products of any other oil company. There were other less important stipulations relating, inter alia, to the times and manner of the operation of the service station and the payment of accounts. There was also a limitation in relation to assignment. All these were in favour of Amoco. Amoco, for its part, undertook to pay for certain work at the service station and to lend Rocca plant and equipment for its operation. When the station was ready to be opened in December 1964, Amoco had spent about $7,000 upon it. Later, further money was spent. Although the original agreement had been completed by June 1964, the lease and the underlease were not executed until May 1966. The term of the lease was fifteen years from 30th November, 1964. In September 1969, the parties executed extensions of the lease and underlease for an additional five years. The consideration of Rocca agreeing to this extension was that Amoco should pay for certain further improvements to the service station and should increase the amount of the rebate for the extended term. In all, Amoco spent about $19,000 upon Rocca's garage.

In 1971, Rocca wanted to re-negotiate these arrangements with Amoco. When Amoco refused to do this, Rocca started negotiations with another oil company, I.O.C. Australia Pty. Ltd. (I.O.C.). On 12th November, 1971, Rocca ordered Amoco to remove some of the equipment that it had installed at the service station. When Amoco did not comply with these demands, Rocca began itself to remove the petrol pumps and illuminated sign, and to replace them with I.O.C. equipment. Amoco thereupon commenced proceedings in the Supreme Court and obtained interlocutory injunctions.

In the High Court of Australia

No.21

Reasons for Judgment of Menzies J. 11th October 1973 (continued)

An order was then made for a trial without pleadings of certain issues. These issues were:

"1. Is the defendant entitled to assert that the covenants contained in Memorandum of Underlease No. 2775160 or any of them are in restraint of trade, and unenforceable?

2. Are the covenants contained in Memorandum of Underlease No. 2775160 or any of them an unreasonable restraint of trade and unenforceable?

3. If the covenants in Memorandum of Underlease No. 2775160 or any of them are unenforceable is the whole of the said Memorandum of Underlease void?

4. If the said Memorandum of Underlease is void is Memorandum of Lease No. 2775159 also void?

5. All questions of consequential relief for either party arising from the resolution of the above issues shall be deferred for later consideration."

The learned trial judge determined the second issue in the negative upon the basis that the first issue should be answered in the affirmative.

The Full Court was of the opinion that both issues should have been determined in the affirmative. Upon this appeal it was argued for the appellant that the Full Court was wrong in its determination of both issues.

The contention that the first issue should have been answered in the negative was based principally upon the submission that the doctrine of unlawful restraint of trade did not apply to restrictions contained in the underlease from Amoco to Rocca simply because it was in a lease restricting the use of leased premises rather than the activities of a trader. The argument was based principally upon the judgment of the Court of Appeal in Cleveland Petroleum v. Dartstone (1969) 1 All E.R. 201. It seems to me that the basis of that decision was that a person who was out of possession of premises and who was let into possession of premises by an oil company on its

terms, i.e., to tie himself to that company for supplies, cannot rely upon the doctrine of restraint of trade. This conclusion was supported, so the Court of Appeal found, by what was said by three members of the House of Lords in Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (1968) A.C. 269; (1967) 1 All E.R. 699. In the circumstances here as stated, it would, however, be artificial to conclude that it was Amoco that let Rocca into possession of the service station. The service station was erected by Rocca upon land to which Rocca was entitled. Rocca, in the course of negotiations, had refused to sell the land to Amoco. The lease and the underlease were in no way a sham, but it would be wrong merely to look at the underlease as a source of Rocca obtaining possession of the land. At the beginning of the negotiations, Rocca owned the land and was entitled to possession of it. Once the lease and the underlease had been given, it is true in a sense that Rocca's possession was as under-lessee, but the substance of the matter is that Rocca, by granting a lease and taking an underlease, did not acquire possession of land. It was never out of possession of its land. The lease and the underlease were merely the machinery whereby the parties effected their purpose of arranging for the supply of petrol to a service station with a tie in favour of the supplier. This tie restricted Rocca in its trading upon its land.

Accordingly, it is not necessary to determine whether Cleveland Petroleum v. Dartstone (supra) is a correct application of what was said in the House of Lords in Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (supra). Nor do I think that the doctrine based upon public policy which requires a restraint of trade to be reasonable can have no application where the covenant in restraint of trade is given by some-one starting a new business in relation to future trading. In The Queensland Co-operative Milling Association Ltd. v. Pamag Pty. Ltd. (1973) 47 A.L.J.R. 342 a covenant given in such circumstances was subjected to the test of reasonableness.

In my opinion, the first issue was rightly determined in the affirmative, and the tie to be enforceable must be found to have been reasonable in the circumstances.

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No.21

Reasons for Judgment of Menzies J. 11th October 1973 (continued)

In the course of a very full, learned and powerful judgment, his Honour, the learned trial judge, reviewed the law relating to restraint of trade since Mitchel v. Reynolds (1711) 1 P.Wms.181, and set out the principles which he extracted from the review of authorities in a number of propositions. The law, which he so stated, he applied to the facts which he found in careful detail to conclude that the restrictions to be found in the underlease did not constitute an unlawful restraint of trade because, on the whole, they were reasonable both as between the parties and as between the parties and the public. His Honour's judgment was, no doubt, intended as an application of the following statement from Mitchel v. Reynolds (supra) at p.197:

> "In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained."

The Full Court reversed the decision not, as I understand it, because of any error by the learned trial judge in the formulation of the law which he applied, but because the Full Court came to a different conclusion upon the question whether the restraints were reasonable.

It was the basis of the decision of the trial judge that when parties negotiate a commercial arrangement from positions where one does not have the other at an unfair advantage and do, after hard bargaining, reach an agreement which each finds in its interests to accept, the Court will not readily find that their bargain is unreasonable as between themselves, notwithstanding the well-established policy of the law against restraints of trade. The course of his Honour's reasoning was the same as that stated persuasively by Ungoed-Thomas J. in Texaco Ltd. v. Mulberry Filling Station Ltd. (1972) 1 W.L.R. 814 where another petrol tie was under consideration. In 1963, Rocca could and did freely negotiate for a supply of petroleum products for the service station which it desired to establish and after contact with at least one other supplier

of petrol made the best bargain that it could at a time when there was competition among oil companies to secure solus outlets and, at a time when Amoco was in a disadvantageous position vis-a-vis its competitors in that it had only entered the Australian market in 1961. His Honour altogether rejected the suggestion that Rocca had been in any sense overborne into making an agreement to its disadvantage. His view was that Rocca had itself driven a hard bargain and had won the acceptance of favourable conditions which it required. His Honour accordingly weighed the advantages that Rocca had obtained against the disadvantage it suffered by tying itself to Amoco for fifteen years.

I agree entirely with his Honour's approach to this problem of reasonableness as between the two parties, and consider that, despite the severe restrictions which Rocca accepted - restrictions which the Full Court regarded as unnecessary and harsh - there was not, applying Edwards v. Noble (1971) 45 A.L.J.R. 682, sufficient to warrant interference with the conclusion that the learned trial judge reached. For my part, I regard it as a circumstance of considerable weight that five years after making the original arrangement and with the experience of its working during that time, Rocca should, in 1969, in consideration of Amoco paying for further work at the service station and increasing the rebate, have agreed to extend the terms of the lease and underlease for a period of five years. This hardly suggests that Rocca, having agreed to a term of fifteen years, considered itself to be thereby the victim of an unreasonable restraint of trade. The members of the Full Court did direct criticism to the use that his Honour made of certain evidence tendered by Amoco to show that a tie of fifteen years would do no more than provide it reasonable protection for its legitimate interests, i.e., the protection of its distributing system based upon a number of assured outlets. I think that his Honour gave expert evidence on this point more attention than I would have had I been trying the case, but this was but one matter which he took into account in reaching his conclusion. The Full Court did emphasize that a restraint cannot be justified simply as a means of maintaining a favourable competitive position. That is the law but it must, I think, be recognized that every

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restraint which has been upheld has afforded some measure of protection against competition, and the presence of this element does not spell invalidity. Surely it would not be an unlawful restraint of trade for the owner of an actually established service station to stipulate with its sole supplier that it would not for some substantial period of time during its contract, supply another station within the same locality. Such a restriction would, of course, be little more than protection against competition, even if it were to be expressed as the protection of an investment in the service station. Again, where solus agreements have been sustained, their effect has been as a protection against competitors notwithstanding that it can be expressed as a protection of the supplier's outlets. To pronounce and apply a dictum in favour of unlimited competition hardly determines whether or not a particular restriction is reasonable or unreasonable.

To the members of the Full Court the critical matter was the period of the tie, and it was thought that fifteen years was too long to be reasonable. It is not possible, however, as a matter of law to fix some maximum length of time as the period within which a restriction may be regarded as reasonable. What seems to me of vital importance is what the person who accepts the tie expects to gain by doing so. Indeed, the real problem for a Court is to weigh the advantages and disadvantages as they must have appeared to those who entered with their eyes open into the commercial arrangements involving restrictions upon future trading. The decision is one of mixed fact and law to be decided upon all the circumstances of the particular case. Here, the trial judge found that Rocca not only made the best bargain that it could to obtain a supply of petrol for the service station which it was minded to establish, but that the bargain which was made - including the provisions which members of the Full Court regarded as unnecessary and harsh - was as a whole fair to both sides. In doing so, he did not suggest that like restrictions would be reasonable in other cases; his decision was simply that taking the agreement as a whole the restrictions were reasonable in this case. In my opinion, the Full Court ought not to have substituted its own opinion for that of the learned trial judge as to these matters.

In dealing with the issue whether the restraint was injurious to the interests of the public, his Honour quite properly laid stress upon the interest of the public in the carrying out of commercial arrangements entered into freely by parties who may be trusted to see and appreciate their own interests. His Honour took into account the consequence of destroying a commercial contract under which the party who was rejecting it had taken substantial benefits both at the time of making the contract and over a period of years subsequently.

It is a matter of common knowledge that over the past fifteen years, the selling of petroleum products to the public has been through service stations operating in one way or another under solus agreements with suppliers. The restrictions that are implicit in such a system of trading are an accepted element of commercial life. The law recognizes this, and in any particular case, the essence of the problem is to decide whether or not particular restrictions are reasonable in all the circumstances, taking into account the interests of the public. What is reasonable, taking the interests of the public into account as well as the interests of the parties, is not injurious to the public.

The cases show that it has become a matter for judgment after weighing the relative advantages and disadvantages of what has been agreed to decide whether a trade tie is reasonable in the sense already indicated. This, despite the differences that are apparent in the speeches of the members of the House of Lords in the Esso case (supra) is the essence of the decision in that case upholding one tie and condemning the other. Once this position has been reached, it seems to me that a great regard should be accorded to the judgment of a trial judge who has, without error of law, applied his mind after a careful review of the facts to the correct question. The judgment of the learned trial judge in this case is, to my mind, an excellent instance of the application of the right judicial method, viz., the application of the relevant law formulated clearly, and, as I think, correctly, to a carefully found factual situation. The Full Court, nevertheless, for reasons which seemed good to it, decided that the primary judge

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Reasons for Judgment of Menzies J. 11th October 1973 (continued)

was in error in his assessment of that situation. I, with respect, do not share this view and would allow the appeal and restore the judgment of Wells J.

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Reasons for Judgment of Walsh J. 11th October 1973

No. 22

REASONS FOR JUDGMENT OF WALSH J.

AMOCO AUSTRALIA PTY. LIMITED

v.

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD.

This is an appeal brought pursuant to leave granted by the Full Court of the Supreme Court of South Australia against a decision of that Court which upheld an appeal by the present respondent against a decision of Wells J., given in an action brought by the appellant against the respondent claiming certain injunctions and declarations. The basis of those claims was that the respondent had acted and was intending to act in breach of covenants contained in an underlease of certain land in respect of which the respondent had granted a lease to the appellant and had accepted an underlease from it. It is not in dispute that the respondent acted and proposed to act in a way which would constitute a breach of some of those covenants if they were binding, but it was asserted by the respondent that they were not enforceable because they were an unreasonable restraint of trade.

The matter proceeded before Wells J. as a trial of certain agreed issues, including the following:

"1. Is the defendant entitled to assert that the covenants contained in Memorandum of Underlease No.2775160 or any of them are in restraint of trade, and unenforceable?

2. Are the covenants contained in Memorandum of Underlease No.2775160 or any of them an unreasonable restraint of trade and unenforceable?

There were further issues raising questions as to the consequences which would follow as to the validity of the underlease and of the headlease, if the covenants in the underlease or any of them were found to be unenforceable. It was agreed that all questions of consequential relief arising from the resolution of the stated issues should stand for later consideration. Wells J. answered the first question by stating that he treated the respondent as entitled to assert that the covenants were in restraint of trade and unenforceable. He answered the second question "No". Thereafter he made certain declarations and orders, with the terms of which we are not presently concerned. In the Full Court the first and second questions were answered in the affirmative and the Court ordered that the action be referred back to the trial judge for further consideration and alternatively or in addition that any party might be at liberty to make any application to the Court consequential upon its order. In this appeal the Court is concerned only with the issues Numbered 1 and 2 set out above. If the appeal succeeds the declarations and orders made by the trial judge will stand. If the appeal fails, the action will require further consideration in the Supreme Court.

In 1963 members of the Rocca family, after some previous negotiations with another oil company, entered into discussions with the appellant (hereinafter called Amoco). The land was purchased in 1963 by one of the family and this was subsequently transferred to the respondent (hereinafter called Rocca), which was incorporated on 10th February 1964. The land is at Para Hills, some twelve to fifteen miles north of Adelaide, in an area which was at that time far from being fully developed. The subject of the discussions with Amoco was the establishment of a service station on the land. After a preliminary agreement, upon which I need not dwell, an agreement between Amoco and Rocca was executed on 19th June 1964. Rocca was not then the registered proprietor of the land, but, in my opinion, nothing turns on

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that fact. It became registered proprietor before the lease and the underlease, which the agreement contemplated, were executed. The agreement provided that Rocca would at its expense erect the service station in accordance with an attached plan. Amoco would lend plant and equipment to Rocca pursuant to an Equipment Loan Agreement which was to be executed by the parties. The service station was to be completed on or before 31st March 1965. On its completion by that date Rocca would grant and Amoco would accept a lease of the premises for fifteen years, with a right of determining the lease at the expiration of the first ten years on three months' notice. It is clear that this right of earlier determination was vested in Amoco only and not in both parties. The lease was to be at a yearly rental of One pound, plus a sum equal to threepence per gallon of all petrol delivered by Amoco to the premises for sale. It was further agreed that Amoco would grant and Rocca would accept an underlease for a term of fifteen years less one day (subject to the right of earlier determination by Amoco) at the yearly rental of One pound. The lease and underlease were to be in the forms annexed to the agreement, with such modifications as the parties might agree upon or circumstances might render necessary.

The lease and underlease were not executed until 19th May 1966. The term of the lease was expressed to be fifteen years commencing on 30th November 1964 with a right by Amoco to determine it after ten years. The underlease was for a like term less one day. Meanwhile the agreement of 1964 had been acted upon. The service station was erected and was opened on 10th December 1964. Prior to that date Amoco lent to Rocca and installed certain plant and equipment. In the Equipment Loan Agreement, annexed to the agreement of 19th June 1964, it was provided that Amoco would lend certain specified equipment which would remain its property and on termination of the agreement by cancellation or otherwise it would have the right to enter and remove the equipment. Rocca was not to remove it from the premises without Amoco's consent.

When the lease and the underlease were executed, their terms accorded generally with those set out in the agreement of 19th June 1964

and in the forms annexed to it. The underlease contained a schedule of equipment expressed to be part of the demised premises. This was not identical with the equipment specified in the earlier Equipment Loan Agreement, but I do not regard that fact as important. A more significant variation was that in the underlease as executed, cl. 3(i) bound Rocca to purchase at least 8,000 gallons of petrol and at least 140 gallons of motor oil from Amoco in every month during the term. The corresponding printed clause, in the form attached to the agreement of 19th June 1964, had not been completed by filling in the quantities and it appears to have been crossed out. It is stated in the judgment of Wells J. that it was common ground that no "gallonage" was stipulated for until 1966. It will be necessary later to make some reference to the bearing of this clause upon the reasonableness of the covenants made by Rocca and to refer to the estimates of "gallonage" used by the officers of Amoco in certain calculations which they made in 1964.

In relation to the dispute as to the enforceability of the covenants in the underlease the most important covenant is cl.3(h), which must be considered, of course, having regard to the length of the term of the underlease. The clause provides:

"3. The Lessee covenants with the Lessor:-

.....

(h) To purchase exclusively from the Lessor all petrol, motor oil, lubricants and other petroleum products required for sale on the demised premises and not directly or indirectly to buy, receive, use, sell, store or dispose of or permit to be bought, received, used, sold, stored or disposed of at or upon the demised premises or any part thereof any petroleum products not actually purchased by the Lessee from the Lessor provided that the Lessor is able to supply same."

There are other clauses which need to be examined in so far as they affect the way in which and the conditions upon which the restrictions imposed by

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cl. 3(h) might operate and in so far as they have been relied upon by Rocca as tending to show that it was subjected to harsh obligations going beyond what was necessary to promote any legitimate interest of Amoco. I proceed to refer to some of the clauses to which attention was given in the Supreme Court.

Clause 3(e) is a covenant not to assign the lease or to part with possession of the premises. It is absolute in form. It was said by Bray C.J. that it should be read as being subject to a proviso that consent is not to be unreasonably or capriciously withheld. I do not regard it as having much significance, in relation to the questions raised by this appeal; but its presence serves, perhaps, to emphasise that Rocca did not have available to it any means by which, during the currency of the underlease, it could free itself from the obligations undertaken by it.

Clause 3(g) requires Rocca to carry on and conduct in a proper manner on the premises the business of a petrol service station and not to use them for any other business or purpose "and not during the continuance of this lease to cease to carry on the said business without the prior written consent of the Lessor". Clause 3(i) requires Rocca to purchase at least 8,000 gallons of petrol and at least 140 gallons of motor oil from Amoco in every month during the term of the lease. In dealing with cl. 3(g), Wells J. referred to what was said by Diplock L.J. in Petrofina (Gt.Britain) Ltd. v. Martin [1966] Ch.146, at p.189, concerning a provision of this kind, which binds a trader whether he trades at a loss or not to continue trading throughout a long period, during which changes may occur tending to make the trading unprofitable. After referring to differences between the circumstances of the Petrofina case and the case before him, Wells J. went on to express the opinim that, although a strict compliance with cl. 3(g) could require Rocca to trade at a loss, it was unreal to think that Amoco would insist upon compliance if the trading were unprofitable. His Honour referred to what he regarded as a lack of any commercial advantage to Amoco "in pursuing an empty claim on the covenant". With respect I do not find in these considerations a satisfactory basis for discounting the stringency

of the covenant. I am not persuaded that if a time came when it was difficult for Rocca to trade profitably it would necessarily be of no commercial advantage to Amoco to insist upon compliance and it is far from being obvious that a claim on the covenant would be an empty claim. But no doubt that is a matter upon which minds may differ. What is more important is the question whether or not a party seeking to justify a restriction imposed for that party's benefit may be permitted to do so on the ground that it was unlikely that it would enforce the stipulations contained in the agreement according to their terms. Elsewhere in his judgment Wells J. referred to the following statement of Lord Reid in Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. [1968] A.C. 269 (herein called Esso), at p. 303:

> "It is true that if some of the provisions were operated by the appellants in a manner which would be commercially unreasonable they might put the respondents in difficulties. But I think that a court must have regard to the fact that the appellants must act in such a way that they will be able to obtain renewals of the great majority of their very numerous ties, some of which will come to an end almost every week. If in such circumstances a garage owner chooses to rely on the commercial probity and good sense of the producer, I do not think that a court should hold his agreement unreasonable because it is legally capable of some misuse."

There may be cases in which it is very clear that a provision would never be enforced according to its strict terms and I do not question the propriety of disregarding in such cases some theoretical possibility. But I am of opinion that, except within very narrow limits, the Court must have regard to the rights and obligations created by the agreement rather than to the manner in which it thinks it is likely that the agreement will operate in fact. I agree with respect with what Bray C.J. has said on this point in the present case.

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Clause 3(i) has the effect, in my opinion, of imposing an obligation that could operate in a very unreasonable way. It binds Rocca to purchase the stated minimum quantities, regardless of the state of its trade at any time throughout the period of the lease, and no matter what changes in circumstances may have occurred causing a reduction in its sales. In his judgment Wells J. said, as I have mentioned above, that this clause was left incomplete in the form of underlease annexed to the 1964 agreement. He said, also, that at that time the officers of Amoco in Adelaide had estimated sales for 1966 at 80,000 gallons (Imp.) of petrol and 1,400 gallons of motor oil. But when the time came to execute the formal lease and underlease it was found that sales had been greatly in excess of expectation and in the first year of operation the sales of petrol had reached 96,000 gallons. His Honour concluded that in 1966 the figure of 8,000 gallons per month was not otherwise than in accordance with reasonable expectations, although it might have seemed rather severe if that figure had been demanded in 1964. Accepting his Honour's views of the facts which I have just mentioned, they raise a difficulty concerning the date at which the question of reasonableness should be examined. In the Full Court it appears that the case was conducted on the footing that the proper date at which to consider that question was the date when the agreement was executed (June 1964). Wells J. considered that he should examine all the circumstances relevant to the trading venture and ought not to exclude the events and circumstances of 1964 and 1965 simply because the lease and underlease had not then been executed. At the same time he said that he did not wholly equate the situation to that which would have existed if, from the beginning, the parties had operated under a formal lease and underlease. In this Court it was stated to be common ground that the enforceability of the underlease was to be judged by reference to the circumstances which existed as at June 1964. The case has been conducted on the footing that the agreement then made was immediately operative and (subject to the restraint of trade question) binding upon the parties. This means that when they made their agreement as to the length of the period of the tie and as to other terms and conditions under which they would do

business, the provisions afterwards inserted in cl. 3(i) formed no part of their bargain. It cannot be asserted, therefore, that that stipulation was considered to be necessary in order to protect the interests of Amoco. It is difficult to see that between then and May 1966, it could have become necessary to include it in the formal document in which the bargain was then embodied. The question at this point is not whether the specified amount of the minimum supply appeared in 1966 to be an amount which Rocca would be able to meet but whether any such provision was reasonably necessary. It cannot be doubted however that the clause did become a binding provision (subject to the restraint of trade question) when it was included in the underlease and it is, therefore, to be taken into account in considering the question of the reasonableness of the restraint of trade, in the light of all the covenants which are associated with it.

Clause 4(a) provides that Amoco will sell to Rocca at the "usual list prices to resellers" its entire requirements of petroleum products. It provides, also, for payment in cash at the time of delivery. Clause 4(b) provides that if Amoco is unable for any reason which in its opinion is beyond its control to supply petroleum products as required its obligation to supply shall be suspended. During such a period of suspension Rocca is to be at liberty to obtain supplies from other sources. Clause 4(c) provides that there is no obligation on Amoco to sell any such products until Rocca has paid for any already supplied and has otherwise observed the conditions of the underlease and that a refusal to supply is not to be deemed a breach of the underlease so as to release Rocca from its obligations to purchase exclusively from Amoco. It will be sufficient I think to make two comments on these provisions. The first is that Amoco is not at liberty to fix prices to be charged by it to Rocca in an arbitrary manner so as to discriminate against it in favour of all other retailers, although it appears that it did grant special discounts on some occasions. The second comment is that the liability of Amoco to maintain supplies is limited in a way that could leave Rocca in difficulties against which it could not guard itself, with no means of escape from those difficulties, except "the cheerless

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right" to seek supplies elsewhere: See Esso, at p.329.

In his judgment Wells J. said that in addition to what was contained in the agreement for a lease the parties had arrived at a collateral agreement which was implemented from time to time that Amoco would lay out considerable sums on fixtures and equipment as well as bearing certain other initial costs. He referred to a grand ceremonial opening of the service station which took place in December 1964, in preparation for which Amoco made a fairly substantial outlay. Its appropriations made before the opening amounted to $7,130. Between then and 1969 there were further appropriations and the total of all the appropriations was $18,995. His Honour said, also, that Rocca received certain intangible benefits from Amoco and in providing them Amoco was acting consistently with a shared intention that it was to treat the Rocca service station much as it would treat one of its own service stations. In a letter written in May 1964 Amoco stated its intention to include the Para Hills service station "in the sales promotions and sales aid activities which we may introduce from time to time". In my opinion it was not shown that by June 1964 or by May 1966 Amoco had undertaken any specific obligations to provide to Rocca any equipment or to make on its behalf expenditure, other than the obligations contained in the formal agreement. Nor was its stated intention as to sales promotion expressed in terms specific enough to be contractually binding. Any expenditure which occurred after May 1966 cannot be regarded, in my opinion, as part of the consideration provided by Amoco for the covenants into which Rocca entered, which has to be assessed at the date when the covenants were made. Such consideration could include, of course, any obligations which Amoco had undertaken. But, in my opinion, it had not committed itself to any defined amount of future expenditure. It is to be observed, also, that Rocca committed itself to a substantial capital outlay. In accordance with the terms of the underlease Rocca received what amounted to a rebate of threepence per gallon on the price of petrol supplied to it. It was suggested that this was a high rebate. But as Bray C.J. has pointed out,

the rebate was not related to the price of petrol for the time being but was fixed for the duration of the term so that increases in the price of petrol could make the rebate a relatively small one.

In 1969 the parties agreed upon an extension of the agreement for a further period of five years, on the understanding that Amoco would at its cost effect alterations to the service station and that the rebate would be increased for the extended period of five years to four cents per gallon. In my opinion this fact has no bearing upon the decision of the questions raised by the appeal.

It is convenient now to turn to a consideration of the first and second issues set out above. The first issue is intended to raise the question whether or not the restraint of trade doctrine has any application at all in the circumstances of this case. Amoco has contended that this question should be answered "No". The first ground on which this contention was based may be expressed as follows. The result of the agreement which the parties made and of the execution of the lease and the underlease was that Rocca, having parted with possession of the land by granting the lease, obtained possession of it from Amoco under the underlease. These were genuine documents. There was no ground for treating them as shams or as cloaks for some different bargain having a different legal effect. It was submitted that the consequence was, in accordance with the observations of some of their Lordships in Esso, adopted in Cleveland Petroleum Co. Ltd. v. Dartstone Ltd. /1969/ 1 All E.R. 201, that Rocca must be considered to have given up no freedom to trade on the land by accepting the underlease and entering into the covenants contained in it. It could not be said that there had been a restriction on any freedom which it had and the question of the reasonableness of the terms upon which it obtained a right to trade does not arise. In my opinion, this submission should not be accepted. I agree with respect with the reasons given by Bray C.J. for rejecting it. It is not necessary to examine closely the correctness of the principle stated in the passages in some of the speeches in Esso on which Amoco relies. I should

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be reluctant to accept that principle as a valid ground for treating the restraint of trade doctrine as necessarily inapplicable. But even if it were to be accepted, this is not a case in which the covenantor came to the land as a stranger and obtained for the first time a right of possession and with it a right to trade on the land, by purchasing or leasing it from its owner upon terms that included restrictions on the scope of its right to trade. Rocca was in possession as owner. The circumstance that in June 1964 it was not yet registered is, in my opinion, immaterial for present purposes. It remained, in actual possession at all times. I agree with the opinion of Bray C.J. that any notional interval of time between the taking effect of the lease and the taking effect of the underlease ought not to be allowed to obscure the realities of the situation for the purpose of the application of the doctrine of restraint of trade. To say that is not to assert that the lease and underlease were shams. It is merely to deny that they had the effect that Rocca must be held to have had no freedom to trade on the land until it obtained the underlease and to deny that the covenants into which it entered, pursuant to an agreement made prior to the execution of the lease and the underlease, imposed no restriction on its freedom.

Two additional matters were put forward in support of the argument that the doctrine of restraint of trade was wholly excluded in the circumstances of this case. It is not clear, I think, whether these are two distinct grounds or refer to two aspects of a total situation to which, according to the argument, the doctrine is inapplicable. It was said that where at the relevant time the covenantor was entering upon a new business and had no way of doing this except by entering into an agreement with a substantial trade tie, the Court will not examine the terms of the agreement to ascertain whether or not it imposes unreasonable restrictions. Likewise, if it appears that the parties have agreed to embark upon a joint venture in setting up a business the doctrine will not be applied. In my opinion, there is no warrant for laying down any such rules of exclusion of the doctrine as those proposed by these submissions. The particular circumstances

to which the argument refers may need to be taken into account when the Court considers whether or not the restrictions go beyond those that are permissible. But they should not be held to prevent the Court from considering that question at all.

I am of opinion, therefore, that the first issue should be decided in favour of Rocca. That means that the Court is required to examine the second issue, that is, whether the covenants in the underlease or any of them are an unreasonable restraint of trade. In relation to that issue it is convenient to refer, first, to some matters of principle.

The Full Court reversed the decision of the learned trial judge. Its members decided for themselves whether the term for which the tie endured, whether considered in conjunction with the alleged harshness of certain other covenants or independently of those covenants, was longer than was reasonable in the circumstances. In my opinion, they were correct in taking that course. Most of the primary facts were not in dispute. One issue of fact that was in dispute had been resolved in favour of Amoco. The trial judge rejected an argument that Rocca had been the victim of overreaching and deception. His finding on that question depended upon oral evidence. It was not challenged in the Full Court or in this Court. It does not appear that the Full Court failed to accept any findings of the learned trial judge which depended in any way upon the credibility or reliability of witnesses. They differed in some respects from the conclusions drawn by him from the evidence, but these differences were not as to any findings which depended upon the forming of opinions as to the competence or the credibility of the witnesses. It has been held repeatedly that the ultimate questions of reasonableness and of the lawfulness of a restraint upon freedom of trade are questions of law. They are questions to which it is inappropriate to apply the principles relating to the approach to be made by an appellate court to the findings of a trial judge on questions of fact, for example, the question whether or not a driver of a motor vehicle has failed to exercise reasonable care.

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I refer next to the question of the extent to which the Court, when considering whether or not a restraint is reasonable, should take into account the benefits which the covenantor obtains from the transaction in exchange for his covenants. The formulation by Lord Macnaghten in Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Company Limited [1894] A.C. 535, at p.565, of the principles by which the enforceability of a covenant in restraint of trade is to be tested has been constantly repeated and adopted. A recent instance is to be found in the judgment of this Court in Buckley v. Tutty (1971) 46 A.L.J.R. 23, at p. 29. That formulation refers to the "interests of the parties concerned". But it lays down that a restriction is to be justified only if it is "so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public" (p.30). This formulation, as it has been developed and applied, means that a restraint will not be enforceable, unless it affords no more than adequate protection to the interests of the covenantee in respect of which he is entitled to be protected. If the Court is not satisfied on that question it is immaterial, in my opinion, whether the covenantor has received much or little by way of benefits from entering into the transaction. But, although, it was held from early times that the Court would not inquire into the adequacy of the consideration for a restraint, nevertheless, I am of opinion that 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. It is to be borne in mind, also, that the benefit received by a covenantor is not limited to what he receives in money or other property. A covenantor may be regarded as obtaining, in return for a restraint, a benefit which consists simply in being able by this means to procure an agreement in aid of his trading, e.g., an agreement for the regular supply of goods which he would not be able to procure, except upon terms of submitting to a restraint.

If that restraint does not exceed what is reasonably adequate for the protection of the covenantee, then it may be regarded as reasonable so far as the interest of the covenantor is concerned. It may be in his interests to be able so to bind himself: See Herbert Morris, Limited v. Saxelby [1916] 1 A.C. 688, at pp. 700, 707-708 and Esso [1968] A.C., at p. 312.

But if the restraint goes beyond what is reasonable for the protection of the interests of the covenantee it will not be regarded by the Court as being in the interests of the parties. Although the parties have not bargained upon unequal terms and although there has been no deception or overbearing of one by the other, in my opinion the Court cannot accept the fact that the restrictions are those upon which the parties have agreed as conclusive to show that they are reasonable in reference to the interests of the parties concerned. There have been judicial observations to the effect that the Court will not readily substitute its own views as to what is reasonable for those of the contracting parties: See, for example, Esso [1968] A.C. at p. 323. No doubt the Court will give weight to the fact that the parties have agreed upon the restrictions. But, in my opinion, it is not entitled to hold itself bound by what they have done and for what reason to refrain from making any judgment on the question on reasonableness. In Texaco Ltd. v. Mulberry Filling Station Ltd. [1972] 1 W.L.R. 814, at p. 826, Ungoed-Thomas J. said:

> "It seems to me right in principle and in accordance with the habitual inclination of the court not to interfere with business decisions made by businessmen authorised and qualified to make them."

With respect that is a statement which, in my opinion, goes beyond what is warranted by the authorities and which cannot be accepted. There is no doubt that the Court has interfered with such "business decisions". The requirement of reasonableness with reference to the interests of the parties and that of reasonableness with reference to the interests of the public are to be regarded, in my opinion, as raising distinct questions. That has been laid down in many cases

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of high authority. But it does not mean, in my opinion, that in dealing with the first of those questions, no element of public policy is involved. It is public policy which lies at the root of the rule that agreements in restraint of trade are, prima facie, unenforceable. A decision whether the circumstances of a particular case call for the application of that rule or justify a departure from it is a decision on a matter concerning public policy. Therefore, if a restraint is imposed which is more than that which is required (in the judgment of the Court) to protect the interests of the parties, that is a matter which is relevant to the considerations of public policy which underlie the whole doctrine, since to that extent the deprivation of a person of his liberty of action is regarded as detrimental to the public interest: See McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society, Limited [1919] A.C. 548, at p. 574. I acknowledge that the consequence of what I have just stated is that there is to some extent a merging of the second branch of the Nordenfelt formulation of the applicable principle with its first branch. But this does not mean that the distinction between them is wholly obliterated. In order to justify a restraint of trade both tests must be satisfied. The restraint must be reasonable in the interests of the parties in that it affords no more than adequate protection to the covenantee "while at the same time it is in no way injurious to the public" (see the Nordenfelt Case [1894] A.C., at p. 565). It may be that although a restraint satisfies the first requirement it is injurious to the public for some reason other than being in excess of what is reasonable in the interests of the parties. Perhaps this will rarely be so. But the possibility that it may occur is fully recognised in the authorities and it is to be noticed that in Esso ([1968] A.C., at p. 321) Lord Hodson rested his decision on the second branch of the Nordenfelt formulation.

From the opinions that I have expressed, I think that it follows that the Court must form its own judgment in dealing with the question of reasonableness as between the parties. It must decide whether or not it is satisfied (the onus being on the covenantee) that the restraint provides no more than adequate protection. It has

been said that when "free and competent parties agree and the background provides some commercial justification on both sides for their bargain" that onus should be easily discharged: See Esso [1968] A.C., at p. 324. But yet it is to be observed that in Esso it was held that a tie for a period of twenty-one years was not shown to be reasonable. although the parties, who were not considered to have been on unequal terms, had agreed to it.

Having regard to the foregoing principles, the question is whether or not the Full Court was in error in holding that the second issue should receive an affirmative answer. In my opinion, it was not in error. I have discussed the principal facts and the terms of the agreement embodied in the documents executed by the parties. A decision upon the question of reasonableness depends upon a judgment the reasons for which do not admit of great elaboration. In my opinion it was not shown that the restrictions placed upon Rocca did not go beyond what was adequate for the protection of Amoco's interests. It is not in doubt, in my opinion, that Amoco was entitled in the circumstances to obtain the benefit of a trade tie in aid of the recoupment of its investment and in aid of the trading interests arising out of its agreement to supply its products to Rocca. The question is whether or not the term of the tie, considered in conjunction with the covenants to which I have referred, was greater than was reasonably necessary. It my opinion it was. At all events its reasonableness was not established. In his judgment Bray C.J. said:

> " The conclusion I have reached is that the covenants in the underlease go beyond what was reasonably necessary for the protection of Amoco. Certainly Amoco, in my view, has not shown the contrary and the onus is on it. A shorter term would, in my view, have been adequate to afford ample protection to its proprietary interest in its investment: and a shorter term or less onerous covenants or both would, in my view, have been adequate to protect its commercial interests."

I find myself in agreement with that statement,

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subject to the qualification that in my opinion the same conclusion would have been correct even if the covenants (other than the exclusive trade tie) had been less onerous.

Having regard to the careful examination of the facts made by Wells J. and by the Full Court I do not consider it to be necessary to discuss the details of the evidence by which Amoco sought to show that the restrictions it obtained were reasonably necessary to protect its interests. But there is one matter of evidence to which I should make some reference.

The document P.12 which was tendered in evidence by Amoco is described as a "determination of profitability index". It came into being in September 1964 that is sometime after the agreement of June 1964 was made. It is described by Wells J. as a document which showed a calculation by which from certain primary statistical facts the likely future cash flow from the project was examined and it was determined that at the end of fifteen years the project would yield 10.2% "profitability" after tax. The explanations given in evidence of the factors which entered into the calculation were somewhat complicated, but what was meant by the term "profitability index" was indicated by the evidence of a witness called by Amoco, who said that "if a project earns enough above operating costs to return the invested amount by the end of the project life plus X per cent after tax effects on the amount still invested each year, that project as an X per cent profitability index". There was evidence that Amoco would not regard a proposed project as acceptable unless the profitability index was 10% or more. It was submitted for Amoco that this calculation was not made for the purpose of determining what should be the period of the tie, which had been agreed upon before the calculation was made, but it was said that it provided evidence that the period agreed upon was a reasonable one. A lecturer in Economics, Dr. Moffatt, whose evidence the learned trial judge accepted, said that in making the calculation Amoco had adopted figures that reflected an extremely cautious or conservative approach. By taking figures based on a more sanguine attitude a similar calculation would yield a result of about 17%. His Honour agreed with the

opinion that the company's calculation was on the conservative side. He added that from this the conclusion did not inevitably follow that Amoco was unreasonable in choosing a fifteen-year period. There is no reason to disagree with this last statement. But it is of no assistance to Amoco. It was obliged to establish that the tie was reasonable, which means, in my opinion, that it was reasonable in an objective sense, not simply in the judgment of some officers of Amoco. It appears to me that the production of Exhibit P.12 and the evidence about it did not provide any proof that the period of the tie was reasonable.

Some observations concerning Exhibit P.12 were made by members of the Full Court. Counsel for Amoco has submitted that the decision of the Full Court was based solely or mainly upon the view taken on this matter and that that view was mistaken. Now if it appeared that the Full Court or some members of it had erred in treating the calculation as tending positively to indicate thatthe restrictions were unreasonable, that would not enable Amoco to rely on it as evidence that they were not. I do not agree, however, that the members of the Full Court who discussed this matter were mistaken in the principal opinions they expressed about it. It is clear, as Bray C.J. pointed out, that the calculation assumed a sale in the fourth year of the project of 72,000 American gallons (60,000 Australian gallons). But this was substantially less than the estimate (96,000 Australian gallons) that had been made early in 1964 by the retail sales manager of Amoco in Adelaide (Mr. Nelson), the latter figure being one which, as it turned out, was reached during the second year and which was used, as stated earlier, in filling in cl. 3(i) in the underlease. Now it may well be that the officers who decided to use the lower figure for the purpose of the calculation had reasons for doing so which to them seemed valid. Some reasons that might influence the making of a reduction in an estimate supplied by the officers of a branch were suggested in evidence. But the use of the lower figure must surely affect greatly, and, indeed, must destroy the value of the results of the calculation, if these are put forward as tending to show that in fact the period of fifteen years was no longer than was reasonably necessary

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in order to secure for Amoco a "profitability" in the order of 10%, in the absence of proof that in 1964 an average monthly sale of 5,000 gallons in the fourth year was a reasonable expectation. The absence of evidence to establish that Mr. Nelson's estimate was too high and to show by how much it ought to have been reduced in order to take account of the facts that the service station had not yet been established and that it might not prove successful is a matter to which importance was attached in the judgment of Hogarth J. In my opinion his Honour was not in error in this respect or in attaching importance to these considerations. I have examined carefully the evidence upon which counsel for Amoco relied in a submission that Hogarth J. was in error in thinking that the evidence did not show that the estimate of the gallonage adopted for the purposes of the feasibility test was a reasonable one and did not explain how that figure came to be selected. In my opinion his Honour's view of the relevant evidence was not mistaken.

I am of opinion that the appeal should be dismissed.

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REASONS FOR JUDGMENT OF GIBBS J.

AMOCO AUSTRALIA PTY. LIMITED

v.

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD.

The facts of this case are recited in the judgment of my brother Walsh, which I have had the benefit of reading. The first of the two questions stated by the learned trial judge and answered by the Full Court is whether the respondent company ("Rocca") is entitled to assert that the covenants contained in the underlease dated 19th May 1966 from the appellant company ("Amoco") to Rocca, or any of those covenants, are in restraint of trade and unenforceable. That underlease, of the land at Para Hills on which Rocca's service station is now constructed, was for a term of fifteen years (less one day) from 30th November 1964. It is relevant

at this stage to refer to the provisions of certain of the covenants in the underlease. By cl. 3(g) Rocca (called in the underlease "the Lessee") covenanted with Amoco (called "the Lessor") "to carry on and conduct in a proper manner in and upon the demised premises during all lawful trading hours the business of a petrol service station only and not to use same for any other business or purpose whatsoever and not during the continuance of this lease to cease to carry on the said business without the prior written consent" of Amoco. By cl. 3(h) it covenanted "to purchase exclusively from the Lessor all petrol, motor oil, lubricants and other petroleum products required for sale on the demised premises and not directly or indirectly to buy, receive, use, sell, store or dispose of or permit to be bought, received, used, sold, stored or disposed of at or upon the demised premises or any part thereof any petroleum products not actually purchased by the Lessee from the Lessor provided that the Lessor is able to supply same". By cl. 3(i) Rocca agreed "to purchase at least 8000 gallons of petrol and at least 140 gallons of motor oil from the Lessor in every month during the term of this lease". Amoco on its part agreed to sell to Rocca and to deliver to the demised premises at Amoco's "usual list prices to resellers at the time and place of delivery" Rocca's entire requirements of petroleum products (cl. 4(a)). However, if Amoco is unable for any reason whatever which is, in the sole opinion of Amoco, beyond its control, to supply petroleum products as required, its obligation to supply is suspended and Rocca is at liberty to supply itself from other sources with sufficient petroleum products but only until such time as Amoco shall notify it that it is prepared to resume supply (cl. 4(b)). There can be no doubt that the covenants of the underlease, if they are valid, will interfere with Rocca's liberty to carry on its trade in the manner which it considers most advantageous. The question is whether they create restraints whose validity is to be tested by the common law rules relating to restraint of trade.

It has been held, or assumed, in many cases, and is now clearly settled, that those rules apply to an agreement by which a trader undertakes to buy

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exclusively from one supplier all the goods of a particular kind that he needs for the purposes of his trade: Peters American Delicacy Company Ltd. v. Champion (1928), 41 C.L.R. 316; Foley v. Classique Coaches Ltd. [1934] 2 K.B. 1; Peters American Delicacy Company Ltd. v. Patricia's Chocolates and Candies Pty. Ltd. (1947), 77 C.L.R. 574; Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. [1968] A.C. 269. Similarly an undertaking by a producer to sell his whole output exclusively to one buyer can fall within the doctrine; McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society Ltd., [1919] A.C. 548; Heron v. The Port Huon Fruitgrowers' Co-operative Association Ltd. (1922), 30 C.L.R. 315. The doctrine is not rendered inapplicable by the fact that the restraint extends only to the use of a particular piece of land; it applies, for example, where a farmer agrees to sell all the produce of his farm to a particular buyer or where the proprietor of a petrol service station agrees to give to a particular oil company the exclusive right to supply him with petrol: Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (supra), at pp. 297-298, 308-311, 315-319. Prima facie, therefore, the covenants in the underlease operated in restraint of Rocca's trade.

However, on behalf of Amoco it was submitted that the doctrine of restraint of trade has no application to the present case for two reasons. In the first place, it was said that during the moment of time between the grant of the lease by Rocca to Amoco and the grant of the underlease by Amoco, Rocca no longer had any right to possession of the land or any right to trade on it, so that when Rocca took possession subject to the covenants in the underlease it gave up no existing right to trade but rather acquired a qualified right to trade. Secondly, it was said that on 19th June 1964, the date of the agreement to grant the lease and to accept the underlease, Rocca was not in business as a service station proprietor and, from a practical point of view, had little chance of getting the supplies necessary to enable it to conduct such a business unless it was prepared to bind itself to take all its requirements of petrol from one oil company. For this reason, it was said, Rocca was not prevented from

exercising any right or freedom to trade, but was in truth enabled to trade by the agreement which it made with Amoco.

Both of these submissions were founded upon some of the speeches in the House of Lords in Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (supra) and upon the later decision of the Court of Appeal in Cleveland Petroleum Co. Ltd. v. Dartstone Ltd. [1969] 1 W.L.R. 116. In Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (supra) their Lordships, in discussing the argument that the doctrine of restraint of trade does not apply to a restraint on the use of a particular plot of land, drew a distinction between the case before them, in which the covenantors, before they made the agreement, were in possession of the land and entitled to use it as they chose, and the situation of a purchaser or lessee of land who takes possession for the first time subject to a restrictive covenant. It was said that the doctrine has no application to the latter case: see per Lord Reid, at p. 298, per Lord Morris of Borth-y-Gest, at p.309, per Lord Hodson, at pp.316-317, and per Lord Pearce, at p.325. The reason for this was expressed as follows by Lord Reid (at p.298):

> "Restraint of trade appears to me to imply that a man contracts to give up some freedom which otherwise he would have had. A person buying or leasing land had no previous right to be there at all, let alone to trade there, and when he takes possession of that land subject to a negative restrictive covenant he gives up no right or freedom which he previously had."

Lord Morris of Borth-y-Gest (at p.309) and Lord Hodson (at pp.316-317) expressed similar views. The Court of Appeal in Cleveland Petroleum Co. Ltd. v. Dartstone Ltd. (supra) referred to these remarks as dicta but followed and applied them on an interlocutory application.

I have, with respect, no difficulty in sharing the opinion of Lord Pearce that "It would be intolerable if, when a man chooses of his own free will to buy, or take a tenancy of, land

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which is made subject to a tie (doing so on terms more favourable to himself owing to the existence of the tie) he can then repudiate the tie while retaining the benefit" (see Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (supra), at p. 325). However, I do not find it necessary to consider whether an unjust repudiation by a purchaser or lessee in such circumstances should be prevented by holding that a transaction of that kind is not subject to the doctrine of restraint of trade or by treating it as subject to the doctrine and upholding the covenant as reasonable. In the present case it is unnecessary to decide whether the scope of the doctrine is limited in the manner suggested by Lord Reid, Lord Morris of Borth-y-Gest and Lord Hodson in Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (supra). Assuming that the principle stated in the passages to which I have referred is accepted as correct, it does not in my opinion follow that the covenants in the underlease in the present case lie outside the doctrine.

The present is not a case in which a covenantor accepts a lease of land of which he had never been in possession and on which he had never previously had a right to trade. Here, pursuant to the agreement made between the parties on 19th June 1964, Rocca, on 19th May 1966, granted to Amoco a lease of land which Rocca owned and of which it had possession and on the same day took an underlease of the land from Amoco for the term of the lease less one day. Clearly the execution of the lease and the underlease formed part of one transaction. It was intended that Rocca, which had possession, should, if not retain it, at least regain it after the lapse of a mere moment of time. This is not to say that the transaction was a sham - it was not; there was a genuine lease under which Amoco acquired an interest in the land and a real underlease to Rocca: cf. Strick (Inspector of Taxes) v. Regent Oil Co. Ltd. /1966/ A.C. 295, at pp. 312, 336 and 340. Nevertheless the effect of the transaction was that Rocca subjected itself to restrictions as to the use which it could make of land which it was previously free to use as it pleased. In truth and substance Rocca did fetter a right to trade which it previously had. The

application of the doctrine of restraint of trade does not depend "on legal niceties or theoretical possibilities" (Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (supra), at p.298) but is to be determined "by reference to the practical working of the restraint, irrespective of its legal form" (Pharmaceutical Society of Great Britain v. Dickson, /1970/ A.C. 403, at p. 440). The practical effect of the agreement, and of the covenants in the underlease made pursuant to the agreement, was to limit Rocca's pre-existing freedom to trade, and the agreement and the underlease were both within the doctrine of restraint of trade. Further, the positive agreement by Rocca to carry on the business during all lawful trading hours throughout the period of the underlease (cl. 3(g)) might in itself have been regarded as a restraint of Rocca's trade - cf. Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (supra), at p. 298.

I am quite unable to accept the second argument advanced on behalf of Amoco, which would in my opinion give the statements of their Lordships in Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (supra) an application far wider than was intended. The argument was in effect that Rocca had no existing freedom to trade because it had no existing business as a retailer of petrol and, from a practical and commercial point of view, had probably no prospect of successfully commencing such a business unless it agreed to take its supplies exclusively from one oil company or another. However, that does not mean that Rocca had no choice but to tie itself to Amoco; it had the power to negotiate with other oil companies and, if it agreed to tie, would not inevitably have bound itself for the same length of time and on the same conditions as are stipulated in the underlease. Rocca did have the right to trade on the land, although it had not previously exercised the right by conducting a service station. There is no justification in principle or in the authorities for excluding the doctrine of restraint of trade from cases where the covenantor is for practical or commercial reasons obliged to accept some restrictions on his freedom; 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 to one of the parties or

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contrary to the public interest. In further support of this branch of Amoco's argument it was contended that Amoco, which had only recently commenced to trade in Australia, and Rocca, which was commencing business as a service station proprietor, stood in a relationship of mutual need and ought to be regarded as being engaged in a joint venture rather than as supplier and retailer. With all respect, I can see no reason why, if this were correct, the doctrine relating to restraint of trade should be inapplicable, but in any case the parties were in truth not joint venturers; Amoco was a supplier endeavouring to bind Rocca, when it commenced business as a retailer, to obtain its supplies exclusively from the one source.

For these reasons the Full Court was in my opinion correct in holding the doctrine of restraint of trade to be applicable and in answering the first question "Yes".

The second question raised for decision is whether the covenants contained in the underlease, or any of them, are an unreasonable restraint of trade and unenforceable. The test to be applied in determining the validity of a restraint of trade was stated by Lord Macnaghten in Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Company Ltd., [1894] A.C. 535, at p. 565, in a passage that has been cited with approval in many cases including, to name only recent decisions, Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (supra) at pp. 299, 307 and 318, and Buckley v. Tutty (1972), 46 A.L.J.R. 23, at pp. 29-30. Lord Macnaghten said:

> "All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in reference to the interests of

> the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

The requirement that the restriction be reasonable in the interests of the parties has been explained as meaning that the restraint "must afford no more than adequate protection to the party in whose favour it is imposed" (Herbert Morris Ltd. v. Saxelby, [1916] 1 A.C. 688, at p.707), or in other words, "does the restriction exceed what is reasonably necessary for the protection of the covenantee?" (McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society Ltd. (supra), at p. 563). The test thus stated suggests that it is not material to consider the effect of the contract on the covenantor. It is established that the Court is not entitled to inquire into the adequacy of the consideration for a restraint, that is, the Court may not weigh whether the consideration is equal in value to that which the covenantor gives up or loses by the restraint: Hitchcock v. Coker (1837), 6 Ad. & El. 438, at p. 457; 112 E.R. 167, at p. 175; Herbert Morris Ltd. v. Saxelby (supra), at p. 707. Nevertheless the fundamental rule remains that the restraint must be reasonable in the interests of the contracting parties, and it would not be in the interest of a covenantor to subject himself to any restraint unless he received some advantage by so doing. In my opinion it is permissible, in asking whether a restraint is reasonable in the interests of the parties, to consider, as part of the circumstances of the case against which the question of reasonableness is to be decided, the quantum of consideration received by the covenantor and the effect of the agreement on the position of the covenantor: see Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (supra), at pp.300, 323; Fitch v. Dewes, [1921] 2 A.C. 158, at p. 163; Attwood v. Lamont, [1920] 3 K.B. 571, at p. 589; Heron v. The Port Huon Fruitgrowers' Co-operative Association Ltd. (supra), at p. 337; Peters American Delicacy Company Ltd. v. Patricia's Chocolates and Candies Pty. Ltd. (supra) at p. 591.

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Analogous to the rule that the Court is not entitled to concern itself with the adequacy of the consideration is the further principle that has been stated and restated in the authorities, with more or less emphasis, that where the parties to a contract have been in a position to bargain on an equal footing they should be treated as the best judges of what is reasonable in their own interests: North Western Salt Company Ltd. v. Electrolytic Alkali Company Ltd., /1914/ A.C.461, at p. 471; English Hop Growers Ltd. v. Dering /1928/ 2 K.B. 174, at p. 181; Peters American Delicacy Company Ltd. v. Patricia's Chocolates and Candies Pty. Ltd. (supra), at pp. 583, 599; Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (supra), at pp. 300, 305-306, 320, 323-324; Texaco Ltd. v. Mulberry Filling Station Ltd. (1972), 1 W.L.R. 814, at p. 826. Lord Pearce, in Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (supra), at p. 323, gave cogent reasons for the proposition which he there stated that "Undue interference, though imposed on the ground of promoting freedom of trade, may in the result hamper and restrict the honest trader and, on a wider view, injure trade more than it helps it". Nevertheless these statements, authoritative as they are, cannot mean that where the parties have been in an equal position of bargaining the question of reasonableness is entirely for the parties to decide. If that were so, the rule stated in Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Company Ltd. (supra) and constantly approved would be given quite a limited application, and the many cases in which agreements entered into between parties contracting on an equal footing have been held to operate unreasonably in restraint of trade could only be explained on the ground that the restraint was unreasonable in the interests of the public - a ground which in most of those cases was not in fact given for the decision. The truth is, I think, that, as Dixon J. pointed out in Peters American Delicacy Company Ltd. v. Patricia's Chocolates and Candies Pty. Ltd. (supra), at p. 590, there are two principles of policy that work in opposition - the policy of securing ample freedom of contract and enforcing contractual obligations, and that of preserving freedom of trade from unreasonable contractual restriction. As Dixon J. went on to

say (at p. 590):

> "The opposition has been resolved by the adoption of a clear rule making it necessary to justify all contracts in restraint of trade as reasonable in the interests of both the parties and by applying the test of reasonableness according to the situation the parties occupy and so recognizing the different considerations which affect employer and employee and independent traders or business men, particularly vendor and purchaser of the goodwill of a business."

The fact that the parties have bargained from a position of equality is therefore one of the circumstances to be considered in determining whether the covenants were reasonable, but it does not save from invalidity a covenant found to be unreasonable or contrary to the public interest (see also Creamoata Ltd. v. The Rice Equalization Association Ltd. (1953), 89 C.L.R. 286, at p. 318).

In Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (supra), Lord Hodson said (at p.319):

> "It has been authoritatively said that the onus of establishing that an agreement is reasonable as between the parties is upon the person who puts forward the agreement, while the onus of establishing that it is contrary to the public interest, being reasonable between the parties, is on the person so alleging: see Herbert Morris Ltd. v. Saxelby (1916) 1 A.C. 688, at pp. 700, 707-708."

However, the question of reasonableness is a question of law for the decision of the judge: Mason v. Provident Clothing and Supply Company Ltd., /1913/ A.C. 724, at p. 732; Attorney-General of the Commonwealth of Australia v. The Adelaide Steamship Company Ltd. /1913/ A.C. 781, at p. 797; North Western Salt Company Ltd. v. Electrolytic Alkali Company Ltd. (supra), at p. 471; Herbert Morris Ltd. v. Saxelby (supra), at p. 707; Lindner v. Murdock's Garage (1950), 83 C.L.R. 628, at p. 653. The judge's findings as to the circumstances of the case, of course, stand on appeal in the same position as any other finding of fact made by a judge, but his decision that

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the covenants were reasonable is not a decision of fact and an appellate court in reviewing such a decision inquires not whether it has been shown to be wrong, but simply whether it is right. Although a trial judge enjoys no special advantages in deciding such a question, the reasons given for his decision are of course entitled to due consideration. It is right to say, with all respect, that the reasons of the learned trial judge in the present case were very full, careful and helpful, as indeed were the reasons of the learned judges who constituted the Full Court.

It has been held that the validity of a restraint must be decided as at the date of the agreement imposing it: Lindner v. Murdock's Garage (supra), at p. 653; Commercial Plastics Ltd. v. Vincent [1965] 1 Q.B. 623, at p. 644. It was conceded by the parties in the present case that the question whether the restraint was reasonable should be decided in the light of the circumstances as at June 1964. I am not entirely satisfied that this concession was correct. There would in my opinion be much to be said for the view that the relevant date for the purposes of the inquiry as to the validity of the underlease - the instrument sought to be enforced - was 19th May 1966, notwithstanding that the underlease was executed pursuant to the agreement made in 1964. The provisions of cl. 3(i) (requiring the purchase of the specified minimum number of gallons of petrol and oil) had been struck out of the agreement made in 1964 but they formed part of the underlease executed in 1966. It would be somewhat anomalous to consider whether that requirement, made in the light of the knowledge available in 1966, was reasonable by reference only to the circumstances existing in 1964. Moreover, I should add that although it appears to be settled that the validity of the restraint must be decided as at the date of the agreement, it would seem to me that facts that have occurred since that date would not necessarily be irrelevant; such facts might throw light on the circumstances existing at the relevant date and might, for example, absolve the Court from the necessity of speculating as to the value of the consideration agreed to be furnished by the covenantee when, at the date of the litigation, it might be possible to quantify

that consideration exactly. However, these matters, which might in other cases be of vital importance, are not crucial in the present case.

There is no doubt that Amoco had commercial interests which it was reasonable to protect by making agreements with the owners of service stations under which those owners would agree, in exchange for certain benefits offered by Amoco, to take their supplies exclusively from Amoco. For Amoco to trade successfully it was necessary for it to obtain secure outlets for the sale of its petrol over a period of time. Agreements of the kind mentioned - solus agreements, as they are sometimes called - would serve Amoco's interests by enabling it to maintain or increase the volume of its sales and to effect the distribution of its products in an efficient and economical way. Indeed, the sale of petrol through one-brand service stations was the normal way in which most of the oil companies in Australia conducted their business and Amoco could not have entered the field of trade unless it had been able to ensure that a sufficient number of service stations would sell only its brand of products. It is not suggested by Rocca that agreements of this kind were in themselves unreasonable but rather that the restraints in the present case exceeded what was reasonably necessary for the protection of Amoco's admitted interests.

Amoco had the further interest of ensuring that its investment of the moneys outlaid for the benefit of Rocca proved secure and profitable. The cost to Amoco of providing and installing equipment at the service station during 1964 was about $7,775. (For purposes of comparison it may be mentioned that the cost to Rocca of building the service station was about $24,000, but since members of the Rocca family did much of the work themselves the real cost was greater.) In 1968, Amoco, at Rocca's request and in return for an agreement to extend the lease and underlease for five years, spent substantial additional sums in improving the service station. What occurred at that time was not done in pursuance of any obligation imposed by the underlease and it would not seem possible to regard it as part of the consideration given in exchange for the restraints now sought to be enforced. However, if it were

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assumed in Amoco's favour that it is permissible to consider the whole of the financial outlay made by Amoco - which totalled $18,955 to the end of 1969 - the ultimate result would not in my opinion be altered. Further, in May 1964 Amoco agreed to include the service station at Para Hills in its "sales promotions and sales aid activities" and it did in fact provide Rocca with some assistance of this kind. However, there is no evidence which enables the value of these services to be expressed in terms of money. The remaining benefit of a financial kind which Rocca derived from the transaction was the rental which under the lease Amoco was obliged to pay for the demised premises. This rent was fixed at one pound per year, plus a sum equal to three pence (2.5 cents) per gallon on all petrol delivered by Amoco to the demised premises for sale. This sum, although described as rental, was intended to be a rebate on the wholesale price of the petrol and the parties so regarded it. In 1968, when the parties agreed to the extension of the lease and underlease, the rebate was increased to four cents per gallon.

There are certain other circumstances that must be considered in deciding upon the reasonableness of the restraints. Amoco and Rocca negotiated on an equal footing - Rocca was not under pressure to agree to Amoco's suggestions. It was in Rocca's interests to enter into an agreement with some oil company ensuring supplies for the service station. An arrangement effected by means of a lease and an underlease is not an uncommon way for an oil company to obtain a tie over a service station and, generally speaking, the terms of the underlease were not unusual. Some difficulty may have been created in the selection of an appropriate term for the tie by the fact that the area in which the service station was established was not fully developed and the volume of business which the service station was likely to attract was to some extent in doubt.

In deciding upon the reasonableness of the restraint it is not possible to regard the length of the tie apart from the provisions of the covenants - all must be considered together. Perhaps it should be said that some covenants found objectionable in other similar cases do not

appear in the present case. For example, there is no covenant giving Amoco the right to fix the price at which Rocca might sell its products. Further, it is expressly provided (by cl. 4(a)) that Amoco will sell to Rocca at its usual list prices. It is true that Amoco if so minded might sell at a discount to a competing retailer and it is also true that cl. 4(b) gives Amoco power to suspend supply in certain circumstances, but I do not regard these provisions as of cardinal importance. The covenants which seem to me most to require further mention, apart from cl. 3(h) which binds Rocca to buy exclusively from Amoco, are the following. The obligation cast on Rocca by cl. 3(i) to purchase a specified minimum gallonage of petrol and motor oil would not have been unreasonable had it enured only for a short period, since the evidence shows that the gallonage fixed (at least that of petrol) was by no means excessive. However, if over a long term the business of the service station declined, the covenant could impose an unreasonable burden on Rocca. However, the most onerous of the covenants in the underlease is cl. 3(g) which requires Rocca to carry on the business of a petrol service station for the whole period of fifteen years unless Amoco releases it from this obligation. Perhaps cl. 3(e), which prevents Rocca from assigning, subletting or otherwise parting with possession of the demised premises should also be mentioned in this connection. It may be assumed that Amoco's consent to an assignment or sublease could not be unreasonably withheld, but there might be practical difficulties in finding a person willing to take an assignment or sublease on terms which included cl. 3(g)), particularly if the business got into difficulties. It is true that provisions in the form of cl. 3(g) are not uncommonly inserted in leases of various descriptions. However, as I have already indicated, the clause was not inserted in the present case by an owner of land to protect his interests when he leased it, but for the purpose of imposing a restriction on the owner itself. Moreover, the long period of the underlease renders the possible operation of the clause unduly harsh. During the period of fifteen years, trade at the service station could become quite unprofitable for a variety of reasons, including some of those mentioned by Diplock L.J. in Petrofina (Gt. Britain) Ltd. v. Martin, [1966]

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Ch. 146, at p. 189: "Better or cheaper products may be discovered. New or improved highways may divert the motor traffic from passing the filling station, other filling stations may be opened in the vicinity - even by the appellants themselves." However, Rocca is obliged to carry on the business even if it is trading at a loss. It was said that in practice Amoco would be likely to release Rocca from its obligation if in fact the business became unprofitable, but the interests of Amoco might well be served by maintaining the service station as an outlet for its products as long as it could, notwithstanding that Rocca was making an inadequate profit or even trading at a loss.

After full consideration of all the circumstances, I have reached the conclusion that it has not been shown that a tie for fifteen years on the terms of the underlease was reasonably necessary to protect the interests of Amoco. On the one hand, the great changes that might occur in the space of fifteen years could render the covenants intolerably burdensome on Rocca and the effect of inflation during that period might well greatly reduce the value of the fixed rebate which formed an important part of the consideration receivable by Rocca. On the other hand, there is nothing whatever to show that a tie for fifteen years was necessary to ensure for Amoco the stable outlet and economical system of distribution at which it was entitled to aim. Further, it was not shown that Amoco's outlay - even taking it as $18,955 - could not be recouped with profit in a shorter period.

Finally, it is necessary to make brief mention of the evidence relating to a document referred to as "Determination of Profitability Index" which was prepared for Amoco on 28th September 1964 and was in effect a feasibility study which purported to show that a tie for a period of fifteen years was necessary to render the venture sufficiently profitable for Amoco. In my opinion this document was no evidence that a tie for a period of fifteen years was reasonable. It is unnecessary to go into the details of the calculations set out in the Profitability Index. The final result depended on the adoption of a figure of 72,000 U.S. gallons (60,000 Australian gallons) as representing the gallonage that it was

estimated would be sold at the service station in the fourth year of its operation. The evidence showed that in fact the officers of Amoco had in 1964 estimated that the gallonage sold in the fourth year would reach 96,000 Australian gallons but for some reason which was inadequately explained the figure was reduced for the purposes of the calculations. The estimate of 96,000 Australian gallons was proved in the event to have been conservative - in fact that figure was considerably exceeded in the second year of operations (1966) and in all years thereafter. It is clear that if, for the purposes of the calculations, a considerably larger figure than 72,000 U.S. gallons had been taken, the profitability index arrived at would have been greater, and the study would not have supported the conclusion that the venture would only be profitable if conducted over a period of fifteen years. No doubt Amoco, for its own purposes, was entitled to make a study of the profitability of its operations on whatever basis it chose. However, the circumstances mentioned indicate that the Profitability Index cannot be relied upon as any guide to the question how long it was necessary to bind Rocca to its covenants in order that the transaction should be profitable to Amoco.

For the reasons I have given, I have reached the conclusion that the Full Court correctly answered the second question in the affirmative. It was not reasonably necessary for the protection of Amoco's interests to bind Rocca to the covenants of the underlease for a period of fifteen years. Since the restraints in the underlease were not reasonable in the interests of the parties it is unnecessary to consider the further question whether they were reasonable in the interests of the public.

I would dismiss the appeal.

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No. 24

REASONS FOR JUDGMENT OF STEPHEN J.

AMOCO AUSTRALIA PTY. LIMITED

v.

ROCCA BROS. MOTOR CO. PTY. LTD.

In my view the doctrine of restraint of trade is not applicable to the facts of this case. I would allow this appeal and restore the judgment of Wells J.

My reasons for this conclusion may be stated quite shortly but the considerations which I regard as supporting those reasons require some greater elaboration.

I regard the doctrine of restraint of trade to be inapplicable because the respondent (Rocca), in its arrangements with the appellant (Amoco), and which were arrived at after hard bargaining between parties neither of whom was disproportionately lacking in bargaining power, did not subject itself to restraints upon any existing ability to trade as the proprietor of a service station business. On the contrary, by its arrangements with Amoco it acquired, for the first time, the ability to enter into its intended business as a service station proprietor. But for those arrangements, or others of a similar nature which it might have been made with another supplier but which it regarded as less favourable to its own interests, Rocca's entry into the trade and its use of its vacant land as the site for a service station would not have been possible. Those arrangements were not restrictive of its trade but, on the contrary, have been productive of that trade.

The arrangements which were concluded certainly contained stipulations restricting Rocca's freedom of action once it began its trade and dictating the manner in which that trade might be conducted. The fact that such restrictions are imposed is not however, of itself, enough to require application of the doctrine; in Esso Petroleum Co. Ltd. v. Harper's Garage

(Stourport) Ltd. [1968] A.C. 269, their Lordships, while not all agreeing upon any one test to determine the precise width of application of the doctrine of restraint of trade, were in substantial agreement that there were extensive fields in which the doctrine did not apply despite the existence of restraints imposed upon liberty to trade as one wished. It is not, therefore, every restriction, viewed in isolation from context and circumstance, that attracts the doctrine.

The doctrine of restraint of trade seeks to give effect to, and at the same time to reconcile, two important and apparently conflicting aspects of public policy; on the one hand, the preservation of the freedom of the individual to employ his talents and industry in any lawful activity and, on the other, the preservation both of his freedom to contract and of his ability to enforce by legal process those contracts into which he may enter. It is the function of the doctrine to maintain a balance between these two; with changes of emphasis in the community upon the relative im importance of each, the point of balance has shifted over the years and will no doubt continue to do so. But any suggested application of the doctrine which gives effect to neither of these policies but is, on the contrary, destructive of the one without promoting the other seems to me to be a mistaken application.

The judgment of Lord Macclesfield in Mitchell v. Reynolds (1711) 1 P. Wms. 181, 24 E.R. 347, has long been regarded as of the highest authority in this field; in Herbert Morris Ltd. v. Saxelby [1916] 1 A.C. 688, Lord Shaw described it, at p. 717, as, of all the decisions "the most outstanding and helpful authority". Lord Macclesfield's statement of the reasons lying behind past decisions on voluntarily accepted restraints of trade and his reconcilation of "the jarring opinions" of the past is illuminating since it provides a sound indication of the scope of the doctrine by reference to its purpose in promoting those public policies whose instrument it is. There were, he said at p.190, four reasons to be discerned from the cases for the application of the doctrine; the mischief to the covenantee involved in threatened loss of his livelihood, the mischief to the public by depriving it of a useful

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member, the tendency of such voluntary restraints to foster abuses either by tending towards a monopoly, thus reducing trade into as few hands as possible, or by injuring the interests of apprentices and, lastly, and especially in the case of general restraints, the infliction of hardship on the covenantor while not benefiting the covenantee, who required no such width of restraint for his adequate protection.

If such were the reasons why the common law discouraged the acceptance of voluntary restraints on trade it can hardly be that the public policies which gave rise to the doctrine are properly effectuated by an application of the doctrine which, far from relieving against these evil consequences, has rather the opposite effect. W Where no ends of public policy are ttained by the application of the doctrine that is a sound reason for not applying it; otherwise the result may be "to miss the substance of the rule in a blind adherence to its letter" - per Lord Herschell L.C. in Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. [1894] A.C. 535 at p. 547.

In the present case a marked contrast exists, at each point, between those evil consequences at which Lord Macclesfield found the doctrine to be aimed and the consequences of the transaction here in question. By accepting the present contractual restraints Rocca was able to engage for the first time in a trade instead of being debarred from it, so that nothing equivalent to any loss of livelihood is present; as a result of its arrangement with Amoco Rocca's services were made available to the community rather than the public being deprived of a useful member; as a further consequence the total number of service stations serving the community has been increased rather than reduced; and from the arrangement Rocca has obtained considerable benefits while Amoco obtained protection useful to itself.

My reasons for concluding that the doctrine of restraint of trade does not apply in the present case may, then, be summarized as follows: to apply it to the present facts seems to me to run counter to each of those reasons associated with the upholding of a public policy in favour of the individual's freedom to engage in trade,

which is one component of the doctrine, while at the same time disregarding entirely that other component, freedom of contract. Moreover I know of no authority which compels me to a contrary view to that which I have formed, in light of the particular facts of this case.

The Courts have, of course, over the years provided a number of descriptions of the doctrine and on occasions definitions of what is a relevant restraint have been given; some of these are referred to by their Lordships in the Esso case, always accompanied by a warning against any too literal application of them - at pp.294-296, 307, 331. As Lord Wilberforce says, at p.331, the doctrine is one "to be applied to factual situations with a broad and flexible rule of reason" and in the Nordenfelt case Lord Watson, at p.553, distinguished between the binding authority of decisions dealing with and formulating principles which are purely legal and those decisions, such as the precedent cases here in question, "based upon grounds of public policy".

This is a case the relevant facts of which appear to me to distinguish it from the relatively few other decided cases where the doctrine has been applied outside its traditional sphere of master and servant, vendor and purchaser of goodwill and its less frequently applied, but nevertheless acknowledged, application in cases of combination to fix prices or restrict output.

The general facts of the case appear adequately from the judgments of other members of this Court and it suffices, for my purpose, to confine myself to that area of fact which is concerned with Rocca's entry into the petrol retailing trade and which provides the important distinction between this case and precedent decisions.

The evidence of the state of the trade in South Australia at the relevant time is all one way and is not in dispute, it discloses that virtually all reseller outlets were tied to one or other of the relatively few marketers of petroleum products, conveniently described as oil companies, and were required to enter into trade ties with them ensuring exclusive supply rights.

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Reasons for Judgment of Stephen J. 11th October 1973 (continued)

Representatives of Amoco described it as a fact of life within the industry that any new service station would be one which was "tied" to a particular oil company, the method of petrol distribution through service stations contractually "tied" to a particular oil company being by then firmly established throughout South Australia. The members of the Rocca family were well aware of this situation. Mr. Vincenzo Rocca, who led the negotiations on behalf of the Rocca family and its company, knew that he would have to "do a deal" with an oil company if he were to open a service station on the proposed site, as did his son, Mr. G. G. Rocca, to whom it was obvious "that we needed an oil company" and that to come to terms with an oil company would involve an arrangement for exclusive dealing with it. His other son, Mr. P. A. Rocca, also knew that to build a service station it would be necessary to make an arrangement with an oil company and that all service stations were then operating as one-brand service stations.

It was upon the footing of this evidence that Wells J. said in his judgment that the Roccas realized

> "that it was, to all intents and purposes, impossible to set up a service station unless they could interest one of the major oil companies in becoming their supplier".

His Honour thus concluded that

> "for the Roccas, the chance of establishing a service station business that was capable of surviving and developing in the current commercial situation was almost non-existent, unless they were prepared to submit to a substantial trade tie".

The doctrine of restraint of trade being designed to give effect to broad concepts of public policy it must be to the commercial realities of the situation that attention is to be directed. As Lord Reid said in the Esso case, at p. 298:

> "As the whole doctrine of restraint of trade is based on public policy its application

> ought to depend less on legal niceties or theoretical possibilities than on the freedom which it is the policy of the law to protect".

and see Pharmaceutical Society of Great Britain v. Dickson [1970] A.C. 403, per Lord Wilberforce at p.440.

It seems consistent with such an approach to the doctrine, based as it is upon public policy, to have regard to the practical choice which confronted Rocca, when it contemplated entry into the service station business. That choice consisted either of making an arrangement with an oil company, a term of which would be that it should be its exclusive supplier of petroleum products, or of refraining altogether from entry into the trade of service station proprietor.

It follows that Rocca, in seeking to make its first entry into its chosen trade, was not accepting a restriction upon any pre-existing trade which it carried on or upon its ability to earn profits in that trade. It had at that time no such trade nor any such ability.

Throughout the precedent cases concerned with voluntary contractual restraints of trade there is to be found the concept that it is the acceptance by a trader of a restraint upon the carrying on of "his" trade that is the evil to be guarded against. Lord Macnaghten, in his notable judgment in the Nordenfelt case, begins his much cited statement of "the true view at the present time" by saying, at p.565,

> "The public have an interest in every person's carrying on his trade freely: so has the individual".

Later, at p.571, his Lordship describes the leading principle laid down in Mitchell v. Reynolds as being

> "that the public have an interest in every person carrying on his trade freely".

In A.G. of the Commonwealth of Australia v. Adelaide Steamship Co. Ltd. [1913] A.C. 781, Lord Parker, at p. 793, spoke of the doctrine as prohibiting

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interference with another's "free exercise of his trade or business", and from this Diplock L.J. took his definition of restraint of trade in Petrofina (Gt. Britain) Ltd. v. Martin [1966] 1 Ch. 146, when he said that it concerned a restriction upon an individual's liberty "in the future to carry on trade with other persons". In the Esso case Lord Morris, at p. 304, refers to the many centuries during which the law has set itself against restraint of trade and, after referring to monopolies, gives as a reason for its application to wider fields the fact that

> "Restraints which would result in preventing a man from pursuing his trade and earning his living may be injurious to the man himself and ... detrimental to the public interest".

Lord Hodson, at p.318, cites a number of passages from earlier cases where the preservation of the existing trade of the individual is emphasized. In the Pharmaceutical Society case Lord Wilberforce, at p.440, describes the proposed new rule of the Society there in question as being plainly in restraint of trade because aimed at the trading side of the profession of a pharmacist the restraint being "of a trade actually and legitamely carried on".

The use of the word "restraint" in the title of the doctrine, descriptive of an enforced deprivation or diminution of personal liberty or freedom of action, in itself illustrates how central to the doctrine is this concept of the acceptance of a diminution of an existing freedom to engage in trade.

In the Esso case, as in the other petrol reselling cases of the recent past, the defendant was already engaged in trade as a retailer of petrol, it had had an existing trade and had accepted a restraint upon that trade. There Lord Reid regarded the doctrine as based upon the giving up of an existing freedom, saying, at p.298,

> "Restraint of trade appears to me to imply that a man contracts to give up some freedom which otherwise he would have had".

Lord Morris, at p. 309, indicated the ambit of the doctrine when he said,

> "There is a clear difference between the case when someone fetters his future by parting with a freedom which he possesses and the case where someone seeks to claim a greater freedom than that which he possesses or has arranged to acquire".

He thus distinguished between the taking of a lease subject to a restriction as to trading and the case before him in which "Harper's had their garages" and by the agreements "agreed for periods of years to limit and restrict their trading activity". Lord Hodson, at p. 316, when dealing with the argument as to restraints imposed on the use of land, pointed out that all land dealings were not in the same category and said:

> "the purchaser of land who promises not to deal with the land he buys in a particular way is not derogating from any right he has, but is acquiring a new right by virtue of his purchase"

and continued, on p. 317, by saying if one subjected oneself to

> "... restrictions as to the use to be made of your own land so that you can no longer do what you were doing before, you are restraining trade ...".

Lord Pearce, at p. 325, drew a similar distinction. Both he and Lord Wilberforce refer to the concept of sterilization of a man's capacity for work; Lord Pearce contrasts it with the absorption of that capacity and says, at p. 328, that it was its sterilization and not its absorption that underlay the objection of the common law to restraint of trade; Lord Wilberforce, at p. 336, says that in the case of contracts of employment it is the limitative or sterilizing nature of a restriction that may make such a contract subject to the doctrine.

Where, as here, there is neither sterilization of any pre-existing ability to trade nor any shackling of a pre-existing freedom to engage in a

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Reasons for Judgment of Stephen J. 11th October 1973 (continued)

trade there should, in my view, be no reluctance on the part of a Court to enforce contractual obligations solemnly entered into after free negotiation between parties at arms length, at least when the obligations which are in question are reasonably referable to the trade which is to be entered upon and are confined, as they are here, to the period of the contract. There is much authority for the view that a restriction imposed only during the period while contractual obligations remain to be performed on both sides may, in the context of the doctrine of restraint of trade, be viewed in a different light from a restriction which operates after the other party's obligations have come to an end - Pilkington v. Scott (1846) 15 M. & W. 657, 153, E.R. 1014, per Rolfe B. at p. 661, Hartley v. Cummings (1847) 5 C.B. 247, 136 E.R. 871, per Creswell J. at p. 261, William Robinson & Co. Ltd. v. Heuer (1898) 2 Ch. 451 at p. 458, Rely-a-Bell Burglar & Fire Alarm Ltd. v. Eisler [1926] Ch. 609 at p.612, Warner Bros. Pictures Inc. v. Nelson [1937] 1 K.B. 209 at p.214. In the Esso case Lord Pearce referred to this aspect at p. 328 and Lord Read and Lord Morris also mention it, at p. 294 and p.307 respectively, as does Lord Wilberforce, at p. 332.

It may be that there would be room for the doctrine to operate had the price of entry into the trade included, in this case, the acceptance of some restraint operating after the contractual obligations of Amoco to supply Rocca had come to an end or if some restraint were imposed which could not be seen as reasonably related to Rocca's trade as a retailer of Amoco's petroleum products. Any such restraint could perhaps be said to form no integral part of the commercial arrangement which, by providing Rocca with supplies of the products in which it was to trade and with associated facilities, made it possible for it to engage in its chosen trade. No such considerations arise in the present case.

If a rationale for my view of the application of the doctrine is to be sought it may lie in this; where an existing freedom is surrendered the Courts will examine the circumstances and will refuse to enforce that surrender if it be not reasonable; where, however, viewed as a practical question and

apart from legal forms or theoretical possibilities, it appears that there has not been any surrender of a pre-existing right nor any acceptance of a restraint operating after the commercial relationship between the parties has ended or otherwise unconnected with that relationship, the doctrine of restraint of trade will have no application.

There may perhaps be thought to be social or economic evils involved in a state of affairs which permits entry into a particular trade to be denied to those who will not conclude some exclusive supply agreement with a distributor. That is not, however, of itself any reason for the application of the doctrine of restraint of trade although some may view the situation as calling for legislative intervention or for the application to it of appropriate existing legislative measures. It cannot of course be assumed that the situation which prevailed in South Australia at the relevant time was one which relied for its existence upon trade ties which, if the doctrine were to be applied to them, would be unenforceable; from the evidence it appears that in many cases the distributors were themselves the owners of retail sites, as to the rest the trade ties involved might, for all the evidence discloses, in each case be upheld as reasonable if subjected to individual scrutiny.

The learned trial judge, Wells J., after a minute examination of the evidence and an exhaustive analysis of the authorities, concluded that the argument of counsel for Amoco that the doctrine was inapplicable was both logical and attractive, he inclined, he said, to the view that it correctly represented the law and I respectfully agree with that conclusion. For reasons stated by his Honour he nevertheless went on to decide the case in favour of Amoco upon the footing that the doctrine did apply.

I would allow this appeal for the reasons that the doctrine of restraint of trade upon which Rocca relies is inapplicable. However if, contrary to my own view, the doctrine is properly applicable to the facts of this case I would agree with the reasons for judgment of Menzies J., which I have had the advantage of reading, and would then, for those reasons, allow this appeal.

In the High Court of Australia

No.25

Order of the High Court of Australia on Issues 1 and 2 11th October 1973

No. 25

ORDER OF THE HIGH COURT OF AUSTRALIA ON ISSUES 1 and 2

IN THE HIGH COURT OF AUSTRALIA

SOUTH AUSTRALIA REGISTRY

No. 13 of 1973

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN: AMOCO AUSTRALIA PTY. LIMITED
Appellant (Plaintiff)

- and -

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD.
Respondent (Defendant)

BEFORE THE HONOURABLE THE ACTING CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE MENZIES
THE HONOURABLE MR. JUSTICE WALSH
THE HONOURABLE MR. JUSTICE GIBBS AND
THE HONOURABLE MR. JUSTICE STEPHEN
THURSDAY THE 11TH DAY OF OCTOBER, 1973.

THIS APPEAL from the judgment of the Full Court of the Supreme Court of South Australia given and pronounced on the 7th day of August, 1972 coming on for hearing at Adelaide in the State of South Australia on the 25th, 26th, 27th and 28th day of September, 1972, AND UPON HEARING Mr. Jacobs Q.C. and Mr. Angel of Counsel for the appellant and Mr. Fisher Q.C. and Mr. Millhouse of Counsel for the respondent the Court did reserve judgment AND the same standing for judgment this day at Melbourne THIS COURT DOTH ORDER that the appeal be dismissed and that the appellant do pay to the respondent its costs to be taxed.

BY THE COURT

DISTRICT REGISTRAR

THIS JUDGMENT is filed by HAIG & MATHWIN of 16 Bartley Crescent, Wayville, S.A. 5034. Solicitors for the Respondent (Defendant).

No. 26

In the Full Court of the Supreme Court of South Australia

No.26

Reasons for Judgment of Bray C.J. 10th December 1973

REASONS FOR JUDGMENT OF BRAY C.J.

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD.

v. AMOCO AUSTRALIA PTY. LIMITED

Judgment on this appeal from an interlocutory order of Wells J. dated 21st April 1972 was given by this court on the 7th August 1972 when the appeal was allowed. Our judgment was subsequently upheld by the High Court on the 11th October 1973. It is understood that the respondent has appealed to Her Majesty in Council.

When the matter was before Wells J. pleadings were dispensed with owing to the urgency of the case and it was directed that the action proceed on the basis of agreed issues as under.

1. Is the defendant (the appellant, hereinafter referred to as 'Rocca') entitled to assert that the covenants contained in Memorandum of Underlease No. 2775160 or any of them are in restraint of trade, and unenforceable?

2. Are the covenants contained in Memorandum of Underlease No. 2775160 or any of them an unreasonable restraint of trade and unenforceable?

3. If the covenants in Memorandum of Underlease No. 2775160 or any of them are unenforceable is the whole of the said Memorandum of Underlease void?

4. If the said Memorandum of Underlease is void is Memorandum of Lease No. 2775159 also void?

5. All questions of consequential relief for either party arising from the resolution of the above issues shall be referred for later consideration.

The learned judge answered the first question in the affirmative and the second question in the negative. It then became unnecessary for him to consider the remaining questions. This court on appeal answered both the first and the second

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questions in the affirmative. The third, fourth and fifth questions then arose for decision. By our order the action was referred back to the learned judge for further consideration or, alternatively, it was provided that either party might be at liberty to make any application to this court consequential upon its order. This is such an application. The High Court dismissed an appeal against our order.

The matter has now been called on before us again for the purpose of obtaining our answers to the third and fourth questions. An answer to the fifth question is not sought at this stage.

At the outset Mr. Angel suggested that we should not proceed to answer the questions because to do so might produce some embarrassment in connection with the Privy Council appeal. I am, of course, anxious to avoid anything of the sort, but I cannot see how any embarrassment could arise. Our answers to the third and fourth questions can in no way impinge on the issues raised by the first and second questions. If the appeal succeeds, the answers we are about to give will be superfluous and the costs occasioned by them thrown away, but that is all. On the other hand if the appeal were to fail and if we had not answered these questions, the case would be brought back to us for the purpose of answering them, and a new appellate round would or could begin. It seems to me that there is a clear balance of convenience in our answering the questions now so that the answers can, if desired, be placed before their Lordships and all the issues arising out of the case, or nearly all of them, can be disposed of at once.

I will not repeat the narration of the facts contained in the previous judgments of this court and in the judgment of the learned judges of the High Court, except to say that the respondent (hereinafter referred to as 'Amoco') sought to create a trade tie in connection with the supply of petrol to a service station owned by Rocca, leased by it to Amoco and leased back by way of underlease to Rocca, and that tie was held by this court and by the High Court to be in restraint of trade and unenforceable. What is before us now is, in one sense, the question of severability.

The fact is that all the objectionable covenants are contained in the underlease, not in the lease. As a result of this three possible solutions were canvassed. I think it better to avoid the term 'void' for reasons which will appear later.

1. Both the lease and the underlease are unenforceable in toto.

2. The underlease is unenforceable in toto, but the lease remains in full force and effect.

3. Both the lease and the underlease remain in full force and effect, except that the underlease should be 'blue pencilled' or altered so as to strike out all the covenants creating the tie or the restraint.

As will be seen, I think that neither of these three solutions exactly fits the case.

Mr. Fisher, Q.C., for Rocca contended for 1. above and, as a last resort, for 3. above. Mr.Angel for Amoco contended for 2. He did not seek to uphold the underlease shorn of one or more of the objectionable covenants.

To my mind difficulties are created by the fact that the transaction has taken the form of a lease and underlease and that both have been registered on the title deed under the Real Property Act 1886-1963. If all the documents were simple contracts I would have little difficulty. I proceed to consider the case first of all on that basis, i.e. the simple contract basis, before turning to the difficulties created by the form of the documents.

I may say to begin with that I do not think that cases like Mason v. Provident Clothing and Supply Co. Ltd. 1913 A.C. 724, Attwood v. Lamont 1920 3 K.B. 571, and Putsman v. Taylor 1927 1 K.B. 637 are applicable. These are cases where the restraint was too wide, but a lesser restraint would have been good and the contest was as to whether the covenants could be so severed or altered by the use of a blue pencil or otherwise so as to leave a lesser restraint in existence. Nothing like that is in issue here. Amoco does

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not seek to sever the objectionable covenants. In fact the term of 15 years, extended for a further 5 years, could not be severed by any blue pencil test and there is no suggestion on the part of Amoco that the underlease might be able to stand if the obligation to purchase a minimum quantity of petrol, or to use the premises as a petrol station for the term of the lease, or to purchase exclusively from the respondent, or any one or more of them were cut out.

I find it difficult to derive much help from the time-honoured distinction between illegality of the consideration and illegality of the promise, or one of the promises. It seems to me that both parties gave consideration and both parties made promises. But if the entering into the tie can be regarded as part of the consideration Rocca gave for the whole transaction, I think it was clearly the substantial part of it. It does not have to be the sole consideration to prevent severance, Heydon, The Restraint of Trade Doctrine p. 291, Cheshire & Fifoot, Law of Contract, 2nd Australian edition, p. 501.

The salient factor, as I see it, is that the parties undoubtedly entered into the agreement of the 19th June 1964. That agreement contemplated the grant of a lease and an underlease with covenants mainly, though not completely, in the form ultimately adopted. It was conceded on the original hearing and before the High Court that the reasonableness of the restraint was to be judged as at the date of the agreement, the 19th June 1964, see my judgment at p.5 and the judgment of Walsh J. in the High Court at p.9, (I regret that I have to refer to these judgments by the pages of the typescript as they have not yet appeared, as far as I know, in any report).

What would have been the position on the 20th June 1964 if Rocca had repudiated the arrangement and refused to go on with it on the ground that the underlease embodied an illegal restraint and if Amoco had sought a decree of specific performance? Quite clearly, in my view, the action would have failed, assuming the correctness of the judgments of this court and of the High Court about the restraint. It would then have been all one document. No question could have

arisen about the separate existence of the lease and the underlease. There would presumably have been no more request for severance on the part of Amoco than there is now. The raison d'etre for the whole transaction was the creation of the tie and the acquisition of the service station, and of them I think the creation of the tie was by far of greater importance. Rocca would not have agreed to Amoco using the site as a service station run by itself or by some person other than Rocca. Rocca wanted the rebate and Amoco wanted the tie.

The commercial realities of the situation are that, despite the form ultimately taken, the whole transaction was one transaction and both the lease and the underlease are part of that one transaction. It was so said by the judges of this Court and by the learned judges of the majority in the High Court, see per Walsh J. (with whose judgment McTiernan A.C.J. concurred) at p.14, per Gibbs J. at p.6.

Nor would the subsequent execution of two simple contracts, with the objectionable covenants all contained in one of them, have prevented the striking down of both if they were in reality part of one illegal transaction, Kenyon v. Darwen Cotton Manufacturing Co. Ltd. 1936 2 K.B. 193, Total Oil Great Britain Ltd. v. Thompson Garages (Biggins Hill) Pty. Ltd. 1972 1 Q.B. 318 per Lord Denning M.R. at p.323. There, it is true, the lease and the tie were in one document, but an attempt had apparently been made to separate them as separate transactions in that document, see at pp.323-4. It is as true to say here as it was there that the dealer, i.e. in this case Rocca, would never have got the lease unless he had agreed to the tie, see at pp.323-4.

Nor do I think Clause 18 of the lease can aid Amoco. That clause reads as follows:

> "The Lessor and the Lessee agree that this Lease is not in consideration for or dependent or contingent in any manner upon any other contract, lease or agreement between them and that the term, rental or other provisions of said Lease are not intended by said parties to be tied in with any other such contract, lease or agreement, but on the contrary this

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> Lease and all of its provisions are entirely and completely independent of any other transaction or relationship between the parties."

Mr. Angel might have added to the same purpose Clause 19 which reads:

> "This Lease embodies the entire agreement between the parties hereto relative to the subject matter hereof, and shall not be modified, changed or altered in any respect except in writing and in the event of any termination of this lease pursuant to any right reserved by the Lessee herein, all liability on the part of the Lessee for payment of rent shall cease and determine upon payment of rent proportionately to the date of such termination of this Lease."

The argument is that these clauses create an estoppel by deed, the lease and underlease having by statute the effect of deeds when registered, see Real Property Act sec.57, and that Amoco has acted in various ways to its detriment, so an estoppel arises against Rocca contending that the lease and underlease are all one transaction and that they stand or fall together.

If it were not for the question of public policy these clauses would, in my view, create a potential estoppel of the kind relied on and that whether they were in a deed or in a simple contract. But I do not think that a court can be prevented by any estoppel from ascertaining the truth in order to decide whether a contract is void or unenforceable on the ground of illegality or public policy. Brooks v. Burns Philp Trustee Co. & Anor. 43 A.L.J.R. 131 per Taylor J. at p.135, per Owen J. at p.150.

It may be that if the parties were expressly to agree that the remainder of some contract or other transaction should stand, even if part of it were invalidated on the ground of public policy, the court would give effect to their intention if no residual question of public policy stood in the way, see Brooks v. Burns Philp Trustee Company above per Taylor J. at p.134. But I cannot regard Clauses 18 or 19 as express

agreements of that kind. They are not specifically directed to the question of restraint of trade and severability or to the separate survival of the lease if the underlease were struck down. It is impossible to think that any such consideration was present to the mind of Rocca and absurd to think that it would have agreed to the clause if it had been.

It is clear, then, in my view, that, if all questions of deeds and the proprietary rights attached to the lease and the underlease were put aside, the correct conclusion would be that no part of the transaction would be enforceable by either party against the other. I repeat that Mr. Angel's argument does not seem to me really to involve the question of severance in the traditional form at all. As I have said on several occasions, he repudiated any severance of the covenants in the underlease. His argument really is that the lease can and ought to exist on its own and that the underlease is void.

Let us see what curious effects that would have. The underlease would go: Rocca would be liable to be evicted from its freehold. What would it get in return? Only the rent provided by the lease. That is $2 per annum and a rebate, since the extension, of 4c. per gallon on all petrol delivered by Amoco to the demised premises for sale. Amoco may not deliver any petrol there for sale. It may use the premises for some other purpose. It may sell the lease. Rocca would have no remedy. It would be out of possession of its freehold until 1984, when the extension of the lease expires, with the only return from its property a dubious chance of getting the rebate, apart from the princely sum of $2.00 per year. And this is the consequence to Rocca winning in this court and in the High Court its claim that the tie and the covenants were illegal restraints of trade. It would have been far better off if it had lost.

I would not come to this conclusion unless inexorably constrained by the most stringent rules of positive law. Nevertheless there is no escape from the existence of the registered lease and underlease. They have the sanctity attributable to registration under the Torrens system.

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On registration Amoco became the registered proprietor of an estate as lessee and Rocca as underlessee. Third persons dealing with these interests on the face of the Register would be protected. How will any finding of this court about the unenforceability of either document get them cleared off the Register?

It is true, as Mr. Fisher says, that in the Esso case 1968 A.C. 269 and in the Petrofina case 1966 Ch.146, referred to in our earlier judgment, the House of Lords in the first case and the Court of Appeal in the second held the whole transaction to be invalid. But this does not altogether meet the point. In the Petrofina case there was only one document, a solus agreement. That was held not to be severable. Covenants in a lease, a conveyance or a mortgage were excluded from consideration, see per Diplock L.J. at p.185. In the Esso case there were two solus agreements, one in relation to each of two garages, and one of them was supported by a mortgage. Their Lordships held the agreement unsupported by the mortgage good and the one supported by the mortgage bad. They held that the mortgage must share the same fate as the agreement, see per Lord Wilberforce at p.342, per Lord Morris of Borth-Y-Gest at p.314, but the restrictive covenants were repeated in the mortgage document, see at p.274. Some of their Lordships expressed the opinion that a covenant in a mortgage might in certain cases receive more favourable treatment than one in an agreement, see per Lord Pearce at p.326, and the House refused to treat the mortgage as a lease, see per Lord Hodgson at p.321, per Lord Pearce at pp.325-6 and per Lord Wilberforce at p.343.

These cases, therefore, have no direct application to a case of a lease and an underlease when all the restrictive covenants are in the underlease and none in the lease.

I am firmly of opinion that the underlease and the lease must share the same fate. I regard the whole transaction as one and intend to treat it as such, unless the law of property compels me to hold otherwise. And the underlease is as much entitled to all the sanctity of an instrument registered on the certificate of title as is the lease.

I have found a partial solution, not perhaps an ideally satisfactory one, after consideration of the way in which the law treats leases made for an illegal purpose. I think it may be compendiously said that the law regards such leases as bad as contracts, but good as grants. This means that neither party can sue the other on any of the covenants in the lease, Halsbury 3rd Ed. Vol. 23 p.434 para.1030. Gas Light and Coke Co. v. Turner 5 Bing. (N.C.) 666, 132 E.R. 1257, affirmed 6 Bing. (N.C.) 324, 133 E.R. 127, Alexander v. Rayson 1936 1 K.B. 169 at pp.184-6, Total Oil v. Thompson Garage etc. see per Lord Denning M.R. at p. 324, though there the terms of the agreement were temporarily unenforceable by the landlord, not because of illegality, but because he had repudiated some of his obligations under it, which he afterwards reacknowledged, and the effect might not be exactly the same.

It is worth while considering the facts in the cases cited. In the Gas, Light & Coke Co. Ltd. case there was a perfectly ordinary lease quite valid on the face of it. There was a collateral agreement that the tenant was to use the premises for boiling tar in a manner forbidden by the prevailing Building Act. The landlord sued for rent under the terms of the lease. He failed. The judges did not say that the agreement was invalid but that the lease was good. They said that the lease had been entered into for the purpose of violating the law and that the court would not lend its aid to enforce it. But something was said by Tindal C.J. to the effect that the landlord might be able to eject the tenant in certain circumstances, see at 132 E.R. p.1261. So in Alexander v. Rayson the landlord let the premises at a low rent for the purpose of getting the rates reduced, but stipulated for an additional sum in a collateral agreement. Scott L.J., speaking for the Court of Appeal, said at p.186:

> "In view of these various authorities it seems plain that, if the plaintiff had let the flat to the defendant to be used by her for an illegal purpose, he could not have successfully sued her for the rent, but the leasehold interest in the flat purporting to be granted by the lease would nevertheless have been legally vested in her. The result

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would have been that the defendant would be entitled to remain in possession of the flat without payment of rent until and unless the plaintiff could eject her without having to rely upon the lease or agreement."

And, despite what was said by Tindal C.J. in the Gas, Light & Coke Co. case above in the passage just referred to, it appears from the famous case of Feret v. Hill 15 C.B. 207, 139 E.R. 400, that the landlord might not find it so easy to eject the tenant from premises held by him under a lease unenforceable by reason of illegality.

I do not, however, propose to canvass now the possible consequences of the view I take (though, like Walters J., I draw attention to the provisions of sec.64 of the Real Property Act, but without hazarding any opinion as to their applicability). That view is that neither the lease nor the underlease is void, but that neither party can enforce any of the covenants in either of them against the other.

I should add that I do not think that the extensions of the lease and underlease granted in 1969 affect the matter.

In my view the questions should be answered as follows:

3. The Memorandum of Underlease is not void, but neither party thereto can enforce any of the covenants in it against the other.

4. The Memorandum of Lease is not void, but neither party thereto can enforce any of the covenants in it against the other.

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Reasons for Judgment of Hogarth J. 10th December 1973

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REASONS FOR JUDGMENT OF HOGARTH J.

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. v. AMOCO AUSTRALIA PTY. LIMITED

I have had the opportunity of reading the judgment prepared by the learned Chief Justice. I concur in the answers which he proposes to questions 3 and 4, for the reasons which he gives.

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REASONS FOR JUDGMENT OF WALTERS J.

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. v. AMOCO AUSTRALIA PTY. LIMITED

By a judgment pronounced on 11th October, 1973, the High Court affirmed the decision of this Court which upheld an appeal from the judgment of Wells, J. answering the first and second questions posed by the agreed issues in this matter. In allowing the appeal from the decision of the learned trial judge, this Court held, firstly, that the appellant company ("Rocca") is entitled to assert both that the doctrine of restraint of trade applies to the covenants contained in Memorandum of Underlease No. 2775160 from the respondent company ("Amoco") to Rocca and that the covenants are unenforceable, and, secondly, that the term and covenants of the underlease go beyond what was reasonably necessary to protect the interests of Amoco and that the restraints thereby imposed on Rocca are unenforceable.

When the appeal was first argued in this Court, it was only upon the answers given by the learned trial judge to the first and second questions raised by the agreed issues that conflicting contentions were submitted by counsel. The appeal was stood over for further consideration of the third, fourth and fifth questions, which related to consequential relief and which the learned judge found it unnecessary to answer by reason of his answers to the first and second questions. In the notice of appeal, however, the whole of the

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judgment of the learned judge was complained of, and in particular, complaint was made against his finding that it was unnecessary to resolve the questions of consequential relief.

The appeal having been determined favourably to Rocca upon the issues argued before us, this Court referred the matter back to the learned judge for further consideration and, alternatively or additionally, reserved liberty to either party to make any application to this Court consequential upon its order allowing the appeal. The matter comes back to us in pursuance of the leave so reserved.

The questions with which this Court is now concerned arise from further issues which deal with the effect, upon the validity of the underlease and of the headlease, of those covenants in the underlease found to be in unreasonable restraint of trade. The further issues have been stated as follows:

"(3) If the covenants contained in Memorandum of Underlease No.2775160 or any of them are unenforceable, is the whole of the said Memorandum of Underlease void?

(4) If the said Memorandum of Underlease is void, is Memorandum of Lease No. 2775159 also void?"

Upon the matter coming on for further hearing, counsel for Rocca contended that the headlease, though separate in form from the underlease, was in substance so connected with it as to make both instruments an indivisible whole and part of the composite transaction which had its origin in the agreements made between the parties on 19th June 1964. Hence it was argued that since the underlease, containing as it does covenants which impose an unreasonable restraint of trade, must be struck down, the headlease must necessarily fall with it. In the alternative, it was argued, but faintly I I think, that if the headlease and underlease were to stand in full force and effect, this Court might sever from the underlease those covenants imposing the unreasonable restraints and allow the headlease and underlease, with its offending

covenants excised, to remain in operation as valid instruments.

Counsel for Amoco did not seek to uphold the validity of the underlease, nor did he advance any argument in support of the severance from the instrument of its objectionable covenants. But he contended that the headlease was separable from the underlease and that the headlease should stand apart and be considered by itself as an independent instrument without reference to the underlease. And being so considered, it was submitted that the headlease was not tainted by the offending provisions of the underlease so as to preclude the enforcement of it.

I would say at once that in my opinion this is not a case in which the principle of severance can be applied to the underlease. To treat the underlease as divisible and to enforce it to the extent to which its covenants are reasonable would involve a process which would not only split the covenants in the underlease but would also destroy "the main purport and substance" of the instrument. In my view, the elimination of the objectionable covenants could not be effected without changing completely the true character of the transaction between the parties; and an excision of this kind would fail to answer the test laid down by Lord Sterndale M.R. in Attwood v. Lamont [1920] 3 K.B. 571, at pp.577-578. Moreover, when regard is had to the nature of the covenants which have been held to impose an unreasonable restraint of trade, I cannot conceive how this Court could "carve out of" them provisions which could be supported, except by making new covenants for the parties. I do not think, therefore, that this Court can sever the objectionable covenants in an attempt to validate an instrument which would otherwise be unenforceable.

Upon full consideration of the facts and the documents in the case, I have no hesitation in concluding that the headlease and underlease must be linked together as part of the one transaction, even though the two instruments are ex facie independent. It is my opinion that the headlease cannot be isolated from the underlease and that the whole of the circumstances raise an implication of dependency of the headlease and the underlease

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upon each other. This implication must obviously be necessary to carry into effect the intention of the parties appearing from the agreement executed on 19th June, 1964, and appearing, indeed, upon the face of the two instruments when taken together. It seems to me that the principle to be applied in the present case is that stated by Knight Bruce L.J., when delivering the judgment of the Privy Council in Shaw v. Jeffery (1860) 13 Moo. P.C.C. 432 at pp. 456-457, as follows:

> "When the same parties execute contemporaneously several instruments relating to different parts of the same transaction, all must be considered together; all must be examined in order to understand each; apparent inconsistencies are to be reconciled; and where there are real inconsistencies, the governing intention of the parties is still to be collected from a consideration of the language of all the instruments, and effect given to it."

Applying that principle, I take the view that the headlease and underlease are integral parts of the same wide transaction, are intended to regulate the totality of the rights and obligations of Rocca and Amoco, and are incapable of being treated as independent of each other. So, therefore, if Rocca is to be absolved, as I think it is, from performing its covenants under the underlease, I think it must also be absolved from the performance of its covenants under the headlease, despite the fact that the general tenor of the headlease purports to introduce or create an independence of the two instruments. It is my opinion that once a conclusion adverse to the underlease is reached, the same result must follow with regard to the headlease; that both instruments fall at the one time.

With all respect to the argument put forward on behalf of Amoco, I am unable to see that the doctrine of estoppel by deed operates against Rocca, so as to prevent Rocca from contending, despite the provisions contained in clause 18, and, for that matter, in clause 19 of the headlease, that the two instruments are dependent upon each other. In my opinion, an estoppel by deed cannot shut out facts or circumstances which,

if disclosed, would show that a transaction is unenforceable as being contrary to the rules of law as to restraint of trade. An estoppel cannot give legal validity to a transaction which the law will not allow, for if it were to do so, "the court would be allowing the doctrine to become a mere cloak for illegality". In this connection, the observations ofTaylor J. in Brooks v. Burns Philp Trustee Co. Ltd. (1969) 43 A.L.J.R. 131, at p. 135, are apposite; there his Honour said that the doctrine of estoppel inter partes cannot be invoked in order "to preclude a court from declaring void a covenant which is, in fact, contrary to public policy". In my view, the submission made on behalf of Amoco on this aspect of the case cannot be upheld.

I think that in the result the parties are left with two instruments, neither of which is enforceable against the other party. Affected as they are by covenants in unreasonable restraint of trade, it seems to me that the headlease and underlease are illegal in the sense that they are nugatory and unenforceable; "the law will not lend its aid to enforce /them/" (Mogul Steamship Company v. McGregor Gow & Co. /1892/ A.C. 25, at pp. 39 and 46). In this context, there may also be applied the statement of Bowen L.J., in the Court of Appeal, in Mogul Steamship Company v. McGregor Gow & Co. (1889) 23 Q.B.D. 598 at p. 619; his Lordship said:

> "Contracts, as they are called, in restraint of trade, are not, in my opinion illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts; it merely declines, after they have been made, to recognise their validity."

This conclusion with respect to the validity of the instruments leaves unresolved the question whether the headlease, though unlawful and incapable of being enforced, is still operative to create a leasehold estate in Amoco which remains effective for its full term. But as I see it, whether Rocca should be relieved of the burden of the headlease upon its title is a matter upon which argument should be presented when the question of consequential relief, arising from the answers to the questions which this Court has now resolved, falls

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for consideration. In the existing situation, it may be that the provisions of section 64 of the Real Property Act could suitably be applied in the present case.

I agree with the answers proposed by the learned Chief Justice to the third and fourth questions raised by the agreed issues.

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Judgment of Full Court of Supreme Court of South Australia on Issues 3 & 4 18th January 1974

No. 29

JUDGMENT OF THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA ON ISSUES 3 and 4

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 1526 of 1971

BETWEEN

AMOCO AUSTRALIA PTY. LIMITED — Plaintiff (Respondent)

and

ROCCA BROS. MOTOR ENGINEERING CO. PTY. LTD. — Defendant (Appellant)

BEFORE THE HONOURABLE THE CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE HOGARTH AND
THE HONOURABLE MR. JUSTICE WALTERS
FRIDAY THE 18TH DAY OF JANUARY, 1974

THIS ACTION coming on for hearing before the Full Court of this Court on the 10th day of December, 1973 on the question of the issues numbered 3 and 4 respectively in the Statement of Issues herein dated the 10th day of December, 1971 pursuant to the liberty reserved to the defendant in that behalf by the Order herein of the Full Court of this Court dated the 7th day of August, 1972 UPON READING the said Statement of Issues

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No.29

Judgment of Full Court of Supreme Court of South Australia on Issues 3 & 4 18th January 1974 (continued)

AND UPON HEARING Mr. Fisher Q,C. and Mr. Millhouse of Counsel for the defendant and Mr. Angel of Counsel for the Plaintiff the Court did reserve judgment AND the same standing for judgment this day THIS COURT DOTH ORDER

1. That the question numbered 3 in the said Statement of Issues namely "If the covenants in Memorandum of Underlease No. 2775160 or any of them are unenforceable is the whole of the said Memorandum of Underlease void?" be answered "The Memorandum of Underlease is not void, but neither party thereto can enforce any of the covenants in it against the other."

2. That the question numbered 4 in the said Statement of Issues namely "If the said Memorandum of Underlease is void is Memorandum of Lease No. 2775159 also void?" be answered "The Memorandum of Lease is not void, but neither party thereto can enforce any of the covenants in it against the other."

AND DOTH ADJUDGE the same accordingly AND THIS COURT DOTH FURTHER ORDER

3. That the plaintiff do pay to the defendant its costs of this hearing to be taxed.

BY THE COURT

MASTER

THIS ORDER is filed by HAIG & MATHWIN of 12 Bartley Crescent, Wayville, Solicitors for the Defendant (Appellant).

In the Privy Council

No.30

Order in Council granting leave to appeal to Her Majesty in Council from Supreme Court of South Australia Judgment on Issues 3 and 4
20th February 1974

No. 30

ORDER IN COUNCIL GRANTING LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL FROM SUPREME COURT OF SOUTH AUSTRALIA JUDGMENT ON ISSUES 3 AND 4

AT THE COURT OF SAINT JAMES

The 20th day of February 1974

PRESENT

THE COUNSELLORS OF STATE IN COUNCIL

WHEREAS Her Majesty in pursuance of the Regency Acts 1937 to 1953 was pleased by Letters Patent dated the 24th day of January 1974 to delegate to the six Counsellors of State therein named or any two or more of them full power and authority during the period of Her Majesty's absence from the United Kingdom to summon and hold on Her Majesty's behalf Her Privy Council and to signify thereat Her Majesty's approval for anything for which Her Majesty's approval in Council is required:

AND WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 14th day of February 1974 in the words following viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Amoco Australia Pty. Limited in the matter of an Appeal from the Supreme Court of South Australia between the Petitioner and Rocca Bros. Motor Engineering Co. Pty. Ltd. Respondent humbly praying Your Majesty in Council for special leave to appeal from a Judgment of the Full Court of the Supreme Court of South Australia dated the 18th January 1974 and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council

have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute its Appeal against the Judgment of the Full Court of the Supreme Court of South Audstralia dated the 18th January 1974 upon depositing in the Registry of the Privy Council the sum of £1,000 as security for costs:

"And Their Lordships do further report to Your Majesty that the proper officer of the said Full Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY Queen Elizabeth The Queen Mother and Her Royal Highness The Princess Margaret Countess of Snowdon being authorised thereto by the said Letters Patent have taken the said Report into consideration and do hereby by and with the advice of Her Majesty's Privy Council on Her Majesty's behalf approve thereof and order as it hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor or Officer administering the Government of the State of South Australia and its Dependencies in the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

N. E. LEIGH

IN THE PRIVY COUNCIL No. 8 of 1974

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT
OF SOUTH AUSTRALIA

B E T W E E N :-

AMOCO AUSTRALIA PTY. LIMITED — Appellant

- and -

ROCCA BROS. MOTOR ENGINEERING
CO. PTY. LTD. — Respondent

RECORD OF PROCEEDINGS

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