# RESTRAINT OF TRADE IN EXCLUSIVE SERVICE CONTRACTS

## *A. SCHROEDER MUSIC PUBLISHING CO. LTD.* v. *MACAULAY (FORMERLY INSTONE)*

## *CLIFFORD DAVIS MANAGEMENT LTD.* v. *W.E.A. RECORDS LTD. AND ANOTHER*

The recent decision of the Court of Appeal in interlocutory proceedings in *Clifford Davis Management Ltd.* v. *W.E.A. Records Ltd.*,[1] interpreting the House of Lords' decision in *A. Schroeder Music Publishing Co. Ltd.* v. *Macaulay*,[2] has added another chapter to the recent re-evaluation by senior English Courts of the common law doctrine concerning contracts in restraint of trade.[3]

**Introduction**

For centuries the Courts of Law have struck down agreements deemed in unreasonable restraint of trade.[4] Formulations of the doctrine have changed somewhat over that time, but always have turned upon the current trend in "public policy" at the heart of the doctrine.

The recurrent theme of the doctrine was echoed by Lord Wilberforce, delivering judgment on behalf of the Privy Council in *Stenhouse Australia Ltd.* v. *Phillips*.[5]

> The accepted proposition that an employer is not entitled to protection from mere competition by a former employee means that the employee is entitled to use to the full any personal skill or experience even if this has been acquired in the service of his employer: it is this freedom to use to the full a man's improving ability and talents

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[1] [1975] 1 W.L.R. 61 (hereafter, this case shall be cited as *Clifford Davis* v. *W.E.A. Records.*)

[2] [1974] 1 W.L.R. 1308 on appeal from the Court of Appeal *sub nom. Instone* v. *A. Schroeder Music Publishing Co. Ltd.* [1974] 1 All E.R. 171 (hereafter, this case will be cited as *Schroeder's Case*).

[3] For a most thorough treatment of this doctrine, in its application to sales of goodwill, restrictive trade practices as well as the contractual context here considered, see J. D. Heydon, *The Restraint of Trade Doctrine* (1971).

[4] See Heydon, *op. cit. supra* n. 3 pp. 3-36. The first "modern" case was *Mitchel* v. *Reynolds* (1711) 1 P. Wms. 181; 24 E.R. 347 which was a starting point for all formulations of the law thereafter.

[5] [1974] A.C. 391, at 400.

which lies at the root of the policy of the law regarding this type of restraint.[6]

The classic modern formulation of the doctrine, with its emphasis upon the ubiquitous concept of "reasonableness", is that of Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co. Ltd.*

> 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.[7]

This bipartite test for reasonableness has become firmly established in common law judisprudence. In Australia it has been approved and applied by the High Court recently in a number of cases, culminating in *Amoco Australia Pty. Ltd.* v. *Rocca Bros. Motor Engineering Co. Pty. Ltd.*[8] In England it was approved in *Esso Petroleum Co. Ltd.* v. *Harper's Garage (Stourport) Ltd.*[9] by the House of Lords. Also the Privy Council, on appeal from the Supreme Court of New South Wales, in *Stenhouse* v. *Phillips* has applied the test.[10]

The test is divided, then, according to two categories of reasonableness.

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[6] Other discussions of the doctrine emphasise the need to reconcile two principles *viz.* "freedom of contract" and "freedom of work". See *Attwood* v. *Lamont* [1920] 3 K.B. 571, at 577 *per* Lord Sterndale, M.R., *Cf. Queensland Co-operative Milling Association* v. *Pamag Pty. Ltd.* (1973) 47 A.L.J.R. 342, at 347 *per* Stephen, J.; *Amoco Australia Pty. Ltd.* v. *Rocca Bros. Motor Engineering Co. Pty. Ltd.* (1973) 47 A.L.J.R. 681, at 693 *per* Gibbs, J. and at 696 *per* Stephen, J.

[7] [1894] A.C. 535, at 565 (hereafter, this case will be cited as *Nordenfelt*).

[8] (1973) 47 A.L.J.R. 681 (hereafter, this case will be cited as *Amoco* v. *Rocca*). *Cf. Howard F. Hudson Pty. Ltd.* v. *Ronayne* (1971) 126 C.L.R. 449; *Buckley* v. *Tutty* (1971) 125 C.L.R. 353 in the High Court; and in Victoria *Heine Bros. (Aust.) Pty. Ltd.* v. *Forrest* [1963] V.R. 383; and in N.S.W. *Tuit* v. *A.M.P. Society* [1975] 1 N.S.W.L.R. 158.

[9] [1968] A.C. 269 (hereafter, this case will be cited as *Esso Petroleum*) *Cf. Texaco* v. *Mulberry Filling Station* [1972] 1 W.L.R. 814, although at 822 Ungoed-Thomas, J. observed that the various applications of the doctrine so stated over the years have been "by no means easy to reconcile".

[10] [1974] A.C. 391, at 400. The Privy Council on appeal from the High Court in *Amoco* v. *Rocca* [1975] A.C. 561, at 574-76 approved passages from the judgments of Walsh, J. and Gibbs, J. in the High Court which applied Lord Macnaghten's test of reasonableness, but did not have to decide the matter.

The first is that of reasonableness as between the parties. The second is that of reasonableness in the interests of the public.[11]

A. The first of these has tended to dominate judicial discussions of particular restraints, and it is emphasized that it is only the interests of the obligee which are gauged in order to determine whether the obligation imposed exceeds his reasonable needs. This naturally tends to place on a level of lesser significance the interests of the obligor, his benefit or detriment under the agreement.

> The question to be considered is whether or not the restraint was reasonable with reference to the interests of the parties. An affirmative answer to that question should not be given unless it is found that the restraint gives no more than adequate protection to the party in whose favour it was imposed. If this is found in favour of the [obligee], then in the circumstances of this case I am of the opinion that the requirement to which the authorities refer that the restraint must be reasonable having regard to the interests of the covenantor as well as to those of the covenantee should also be found to be satisfied . . . .[12]

As a corollary to this approach, and with a mind to the general law of contract, the courts have long refused to consider the adequacy of consideration given for a restraining contract. A very strict attitude to the question of consideration, added to an equally strict interpretation of the doctrines of duress, undue influence and fraud, was a device of judicial dialectic of the *laissez-faire* era maintaining the Victorian theory of freedom of contract.[13]

Originally, however, there were a number of early decisions, stemming from the authoritative decision of *Mitchel* v. *Reynolds*[14] which asserted that a covenantee would have to give good value for the promise of the covenantor. Lord Lindley, M.R., in *Underwood (E.) & Son. Ltd.* v. *Reed*[15] said that "the restraint on one side meant to be enforced should in reason be coextensive only with the benefits meant to be enjoyed on the other". Similarly in *Young* v. *Timmins*,[16] where the covenantor, a tradesman, in return for the promise of any future orders for his work the covenantee should give, promised not to do work for anyone else, the

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[11] Note on the meaning of the phrase "the interests of the public" the judgment of Ungoed-Thomas, J., in *Texaco* v. *Mulbery Filling Station* [1972] 1 W.L.R. 814, at 827-29 where he insists that it does not encompass the broad range of socio-economic factors that may arise, but only accepted legal propositions.

[12] *Queensland Co-operative Milling Association* v. *Pamag Pty. Ltd.* (1973) 47 A.L.J.R. 342, at 344 *per* Walsh, J. Of course, this case concerned an agreement between traders "on equal terms" and not an exclusive service agreement.

[13] See *supra* n. 6 and the comments of Younger, L.J., in *Attwood* v. *Lamont* [1920] 3 K.B. 571, at 581-82. But *cf.* Lord Diplock in *Schroeder's Case* [1974] 1 W.L.R. 1308, at 1315.

[14] (1711) 1 P. Wms. 181; 24 E.R. 347.

[15] (1806) 8 East. 80, 86-87; 103 E.R. 277.

[16] (1831) 1 Cr. & J. 331; 148 E.R. 1446.

Court of Exchequer[17] held, *inter alia*, that the agreement was void, being a restraint of trade on inadequate consideration.

Nevertheless, from the time of the influential judgment of Tindal, C.J. in *Hitchcock* v. *Coker*,[18] who denied that anything but some type of fraud or insufficiency of consideration could invalidate a restraint of trade otherwise reasonable, the courts have been prepared to measure only the interests of the covenantee, and never overtly the interests of the covenantor. Lord Lindley, M.R., in *Underwood (E.) & Son. Ltd.* v. *Barker* observed:

> The fact that the person restricted is out of work, and is seeking employment, and is therefore at a disadvantage in making a bargain, cannot be a ground for holding his bargain invalid, unless some unfair advantage is taken of his position; and so long as his bargain is reasonable, having regard to the protection of the employer, it cannot be truly said that any unfair advantage is taken.[19]

Hence the mere giving of employment can be consideration enough to ground a restraint of trade.[20]

More recently there have been certain statements of law which, while asserting that "it is immaterial . . . whether the covenantor has received much or little by way of benefits from entering into the transaction",[21] yet suggest that inadequacy of consideration or inequality of bargaining power may be taken into account in an incidental, by no means conclusive, respect in reference to the possibility that the covenantee has exceeded his reasonable demands.[22]

B. As for the second part of Lord Macnaghten's bipartite test, referring to the public interest, this has not achieved any degree of prominence in judicial discussion, except insofar as it is conceded that a restraint not reasonable to protect the covenantee is also probably not reasonable in the public interest.[23]

Nonetheless, the two parts of the test have maintained their theoretical integrity in recent judicial discussions. In *Amoco* v. *Rocca,* Walsh, J., observed:[24]

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[17] Consisting of Lord Lyndhurst, L.C.B.; Bayley, B.; Vaughan, B.; Bolland, B.

[18] (1837) 6 Ad. & El. 438; 112 E.R. 167.

[19] [1899] 1 Ch. 300, at 306.

[20] See Heydon, *op. cit. supra* n. 3 at pp. 164-67.

[21] *Amoco* v. *Rocca supra* n. 8 at 688, *per* Walsh J., *Cf.* Gibbs, J., at 692.

[22] Lord Macnaghten did make this same qualification in *Nordenfelt supra* n. 7 at 565. *Cf.* Lord Reid in *Esso Petroleum supra.* n. 9 at 300. In the High Court, see *Queensland Co-operative Milling Association* v. *Pamag Pty. Ltd. supra* n. 6 at 344 *per* Walsh, J.; at 347 *per* Stephen, J.; *Amoco* v. *Rocca supra* n. 8 at 688 *per* Walsh, J.; at 692-93, 694 *per* Gibbs, J. But *cf. Stenhouse* v. *Phillips supra* n. 5 at 402 where the Privy Council criticised tne trial judge for admitting evidence of the interests and expectations of the employee.

[23] But *cf.* the decision in *Wyatt* v. *Kreglinger and Fernau* [1933] 1 K.B. 793; and the comments of Lord Pearce in *Esso Petroleum supra* n. 9 at 323-24.

[24] *Supra* n. 8 at 689.

> 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 . . . .
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> 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.[25]

Another aspect of the doctrine, again reflecting the general law of contract, is that judicial inquiry will take as relevant to reasonableness only the facts as they existed at the time of the contract's making.[26] The same attitude has for some time been taken towards the construction of contracts, an analogous, but not identical, problem to that of determining whether an agreement of known meaning operates in unreasonable restraint of trade.

In Australian decisions, a very strict view of this has been taken.[27] In recent English decisions, such as that in *Esso Petroleum,* the courts have been prepared to consider possible or foreseeable consequences of particular contractual restraints in order to decide whether they *could* operate unreasonably.[28]

> In *Amoco* v. *Rocca* it was said, however:
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> . . . 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.[29]

To be distinguished from this issue is the question of whether the agreement acts in restraint of trade at all, that is, whether the agreement must be justified under the doctrine. This matter is to be decided by reference, not to the "rights and obligations created by the agreement"

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[25] Strictly, perhaps, a separation of the tests has been maintained by the rules as to onus of proof. The modern formulation requires reasonableness between the parties to be proved by covenantee and unreasonableness in the public interest to be proved by covenantor. See Heydon *op. cit. supra* n. 3 pp. 37-44 and cases there cited. *Cf. Queensland Co-operative Milling Association* v. *Pamag Pty. Ltd. supra* n. 6 at 347-48 *per* Stephen, J.

[26] See Heydon *op. cit. supra* n. 3 pp. 168-170.

[27] E.g. see *Queensland Co-operative Milling Association* v. *Pamag Pty. Ltd. supra* n. 6 at 349 *per* Stephen, J.; *Amoco* v. *Rocca supra* n. 8 at 685-86 *per* Walsh, J.; at 693 *per* Gibbs, J. But *cf. Amoco* v. *Rocca id.* at 695 where Stephen, J., does appear to take into account mere possibilities.

[28] E.g. see *Esso Petroleum supra* n. 9 at 303 *per* Lord Reid. See Heydon *op. cit. supra* n. 3 pp. 168-170.

[29] *Supra* n. 8 at 686 *per* Walsh, J.

but to "its effect in practice".[30] In other words, a contract that is in fact a restraint of trade but is "camouflaged" by its formal arrangement will not be exempt. The court looks to substance, not form.[31] This may result in a faintly ambivalent attitude to any particular contractual agreement, at times difficult in logical application.

**Application of the Doctrine**

In the last preceding paragraph, an issue was raised that deserves fuller explanation. That is the "threshold" question: "To what contracts does the doctrine apply?" It has always been felt, it seems, that the class of cases to which the doctrine should apply must be limited in some way. For example, Sir George Jessel, M.R., in *Printing and Numerical Registering Co.* v. *Sampson* said:[32]

> Does any one imagine that it is against public policy for an artist to sell the picture which he has never painted or designed, or for the sculptor to sell the statue, the subject of which is to be hereafter to be given to him, or the author to sell the copyright of the book, the title of which is even as yet unknown, or, more than that, that a contributor to a periodical may agree that he will devote himself to the exclusive service of certain periodical for a given period, for a given reward? These examples are, to my mind, entirely repugnant to the argument that there is any public policy prohibiting such contracts. On the contrary public policy is the other way. It encourages the poor, needy, and struggling author or artist. It enables him to pursue his avocations, because people rely upon his honour, good faith, and the ordinary practice of mankind; and it will provide for him the means beforehand which, if the law prohibited such a contract, he could not otherwise obtain.[33]

This sentiment was echoed in 1968 by the House of Lords in *Esso Petroleum*.[34] The House of Lords saw the doctrine as needing some definitive limitation and thus in the course of discussion raised three general limitations for consideration:

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[30] *Stenhouse* v. *Phillips supra* n. 5 at 402. *Cf. Buckley* v. *Tutty supra* n. 8; *Howard F. Hudson Pty. Ltd.* v. *Ronayne supra* n. 8 and, in England *Esso Petroleum supra* n. 9.

[31] In *Amoco* v. *Rocca*, the respondents leased the property in question to Amoco, thus gaining finance, whereupon Amoco immediately underleased the property to, in effect, the respondents, in return for certain negative covenants and conditions for payment. This attempt to come within the terms of the decision in *Esso Petroleum* was not successful, although Stephen, J. considered the doctrine inapplicable for other reasons.

[32] (1873) 19 L.R. Eq. 462, at 466.

[33] This case in fact concerned a contract for the sale of a patent and an agreement to sell all future patents over like inventions. It is curious to note that, in the course of his judgment, Sir George Jessel, M.R. seemed to doubt even the existence of a restraint of trade doctrine. *Cf. Middletown* v. *Brown* (1878) 47 L.J. Ch. 411.

[34] Especially note the comments of Lord Reid in *Esso Petroleum, supra* n. 9 at 294.

(1) Lord Reid,[35] Lord Morris[36] and Lord Hodson[37] each suggested that a restraint of trade is an obligation to give up an existing freedom. So, as in the case before their Lordships, if a person takes land under a contract of lease, to which he had no prior right, and "takes possession of that land subject to a negative restrictive covenant [as to the business conducted thereon] he gives up no right or freedom which he previously had . . . ."[38]

(2) Lord Pearce and Lord Wilberforce[39] suggested that the doctrine would not apply to "ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that any prevention of the work outside the contract, viewed as a whole, is directed towards the absorption of the parties' services and not their sterilization".[40]

It is difficult to see how this test may co-exist with the main test of reasonableness, in that the determination of the question whether the covenantee's demand exceeds mere "absorption" and hence "sterilizes" seems to exactly parallel the determination of the question whether the demand exceeds the covenantee's reasonable needs.

(3) Lord Wilberforce[41] put more emphasis on "contracts as, under contemporary conditions, may be found to have passed into accepted and normal currency" as being exempt from application of the doctrine, because such contracts have been "moulded under the pressures of negotiation, competition and public opinion".

His Lordship continued, however:

> Absolute exemption for 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.[42]

Again, such a *caveat* immediately necessitates the consideration in each case of whether the contract in question is "exorbitant", and that procedure would appear to pre-empt the main question of reasonableness within the needs of the covenantee.[43]

It must be emphasized that these three sets of possible limitations

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[35] *Id.* at 298.
[36] *Id.* at 309.
[37] *Id.* at 316-17.
[38] *Id.* at 298, *Cf.* Lord Pearce *id.* at 325.
[39] *Id.* at 328 and 336 respectively.
[40] *Id.* at 328.
[41] *Id.* at 331-33.
[42] *Id.* at 333.
[43] Also Lord Reid's careful qualifications *id.* at 294-95 seem to pre-empt the question of reasonableness.

were not intended to be exhaustive. Lord Wilberforce in particular thought that "it would be mistaken, even if it were possible, to try to crystallize the rules of this, or any, aspect of public policy into neat propositions". He thought that in all circumstances a "broad and flexible rule of reason" should be adopted.[44]

The desire of the courts to limit the application of the doctrine, rather than the doctrine itself, seems to have been so strong in the *Esso Petroleum* decision because before that case it had not often been proposed to the courts that a contract limiting a party's ability to trade with third persons, only as long as he was trading with the other party to the contract, could be in restraint of trade. As a result the House of Lords, later followed by the High Court, sought to distinguish "a restriction which operates after the other party's obligations have come to an end", as susceptible to the doctrine, from "a restriction imposed only during the period while contractual obligations remain to be performed on both sides" as insusceptible to the doctrine.[45]

Should the doctrine be limited in this way at all? It has been suggested that such purported limitations serve no useful purpose.

> It may in truth be illusory to speak of any provision which imposes a real restraint upon the individual's freedom to trade as not falling within the doctrine; the true analysis may simply be that the doctrine is of the greatest breadth but that in many cases restraints will readily pass through its processes of scrutiny unscathed and that in those instances it is of little practical importance to determine whether or not the doctrine is applicable.[46]

Nevertheless, Australian and English courts have adopted and applied the concept of limited application,[47] except in the very unusual fact circumstances in *Pharmaceutical Society of Great Britain* v. *Dickson*[48] and,

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[44] *Id.* at 331.

[45] *Amoco* v. *Rocca, supra* n. 8 at 698 *per* Stephen, J. Note, however, that in other cases the doctrine has been applied where no contractual relationship exists e.g. where the party restrained is subject to rules of an association. See *Pharmaceutical Society of Great Britain* v. *Dickson* [1970] A.C. 403; *Buckley* v. *Tutty* (1971) 125 C.L.R. 353. These cases may be seen as a development of the modern law, or a revival of ancient law concerning "involuntary" restraints (also voidable) i.e. restraints of trade imposed by guild or association rules, by-laws, royal monopolies *etc.*, restraints imposed without a contractual relationship, as opposed to "voluntary" restraints undertaken by personal agreement. See *Mitchel* v. *Reynolds* (1711) 1 P. Wms. 181; 24 E.R. 347 *per* Parker, C.J.

[46] *Queensland Co-operative Milling Association Ltd.* v. *Pamag Pty. Ltd. supra* n. 6 at 351 *per* Stephen, J. His Honour did, however, decide to follow Lord Reid's suggested limitation in *Esso Petroleum, supra* n. 9 at 298.

[47] See *Amoco* v. *Rocca, supra* n. 8; *Texaco* v. *Mulberry Filling Station, supra* n. 9.

[48] [1970] A.C. 403.

in Australia, *Buckley* v. *Tutty*,[49] both of which contain statements to the opposite effect.[50]

Both the question of the applicability of the doctrine and the nature of the test of reasonableness itself were considered anew in *Schroeder* v. *Macaulay* and *Clifford Davis* v. *W.E.A. Records*.

**Facts**

The contracts in both cases were made by composers of original musical works with promoters and distributors of such works. The promoters in each case apparently undertook very similar functions, namely: for five years to receive the world-wide copyrights on the composers' individual works and to promote and exploit those works with a view to the mutual benefit of promoter and composer. However, the contracts imposed no express legal duty in such terms on the promoter, except insofar as in the second, later case, there was a general contractual obligation on the promoter to one of the composers that he "would use his best endeavours to launch the works to the fullest extent",[51] in return for which she alone promised to deliver to the promoter at least one complete musical composition each month. No explanation was offered for this variation of the standard form of agreement.

In return for this general arrangement, the composers, in the first case, having assigned the copyright *gratis*, received a small sum in advance of royalties and thereafter a share in excess royalties and profits. In the second case, if the composition were acceptable to the promoter at all,[52] the copyright was assigned for one shilling only, and thereafter a share in the royalties and profits.

In the first case, the agreement was terminable at the will of the promoter on one month's notice, and should the composer's royalties exceed £5,000, the agreement was automatically extended for a further five years. In the second case, the contract was extensible at the option of the publisher for an additional five years.

In both cases the agreement was assignable at will by the publisher to any person without consulting the composer.

**Instone** v. **Schroeder**[53]

In the decision of the Court of Appeal in *Instone* v. *Schroeder*, the

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[49] (1971)125 C.L.R. 353.

[50] For some discussion of the recent High Court pronouncements on this issue, see (1973) 47 *A.L.J.* 738 on *Amoco* v. *Rocca*; (1973) 47 *A.L.J.* 745 on *Queensland Co-operative Milling Association* v. *Pamag Pty. Ltd.*; and see also the very recent High Court decision of *Quadramain Pty. Ltd.* v. *Sevastapol Investments Pty. Ltd.* to date reported only in [1976] A.L.R. 555.

[51] *Per* Lord Denning, M.R. in *Clifford Davis* v. *W.E.A. Records, supra* n. 1, at 64.

[52] The publisher had the right, for six months after tender of a composition by a writer, to reject, without payment, the transfer to him of the copyright, [1975] 1 W.L.R. 61, at 64.

[53] [1974] 1 All E.R. 171, and see n. 2 *supra*.

arguments of the various members of the House of Lords in *Esso Petroleum*, to the end that the doctrine must be limited, came under close scrutiny. Russell, L.J., delivering the judgment of the Court, said:

> We have been rather puzzled by an approach to restrictions on trade during the currency of exclusive contracts which appears to deny to them the quality of restraints on trade requiring justification as reasonable, unless there is discovered something oppressive, or "too unilateral", or exorbitant; for the very discovery would appear to pre-empt the decision on reasonableness. Rather than attempt to classify some situations involving restrictions on trade as "restraints of trade" and others as not, we would prefer a quite general approach to all such situations. We are not . . . afraid that that would lead to litigious abuse. In many if not most cases of exclusive contracts the contents of the contracts and the situation will make it obvious as a matter of common sense that the public interest cannot be adversely affected.[54]

Thus, the Court of Appeal unequivocally favoured the single test of reasonableness, to be applied to all contracts savouring of a restraint, and the incipient matter of contract "classification" fell to disfavour.

In answering questions directed to the reasonableness of the contract, the Court of Appeal, without any extended consideration of the matter, seemed to regard reasonableness as relevant only to the public interest, it being contrary to public interest for a restraint to be too wide.[55] The Court then decided that the contract was unenforceable because of "a total lack of obligation on the one side, with a total obligation on the other side"[56] which strongly suggests that the Court decided the matter on inadequacy of consideration.

It is to be noted, however, that in determining the question of reasonableness, the Court considered "that there is a great difference between cases of restrictions on trade during an employment or engagement and those after the contract has com to an end . . . . It is far less likely that a restriction during the continuance of a contract would be inimical to the public interest".[57]

It is in regard to this question of reasonableness that the speeches of the House of Lords made interesting elaborations.

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[54] *Id.* at 177.

[55] *Id.* at 176.

[56] *Id.* at 178.

[57] *Ibid.* The Court noted the weight of authority discouraging the application of the doctrine to a restraint operative only during the term of the service relationship, *Warner Bros. Pictures Inc.* v. *Nelson* [1937] 1 K.B. 209, *Rely-A-Bell Burglar and Fire Alarm Ltd.* v. *Eisler* [1926] Ch. 609, but noted that there was no rule of law preventing such application. The Court therefore preferred to follow *W. H. Milstead & Son Ltd.* v. *Hamp and Ross Glendinning Ltd.* [1927] 1 W.N. 233 and *Horwood* v. *Millar's Timber and Trading Co. Ltd.* [1917] 1 K.B. 305. *Cf. Warner Bros. Pictures Inc.* v. *Ingolia* [1969] N.S.W.R. 988. See Heydon, *op. cit. supra* n. 3 pp. 60-61, 170.

**Schroeder** v. **Macaulay (formerly Instone)**[58]

The House of Lords, in *Schroeder* v. *Macaulay*, took an entirely fresh approach to the whole question, a significant development.

Lord Reid first outlined the facts, noting that the composer had never had any of his works published and that the promoter was a large American concern, also that the composer desired a different kind of contract but acquiesced to the promoter's standard form of contract subject to a few alterations.[59]

His Lordship then made some preliminary observations, *viz.* that the validity of the contract must be determined as at the date of the signing regardless of the present state of the parties' relationship; and that "in a case like the present case two questions must be considered. Are the terms of the agreement so restrictive that either they cannot be justified at all or they must be justified by the party seeking to enforce the agreement? Then, if there is room for justification, has that party proved justification — normally by showing that the restrictions were no more than what was reasonably required to protect his legitimate interests".[60]

These "two questions" seem to parallel the question of applicability of the doctrine and the question of reasonableness respectively.

As to the question of applicability his Lordship had, it seems, no difficulty, for it was only the second question he discussed at any length in reference to the terms of the contract.[61]

At the close of his speech, Lord Reid did, however, say that the doctrine did not normally apply to a contract of exclusive services unless the "contractual restrictions appear to be unnecessary or to be reasonably capable of enforcement in an oppressive manner . . . ."[62] This is, perhaps, a surprising test for the application of the doctrine. It seems to place, in the alternative, consideration of the needs of the covenantee, and the possible oppression of the covenantor. As such, it would completely pre-empt the main test of reasonableness in the traditional, Lord Macnaghten, formulation.

However, Lord Reid defined his "second question", the "main question" in this case, as whether and to what extent the agreement conflicts with the "public interest [which] requires in the interests both of the public and of the individual that everyone should be free so far as practicable to earn a livelihood and to give to the public the fruits of his particular abilities".[63]

In this analysis, the "public" appears to be a passive force, and it is

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58 [1974] 1 W.L.R. 1308, and see n. 2 *supra*.

59 *Id.* at 1309.

60 *Id.* at 1310.

61 *Ibid.*

62 *Id.* at 1314.

63 *Id.* at 1313.

the interests of the "individual", the covenantor alone, which are subsequently considered by his Lordship.

> The [composer] is bound to assign to the appellants during a long period the fruits of his musical talent. But what are the [promoters] bound to do with those fruits? Under the contract nothing . . . . But if for any reason the [promoters] chose not to publish them the respondent would get no remuneration and he could not do anything. Inevitably the [composer] must take the risk of misjudgment of the merits of his work by the [promoters]. But that is not the only reason which might cause the [promoters] not to publish. There is no evidence about this so we must do the best we can with common knowledge. It does not seem fanciful to suppose that purely commercial consideration might cause a publisher to refrain from publishing and promoting promising material.[64]

There are, then, four significant features of Lord Reid's formulation:

(1) His Lordship's conclusions on the nature of the contract make it clear that he considered that the contract was "reasonably capable of enforcement in an oppressive manner". Hence, the contract was one of the exceptional service agreements that came within the operation of the restraint of trade doctrine because it was potentially oppressive or "unnecessary".

It is to be noted that such a "threshold" test seems to contemplate the possibility that a restriction could be necessary and yet "reasonably capable of enforcement in an oppressive manner". To the writer, this seems not at all unlikely in the promoter-composer situation of which the instant case was an example. The promoter must be reasonably certain of the supply of the material he may promote but, not knowing anything of the quality or quantity of the future, unascertained properties "could [not] reasonably be expected to enter into any positive commitment to publish future work by an unknown composer".[65]

(2) These same conclusions that show that the contract was subject to the doctrine, clearly are the basis for his Lordship's finding that the contract was not justifiable under the doctrine, because it "sterilized" the composer's work.[66] Hence, Lord Reid has in fact amalgamated the tests of applicability and reasonableness.

(3) Lord Reid in determining whether the contract could oppress the covenantor and then determining whether the contract could "sterilize" the covenantor's work, i.e., whether the doctrine was applicable and whether the contract was reasonable, has, in effect, considered only the interests of the covenantor. His Lordship did point out that normally only

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[64] *Ibid. Cf.* the American approach exemplified by *Hackard* v. *Park* (1948) 188 P. 2d 926 (S.C. of Kansas), quoted by Heydon *op. cit. supra* n. 3 pp. 237-38.

[65] [1974] 1 W.L.R. 1308, at 1313.

[66] *Id.* at 1313-14.

the interests of the covenantee were significant,[67] but in this case they are decidedly subordinated to the "public interest".

(4) As a result of considering the interests of the covenantor alone, the adequacy of the consideration given for the undertaking, in the form of the promoter's reciprocal promises, acquires a prominent position. The promoter's promises were found to be lacking, despite the fact that possibly "no satisfactory positive undertaking by the publisher can be devised".[68] It would thus seem impossible for the promoter to "balance", in the terms of the Court of Appeal,[69] the obligation of the composer, unless the composer is given a right to terminate the contract.[70] That, it is submitted, seems greatly to jeopardise the legitimate interests of the promoter.

Lord Reid's judgment was, then, a large advance from the position his Lordship took in *Esso Petroleum* where he said, after quoting with approval Lord Macnaghten's formulation extracted above, that the interests of covenantor, covenantee and public must all be considered equally, with the "quantum of consideration" being taken into account.[71] Yet it is possible that he considered the facts in this case to be the "very unusual circumstances, such as those in *Young* v. *Timmins*"[72] which justify, not only the application of the doctrine to an exclusive service agreement, but perhaps also a special treatment of the doctrine itself.

In conclusion, therefore, it may be said of Lord Reid's formulation of the doctrine that it depends, in the case of exclusive service agreements, upon the actual and foreseeable interests of the covenantor at the date of the contract.

This approach may well have yielded a just result in the circumstances, but clearly it places a vast number of similar contracts in considerable uncertainty, indeed at the mercy of the covenantor, even if the covenantor enjoys benefits equal to or exceeding his expectations at the date of signing. The covenantor may have done very well out of the arrangement yet, for any reason, may seek to go elsewhere despite the efforts of the covenantee. This seems to run contrary to Lord Reid's warning in *Esso Petroleum*:

> . . . here a term in restraint of trade will not be enforced unless it is reasonable . . . here the party who has been paid for agreeing to the restraint may be unjustly enriched if the court holds the restraint

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[67] *Id.* at 1310.

[68] *Id.* at 1313.

[69] [1974] 1 All E.R. 171, at 178.

[70] As suggested by Lord Reid, [1974] 1 W.L.R. 1308, at 1314. *Cf.* the suggestion of Russell, L.J. in the Court of Appeal, [1974] 1 All E.R. 171, at 178 that the composer be entitled to the copyright of unused compositions at the end of the term of the agreement.

[71] [1968] A.C. 269, at 300.

[72] *Id.* at 294.

to be too wide to be enforceable and is unable to adjust the consideration given by the other party.[73]

This must be equally possible where the "payment" expected by the covenantor materializes after the date of the contract.

Hence, if this formulation, or one similar to it, were to be adopted, it is surely more satisfactory to take into account what in fact has happened under the contract. It is submitted, also, that the imbalance within the contract will not, as Lord Reid suggests,[74] be rectified merely by inserting an obligation on the stronger party to act in good faith and with best endeavours in the interests of the weaker. This is evident from the ineffectiveness of such a term in the facts of *Clifford Davis Ltd.* v. *W.E.A. Records*, considered below. It is extremely difficult to formulate a more substantial obligation to be imposed upon the covenantee.

In the opinion of the writer, it would be by no means improper in law to determine the respective powers and duties of the parties, and hence, in this instance, the enforceability of contracts imposing such, with reference to the behaviour of the parties in the performance of those contracts. This conclusion can be drawn from recent decisions on legal consequences of breach of contract, including *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.*[75]

This is not to say that the construction of the contract should be determined by reference to events following its making, nor that its intent should be illumined by the performance of it by the parties, nor that the contract's terms should be varied by the courts. All such heresies are forbidden by authority.[76]

Rather, it is submitted that the same approach should be taken to determining reasonableness, as is at present taken to determine the applicability of the doctrine, i.e., "not by the form the stipulation wears but . . . by its effect in practice".[77] The conduct of the parties should be a guide to the effect of an agreement of known purport.

Lord Diplock presented an apparently novel approach. He offered an opinion that Lord Reid and Viscount Dilhorne had "in fact" been attempting:[78]

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[73] *Id.* at 295.

[74] [1974] 1 W.L.R. 1308, at 1313.

[75] [1962] 2 Q.B. 26 *Cf. Cehave N.V.* v. *Bremer Handelsgesellschaft m.b.H.*; *The Hansa Nord*, [1976] 1 Q.B. 44, and see J. W. Carter and C. Hodgekiss "Conditions and Warranties: Forebears and Descendants" (1977) 8 *Syd. L.R.* 31.

[76] That a contract cannot be varied *ex post facto*, hence its construction must be determined at the date of the contract: *Wallis* v. *Pratt & Haynes* [1911] A.C. 394. That subsequent conduct of parties cannot be used to aid construction: *James Miller* v. *Whitworth Street Estates* [1970] A.C. 583, even if the contract is ambiguous, *L. Schuler A.G.* v. *Wickman Machine Tools* [1974] A.C. 235. See *Nordenfelt supra* n. 7.

[77] *Stenhouse Australia Ltd.* v. *Phillips, supra* n. 5, at 402.

[78] [1974] 1 W.L.R. 1308, at 1315.

> . . . to assess the relative bargaining power of the publisher and the song writer at the time the contract was made and to decide whether the publisher had used his superior bargaining power to exact from the song writer promises that were unfairly onerous to him [and not] to inquire whether the public have in fact been deprived of the fruit of the song writer's talents by reason of the restrictions, nor to assess the likelihood that they would be so deprived in the future if the contract were permitted to run its full course.[79]

Thus, to bring judicial fact into harmony with judicial theory, his Lordship proposed an overriding, all-encompassing test: "Was the contract fair?"[80]

Standing alone, this startling test may seem simplistic. However, his Lordship suggested parameters:

> The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract.[81]

It is interesting to note that Lord Diplock thus wished to balance in some way promisor and promisee, rather than use the traditional variably weighted presumption of invalidity to be cast aside by reference predominantly to the promisee's interests.[82] The use of these parameters may be compared to the approach of Lord Reid discussed above, where similar factors, the needs of the promisee and benefit to the promisor were placed in the alternative, followed by an analysis of the latter only. In Lord Diplock's test, both parties must be measured against each other, not individually. His Lordship at no stage discusses the doctrine in terms of presumptions.

Finally, both Lord Diplock and Lord Reid made special reference to the use of a standard form of contract.[83] Lord Reid, in response to arguments of counsel in reference to judgments in *Esso Petroleum*, especially those of Lords Pearce and Wilberforce,[84] dismissed summarily the notion that such a contract could, in this case, be considered the result of a common practice, moulded by negotiations of parties on equal terms. Lord Diplock carefully distinguished those standard forms setting

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[79] Lord Diplock, by framing his formulation in terms of reasonableness between the parties, or fairness, seems to leave the onus of justification on the covenantee, for, traditionally, proof of reasonableness between the parties has been required of the covenantee, whereas proof of reasonableness in the public interest has been required of the covenantor. *Mason* v. *Provident Clothing and Supply Co. Ltd.* [1913] A.C. 724; *Herbert Morris, Ltd.* v. *Saxelby* [1916] 1 A.C. 688. *Cf.* Lord Reid's formulation which, though expressed solely by reference to "public interest", [1974] 1 W.L.R. 1308, at 1313, expressly left the onus of justification on the covenantee. *Id.* at 1310.

[80] *Id.* at 1315-16.

[81] *Ibid.*

[82] See nn. 25 and 79 *supra.*

[83] [1974] 1 W.L.R. 1308, at 1314 and 1316 respectively.

[84] [1968] A.C. 269, at 323 and 332-33.

out the "traditional" terms upon which mercantile transactions of common occurrence are to be carried out. He gives examples: bills of lading, charterparties, policies of insurance, contracts of sale in the commodity markets. Opposed to these, Lord Diplock identifies those contracts exemplified by the "ticket cases", of which he considered this contract to be representative:

> The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it.[85]

These observations, it is submitted, were *obiter dicta* in this case. As such, although perhaps apt for the case at hand,[86] they may become difficult in their application to many fact situations, especially in the case of contracts similar to the one under consideration, which seem to occupy a more mediate position between standard bills of lading and standard ticket contracts. Admittedly the parties are far from equal, but the agreement is far more complex than a contract of conditional use of goods and services, and in that complex relationship it would appear that the composer has much to gain and little to lose. Furthermore, it is only the promoter who knows what risks he undergoes and what safeguards are necessary. If the promoter then abuses his powers after the contract has come into effect, there are other remedies more suitable to the situation of the composer.[87]

Thus, it is submitted in summary, there were two attitudes evinced in the decision of the House of Lords. That of Lord Reid, with whom Viscount Dilhorne and Lord Simon of Glaisdale agreed, posits that service agreements do not come within the ambit of the doctrine unless unnecessary or capable of being oppressive. If they do thus come under the operation of the doctrine, then the contract must be justified by the obligee. Such justification, it is submitted, would be almost impossible, the matter already being decided in order to apply the doctrine, for, *à priori*, the covenantee will be required to prove that the contract, from

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[85] [1974] 1 W.L.R. 1308, at 1316.

[86] In the judgment of the Court of Appeal, [1974] 1 All E.R. 171, it was clear that the publishers' standard form of contract, not framed in accordance with standard practice, had been imposed on the composers (*id.* at 178). Nevertheless, the House of Lords' decision was clearly based upon the analysis of the terms of the individual contract as undertaken by Lord Reid, not the mere fact of their "standardness".

[87] For example, in the Court of Appeal, there was some discussion of a possible plan of the publishers to defraud the composer, but, despite that, the conduct of the publisher was seen as a repudiation of the contract, [1974] 1 All E.R. 171, at 179-181. *Cf. Harrigan* v. *Brown*, [1967] 1 N.S.W.R. 342.

its inception, could not possibly be used for the oppression of the covenantor. That of Lord Diplock, with whom Lord Simon also agreed, requires that, once the agreement is seen to be restrictive of trade, it must be shown to the satisfaction of the court that the relationship of the contracting parties was not such that one party had, and used, a superior bargaining position to impose an "unfair" contract.[88] A standard form of contract will be the subject of special scrutiny.

**Clifford Davis Ltd. v. W.E.A. Records**

The nascent potentialities of the judgments in *Schroeder* v. *MacAulay* were given perhaps more than full effect in *Clifford Davis Ltd.* v. *W.E.A. Records*[89] which was in the form of an appeal on interlocutory proceedings before Lord Denning, M.R. and Browne, L.J. in the Court of Appeal.

The Master of the Rolls delivered the principal judgment. His Lordship did not seek to set apart contracts "restrictive of trade", such as the one under consideration, as requiring special justification as such. Indeed, it would appear that Lord Denning decided not to treat this type of service contract as within the restraint of trade doctrine, hence there was no need to discuss the doctrine. Rather he seemed to embrace Lord Diplock's test, "Was the bargain fair?" as the panacea for an "unconscionable bargain", whereas Lord Diplock only used this test, as he said, "because [the contract] can be classified as a contract in restraint of trade . . . ."[90]

Furthermore, Lord Diplock's *obiter dicta* concerning standard form contracts were elevated by Lord Denning, M.R., to become directly applicable to the contract "restrictive of trade" itself, to be *ratio decidendi.* Thus, this curious amalgam is formed:

> Lord Diplock . . . urged the courts to be vigilant. They should look into the provenance of such agreements. He made it clear that if one party used "his superior bargaining power" so as "to exact" terms that are "unfairly onerous" or to "drive an unconscionable bargain", then the courts will relieve the other party of his legal duty to fulfil it. He gave this pertinent example: A strong concern prepares a new standard form containing terms which are most unfair — and dictates to the customer, "Take it or leave it". The customer is in a weak position. He has no real option but to accept. The courts may decline to enforce it or, at any rate, may decline to enforce any term which is unfair to the customer, such as an exemption clause.[91]

His Lordship's use of the word "customer" and cross-reference to

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[88] The onus of justification, as explained *supra* n. 79, in both formulations rests upon the covenantee.

[89] [1975] 1 W.L.R. 61.

[90] [1974] 1 W.L.R. 1308, at 1315.

[91] [1975] 1 W.L.R. 61, at 64.

the law on exemption clauses, imports, it is respectfully submitted, an unmerited breadth into Lord Diplock's statement of policy.

Lord Denning, M.R., also reversed Lord Diplock's logic. Lord Diplock proposed the test, solely applicable to restraints of trade, of fairness, which test could be illumined by reference to inequality of bargaining power.[92] Lord Denning proposes the test, applicable to all contracts, of inequality of bargaining power, which test is illumined by reference to unfairness.

This very broad test was then applied to the facts, with the result of a decision against the promoters, based on four grounds:

(1) *The restriction was greater and longer than was reasonably necessary for the interests of the obligee.* This ground has the very traditional antecedents discussed above and, though placed in an unusual context, needs no further comment.

(2) *The contract would demand the transfer of property (the copyright in musical compositions) at "a consideration that was grossly inadequate".* One shilling, said Lord Denning, M.R., was not enough.

Neither the House of Lords in *Schroeder's Case* nor perhaps any English court for 140 years had put such a proposition so bluntly in reference to contracts in restraint of trade, let alone contracts in general.[93]

Even if this new departure were accepted, its application in this case was, with respect, extremely doubtful. His Lordship came to this conclusion because each composer was guaranteed no more than one shilling for each transfer. His Lordship concedes that there was also provision for payment of royalties but, he said, this counts for nothing, where the promoter has no obligation to exploit the work.

Yet it seems an extraordinary thing that, as a result of this decision, before a promoter could undertake to promote the future, unknown, works of a composer, he must assess the true future worth of this untried talent and thus make a firm agreement for the price of all future works. Who could assess such risks or such possibilities?

Of course, the promoter could fix a price subject to an arbitration agreement for the governance of fair price and proper performance, or renegotiation clauses, but, in the absence of fraud, it would seem that the fairest remuneration would be that based on the actual value accrued by the product, assessed in relation to royalties and/or profits.

In *Schroeder's Case*, Lord Reid had suggested that the imbalance in such agreements might be rectified by the inclusion of an undertaking by the promoter "to use his best endeavours", but his fears that such

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92 [1974] 1 W.L.R. 1308, at 1315.

93 Except for isolated decisions such as *Lloyd's Bank Ltd.* v. *Bundy* [1974] 3 W.L.R. 501 discussed *infra.* Occasionally courts may have taken cognizance of an inadequacy of consideration while resting their decisions on other grounds. See Heydon *op. cit. supra n.* 3 pp. 164-171.

"would probably have to be in such general terms as to be of little use to the composer"[94] appear to have been realized in *Clifford Davis* v. *W.E.A. Records.* That is, although such a term was included in the service agreement there under consideration, it had, it seems, no necessary legal consequences upon the obligations of the promoter, being of such uncertain import.[95]

It is to be observed that in this case, disregarding royalties, the works of the composers were worth vastly more than one shilling, but that will not be so in many, if not most, cases. It may well be that there were other aspects of the bargain, apparent on its face, which suggested that the promises of the promoters were substantially inadequate. It may also be that, in the light of events subsequent to the making of the contract, the consideration was inadequate. However, the ground of inadequacy of consideration as stated by the Master of the Rolls is very difficult to support.

(3) *The obligors, though of full age and competent understanding, were the weaker parties to the bargain, being inexperienced in business.*

(4) *As a result of* (3), *above, undue influences or pressures were brought to bear on the composers,* in that cyclostyled standard forms of contract were used, and the composers did not enjoy legal advice.

Lord Denning, M.R., had cited the decision of *Lloyd's Bank Ltd.* v. *Bundy,*[96] in which he himself had given a judgment in the Court of Appeal.

In that case, the defendant, Mr. Bundy, was an aged farmer owning a farm which had been in his family for generations. Mr. Bundy had an account with the local branch of the plaintiff bank. Mr. Bundy's son formed a company, also banking at the same branch of the plaintiff, but the new company fared very badly, accumulating a sizable overdraft. The plaintiff successively guaranteed the overdraft of his son's company for larger and larger amounts, securing the guarantees on his farm. Indeed, in May, 1969, he acted under the advice of the family solicitor, who warned him not to charge his assets for an amount exceeding half their value. Nevertheless, in December, 1969, Mr. Bundy guaranteed the overdraft for an amount exceeding the value of his one major asset, the farm, despite an additional warning from the bank manager, very recently appointed to that branch, that he considered the company's trouble was "deep-seated". Mr. Bundy, although he said he relied on the manager for good advice, also said he was "one hundred per cent behind his son". The son's company went into receivership. The plaintiff claimed an order for possession of the farm. At first instance

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[94] [1974] 1 W.L.R. 1308, at 1313.

[95] [1975] 1 W.L.R. 61, at 65 *per* Lord Denning, M.R.

[96] [1974] 3 W.L.R. 501. See P. H. Clarke "Unequal Bargaining Power in the Law of Contract" (1975) 49 *A.L.J.* 229.

the order was granted to the bank. The Court of Appeal[97] allowed the appeal on the basis that there was such a relationship of confidentiality between the bank and the defendant that the court could intervene to prevent the relationship being abused; that there was a conflict of interest between the manager's duty to Mr. Bundy and his duty to his employer, and that Mr. Bundy suffered as a result. Lord Denning, M.R., went farther than his learned brethren, saying that there was a general basis of the defendant's right to the court's protection, i.e., that the court would intervene where there was an unfair contract, or where property was transferred for grossly inadequate consideration, where there was grievously impaired bargaining power on one side, coupled with undue influences or pressures brought to bear on the weaker party.[98]

Lord Denning, M.R., now in *Clifford Davis* v. *W.E.A. Records*, considered *Schroeder's Case* to be a "good instance" of the principles he enunciated in *Lloyd's Bank* v. *Bundy*.[99] His Lordship thus proposes that the generality of his observations in *Lloyd's Bank* v. *Bundy* extends beyond the doctrine of undue influence, encompassing the doctrine of restraint of trade as well.

It is curious that Lord Denning, M.R., would subsume under the one, all-encompassing head of "unequal bargaining power", the equitable doctrine of undue influence and the common law doctrine of restraint of trade. Perhaps this is another aspect of the famous "fusion fallacy".[100] Because his Lordship's primary concern was the enunciation of this broad principle, it may be that he was not in fact suggesting that all the traditional law making up the doctrine of undue influence should be imported and applied as such to this case. A full discussion of that equitable doctrine cannot be embarked upon here,[101] but it is enough to observe that no special relationship of influence and confidence was asserted or proved as existing between promoter and composer,[102] as was found in *Lloyd's Bank Ltd.* v. *Bundy*. Neither could it be asserted, in traditional terms, that "actual pressure was used" to procure the contract.[103] Furthermore, the elements of innocence in business, a standard

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[97] Consisting of Lord Denning, M.R., Cairns, L.J., and Sir Eric Sachs.

[98] [1974] 3 W.L.R. 501, at 509.

[99] [1975] 1 W.L.R. 61, at 64-65.

[100] That is, that since the Judicature Acts the Common Law and Equity have become "fused", equitable remedies being available on common law doctrines, and *vice versa*. See R. P. Meagher, W. M. C. Gummow and J. R. F. Lehane, *Equity: Doctrines and Remedies* (1975), pp. 42-53.

[101] *Id.* pp. 330-346. Note (*id.* p. 331) that the learned authors write that undue influence is not founded "upon mere inadequacy of consideration or other inequality in bargaining power or imprudence in the transaction".

[102] Such normally involves a very close, personal relationship, such as priest-parishioner, physician-patient, solicitor-client, parent-child, raising a presumption of emotional domination so great as to rob the weaker party of his independence of will, casting doubt on any benefit received by the stronger party. See Meagher, Gummow and Lehane, *op. cit. supra* n. 100 pp. 335-346. The presumption is very heavy to displace. See *Johnson* v. *Buttress* (1936) 56 C.L.R. 113.

[103] See J. D. Heydon, W. M. C. Gummow, R. P. Austin, *Cases and Materials on Equity* (1975), p. 197 and cases there cited.

form of contract, absence of legal advice, and a hard bargain, as evidenced at the time of the contract, seem to lack that degree of importunacy that usually demands the relief of equity, on the basis of the influence being undue.[104]

Thus, it is submitted that, although in general the doctrine of restraint of trade may have been applicable to this contract and, of course, the equitable doctrine of undue influence may be applicable to all types of contract, the two doctrines should be kept analytically separate, neither one used to support the other if each cannot stand alone, nor amalgamated to manufacture a general doctrine of "unequal bargaining power". As Lord Reid has said in *Esso Petroleum*:

> If a contract is within the class of contracts in restraint of trade the law which applies to it is quite different from the law which applies to contracts generally. In general unless a contract is vitiated by duress, fraud or mistake its terms will be enforced though unreasonable or even harsh and unconscionable, but here a term in restraint of trade will not be enforced unless it is reasonable.[105]

**Conclusion**

In the two cases discussed we may observe three approaches to the restraint of trade doctrine in its application, now, to contracts of exclusive service. Lords Reid and Diplock each applied the doctrine as such to the facts in hand. Lord Reid framed his analysis so that the possible interests of either the obligor or obligee could be assessed for reasonableness. This enabled him, in a situation analogous to an employer-employee relationship, to concentrate on the interests of the obligor. Lord Diplock sought to assess the interests of all parties, in the process of discovering whether the bargain was fair and balanced, at the time of the contract. However, it was submitted that these tests will be difficult to apply when events subsequent to the contracts cannot be regarded. This is especially so of Lord Reid's test in the context of exclusive service agreements, because it looks only to possibilities.

Lord Denning, M.R., sought not to invoke the restraint of trade doctrine at all, seeing such doctrine merely as part of a broader test, that of "unequal bargain powers". This broader test included other, different, doctrines applicable to contracts in general. For reasons outlined above, this approach suffers from similar defects to those of the tests of Lords Reid and Diplock. It has, however, the added difficulty of an insecurity of legal foundation necessary to regulate and clarify its application.[106]

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[104] See *Watkins* v. *Coombes* (1922) 30 C.L.R. 180, at 193-94 *per* Isaacs, J.

[105] [1968] A.C. 269, at 295.

[106] Note, however, the provisions 1-203 and 2-302 of the Uniform Commercial Code (U.S.) concerning obligations of good faith and the use of unconscionable contracts (*infra* n. 113). Those who draughted the Code anticipated that a single, all encompassing, rule of "unconscionable contracts or clauses" would be more workable than a large and complex variety of lesser doctrines, policies and rules.

Perhaps, of this latest development from the general law in England, Lord Diplock's proposals appear the most satisfactory. Yet, because, in the words of Parker C.J., in *Mitchel* v. *Reynolds*,[107] "corporations . . . are perpetually labouring for exclusive advantages in trade, and to reduce it, into as few hands as possible" and "masters . . . are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom" it is clear that the courts, to avoid an inflexible application of the doctrine in a large variety of cases of which these two are but examples, have tended to constantly expand the definition of the doctrine. This has been at once to make it applicable to new cases, and to give the court a remedy in the case to which the doctrine is newly applied.[108]

This search for flexibility has led, it is submitted, to a crisis in the doctrine. It has tended to become so broad in its application that it could readily conflict with other areas of law and policy equally established and also developing. In recent times there has been the competition with the equitable doctrine of undue influence noted above. Also recently in *Quadramain Pty. Ltd.* v. *Sevastapol Investments Pty. Ltd.*,[109] the High Court was divided four to two[110] in deciding whether the doctrine would apply to a *Tulk* v. *Moxhay*[111] covenant, restraining use of land in a manner detrimental to the business conducted on the adjoining land with the benefit of the covenant. The resultant confusion of basic principles and policies demands that some new formulation of public policy be defined, accommodating all conflicting developments. A dramatic example, cutting the Gordian knot in a manner reminiscent of Lord Denning's "basic principles" discussed above, is Uniform Commercial Code (U.S.) ss. 21-203, 2-30.[112] Without such a clear policy directive, the proposals of Lord Reid, Lord Diplock and Lord Denning, M.R., can amount only

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[107] (1711) 1 P.Wms 181, at 190; 24 E.R. 347, at 350.

[108] See J. D. Heydon "Section 45: Agreements in Restraint of Trade" (1975) 3 *Aust.Bus.L.R.* 262, and a note by R. T. Baxt in (1976) 50 *A.L.J.* 41.

[109] As yet reported only in [1976] A.L.R. 555.

[110] In the majority were Barwick, C.J., McTiernan, Stephen and Mason, JJ. who held the covenant enforceable *contra* Jacobs, J. (with whom Murphy, J. concurred) who held that the covenant was subject to the doctrine.

[111] (1848) 2 Ph. 774; 41 E.R. 1143. See R. E. Megarry and H. W. R. Wade *The Law of Real Property* (3rd ed., 1966) pp. 753 *ff.*

[112] Section 1-203: Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

s. 2-302: (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

to a cosmetic amelioration of the increasingly uncertain, unmanageably large, body of law involved.

It may well be, as one learned judge once remarked,[113] that English decisions on restraint of trade can have limited relevance to Australian problems, yet the problems exist still which must be solved. That is, the courts must seek to define the application of the doctrine, the cases to which it will apply, and what will be deemed reasonable. The situation is made more pressing by legislative involvement such as, in Australia, the Trade Practices Act, 1974 (Cwth.) which by s. 45 makes unenforceable contracts "in restraint of trade or commerce" which come within its operation.[114] Sadly, the legislature has chosen in this instance not to guide the courts in the meaning of this phrase.

The Law Reform Commission of New South Wales, by its ninth report, ordered for printing in 1970, has suggested some regulation of the development of the law.

The learned Commissioners decided that, because of the flexibility manifestly necessary to public policy in a changing society, there was no need to impose upon the courts any definitions of the doctrine. Perhaps this is in one respect unfortunate, in that the Commission did not settle the nature and extent of questions going to reasonableness. The view was taken, in the writer's submission erroneously, that reasonableness was always determined by reference to the legitimate interests of both parties to the bargain, and their respective "bargaining power".[115]

Also, it was decided that the doctrine should not be limited in its application.[116]

The main recommendation, then, proposed by the Commission, concerned the traditional remedy given by the courts to the party resisting enforcement of the contract. The courts have always simply refused to recognize the validity of a repugnant obligation or allowed full force and effect to a reasonable one, the courts "mend no man's bargain", will not rewrite the contract.[117] The only alleviation of this "all-or-nothing" approach is the doctrine of severance, discussed at some length in the Report.[118]

As a result the Commission proposed a Division 5A of Part VI of the Conveyancing Act, 1919 (N.S.W.), including s. 89A, subs. (1) which permits the Court to give a restraint such effect as is reasonable.[119] This is so whether or not any words or phrases in the agreement

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[113] *Marquett* v. *Walsh* (1929) 29 S.R. (N.S.W.) 298, at 312 *per* Long Innes, J.

[114] Trade Practices Act, 1974 (Cwth.) ss. 5-6 and Australian Constitution s. 51(xx).

[115] *Report of the Law Reform Commission on Covenants in Restraint of Trade,* Doc. L.R.C. 9, 1970, paras. 8, 44 (hereafter referred to as *L.R.C. Report*).

[116] *Id.* paras. 29-40.

[117] *Id.* paras. 23-26. See *Peters Ice Cream (Vic.) Ltd.* v. *Todd* [1961] V.R. 485.

[118] *Id.* paras. 9-20.

[119] *Id.* paras. 21-22, 43-44 and Appendix.

may be severed from the agreement under the normal rules of contractual interpretation.[120] Furthermore, the proposed section allows courts to grant relief "with such limitations and restrictions if any as the court thinks fit".[121]

This may mitigate the severity of the operation of the doctrine but, sadly, leaves the courts to resolve unaided the conflicting forces evident in *Schroeder's Case* and *Clifford Davis* v. *W.E.A. Records.*

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[120] See *Tuit* v. *A.M.P. Society* [1975] 1 N.S.W.L.R. 158.
[121] *L.R.C. Report* paras. 21-22, 43-44 and Appendix.