7 of 1975

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. LIMITED Respondent

CASE FOR THE APPELLANT

Record

1. This is an Appeal by special leave granted by Her Majesty in Council from a judgment of the Full Court of the Supreme Court of South Australia dated the 18th day of January 1974. p.262

2. The questions raised by the appeal relate to the validity and effect of Memorandum of Lease Registered No. 2775159 and Memorandum of Underlease Registered No. 2775160 both registered over certain land owned by the Respondent at Para Hills an outer suburb of Adelaide in the State of South Australia. p.32 to 47 p.48 to 59

FACTS

3. The Appellant is a Company incorporated in the Australian Capital Territory which carries on business in the States of Queensland, New South Wales, Victoria and South Australia in the Commonwealth of Australia as a refiner, marketer, distributor and wholesale vendor of petroleum products. p.8

4. The Respondent is a Company incorporated in the State of South Australia and carries on business in that State as a Service Station Proprietor. p.8

5. On the 19th of June 1964 the Respondent and the Appellant entered into an Agreement in writing pursuant to which :- p.13 to 15

(a) The Respondent was to build a service

station on vacant land at Para Hills (at that time a newly developing suburb north of Adelaide) in accordance with agreed plans and specifications;

(b) The building was to be constructed at the Respondent's expense (save for certain painting which was to be carried out by the Appellant) but substantially to the Appellant's design, the Appellant equipping the service station by providing and installing plant and equipment at the Appellant's expense.

(c) Upon completion of the service station the Respondent was to grant to the Appellant a lease of the premises for a term of 15 years from the date of such completion or the 31st March 1965 (whichever should be the earlier) with a right for the Appellant to terminate on notice at the expiration of the first ten years of the term at a rent of £1 per annum plus a sum calculated at the rate of 3d per gallon for all petrol delivered for sale to the premises by the Appellant;

(d) The Appellantwas to grant an underlease of the premises to the Respondent for the said term less one day at a yearly rent of £1.

6. Forms of the said lease and underlease were annexed to the said Agreement.

(a) The said Lease contained Covenants by the Appellant to pay the rent and yield up the premises at the expiration of the term; covenants by the Respondent to repair and insure: a right of pre-emption in the Appellant in the event of the Respondent desiring to sell the reversion; the usual proviso for re-entry on breach of covenant; and an express declaration (clause 18) that the Lease was not in consideration for or dependent or contingent upon any other contract, lease or agreement between the parties and that the term, rental or other provisions were not intended by the parties to be tied in with any other such contract Lease or agreement but that the provisions of the Lease should be entirely independent of any other transaction or relationship between the parties.

(b) The said Underlease contained (inter alia)

covenants by the Respondent not to commit waste or make permanent alterations without consent; not to assign charge underlet or part with possession; to carry on the business of a petrol station during lawful trading hours; to purchase supplies of petrol oil and lubricants from the Appellant exclusively; to purchase minimum quantities of petrol and oil per month (the amounts being left blank in the forms annexed to the Agreement); and not to do anything prejudicially to affect the goodwill of the business. It also contained (inter alia) a covenant by the Appellant to supply (subject to force majeure) the Respondent's entire requirements at the Appellant's usual list prices.

7. The service station was duly constructed and opened in December 1964 and the Appellant and the Respondent thereupon commenced to trade in accordance with the terms of the agreement. The formal documents of lease and underlease (which were substantially in the form of the proposed lease and underlease annexed to the said agreement save that in the minimum purchase covenant in the underlease amounts of 8000 gallons of petrol and 140 gallons of oil were specified) were not executed until the 19th day of May 1966. They comprised Memorandum of Lease registered number 2775159 and Memorandum of Underlease registered number 2775160. p.9 pp.32 to 47 pp.48 to 59

8. In November 1971 the Respondent gave the Appellant notice to remove its pumps and equipment from the premises and to replace them with equipment of I.O.C. Australia Pty. Ltd. (a trade rival of the Appellant) whose products the Respondent was desirous of selling in place of those of the Appellant. p.10 to 38

9. On the 16th November 1971 the Appellant issued a Writ out of the Supreme Court of South Australia and obtained Interlocutory Injunctions pending trial. pp.1-4

10. Because the matter was urgent and in the nature of a test case the Trial Judge (Wells J.) dispensed with pleadings and directed that the trial of the action should proceed on the basis of agreed issues. He settled a Statement of Issues thus: pp.5 and 6 pp.6 and 7

(a) Is the Respondent entitled to assert that the covenants contained in the underlease or any of them are in restraint of trade and unenforceable?

(b) Are the covenants contained in the underlease or any of them an unreasonable restraint of trade and unenforceable?

(c) If the covenants in the underlease are unenforceable is the whole of the underlease void?

(d) If the underlease is void is the lease void?

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

pp.66 to p.89. l.1 / p.92. l.40 / p.89. 128 - p.90.l.7. / p.93. ll.2-5

11. At the trial of the action the Trial Judge found (contrary to the evidence and submissions of the Respondent) that the Respondent was not in a disadvantageous bargaining position in the negotiations, that it was made aware of the terms of the proposed terms of the lease and underlease and successfully negotiated some matters to its advantage. These findings have not been challenged since the trial by the Respondent.

12. A summary of the contentions of the Appellant and the Respondent at the trial of the action was set forth by the Trial Judge in the form of quasi pleadings thus:

p.69. l.38 — "Amoco's declaration: Rocca is in breach of several covenants in the sub-lease, and appropriate injunctions should be granted enforcing compliance with those covenants.

p.70. l.2 — Rocca's plea: Rocca admits that, as registered proprietors (sic), 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.

			Record
	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.	p.70. l.18
	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 recognised 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.	p.70. l.33
	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.	p.71.l.18
	Rocca's rebutter:	Rocca joins issue on the question of reasonableness as between the parties, and will rely on evidence to show that, whether	p.71. l.28

reasonable as between the parties or not, the restraints were unreasonable as being contrary to the public interest.

p.71. l.38 **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 -

(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.

p.72. l.9 **Roopa's further answer:** Neither the sub-lease nor the offending covenants can be severed."

13. At the trial it was contended by the Appellant:

(a) that the Agreements in question were not within the ambit of the doctrine of the restraint of trade at all, having regard in particular to -

(i) the legal effect of the lease and underlease (c.f. Cleveland Petroleum Co. Ltd. v Dartstone Limited (1969 1 All E.R. 201);

(ii) that the Respondent, having no existing service station business, gave up no existing freedom to trade;

(b) alternatively, that the covenants in the underlease were in the whole of the circumstances reasonable as between the parties; and

(c) were not otherwise contrary to the public interest.

14. The Trial Judge held that the lease and underlease were to be given their ordinary effect in law according to their tenor and by analogy

applied Regent Oil v Strick (1966) A.C. 295 at 312, 336, 340.

15. The Trial Judge answered the questions formulated in the issues thus:

(i) Although my opinion is otherwise, I have treated him as so entitled. p.142.& 11.39 and 40

(ii) No. p.142. 1.41

(iii) Does not arise. p.142. 1.42

(iv) Does not arise. p.143. 1.1

He accordingly gave judgment for the Appellant and the Judge then declared and ordered - p.143. 1.10

(a) That the underlease was not unenforceable by reason of it being in restraint of trade; p.144. 1.7.

(b) That the lease was not unenforceable by reason of it being in restraint of trade. p.144. 1.10

(c) That the Respondent be restrained during the continuance of the lease and underlease and any extension thereof from breaking various of the covenants (including the sole trading covenant) contained in the underlease. p.144. 1.13

(d) Consequential relief including damages for breaches of the covenants and costs. p.146. 1.15

16. On appeal by the Respondent to the Full Court of the Supreme Court of South Australia (comprised of Bray C.J., Hogarth and Walters JJ.) that Court held that the doctrine of restraint of trade applied to the covenants in the underlease and that the tie therein was unreasonable. pp.190 and 191

17. On the 7th day of August 1972 the Full Court of the Supreme Court of South Australia allowed the Respondent's appeal with costs and ordered that the Orders of the Trial Judge referred to in paragraph 15 hereof be set aside and in lieu thereof that the first and second of the issues be answered in the affirmative and the remaining issues be referred back to the Trial Judge for further consideration, alternatively or in addition that either party may be at liberty to make application to the said Full Court consequential upon the order.

18. It is not easy to determine from the judgments

Record

of the Justices of the Full Court precisely which of the covenants contained in the underlease were considered to be unreasonable and indeed the Court was never called upon to answer this question in

pp.147 to 173 terms. Bray C. J. focussed attention in particular on the restriction on assignment and sub-letting (which under the Law of South Australia is to be read as subject to a proviso that consent is not to be unreasonably withheld), the covenant to carry on business during all lawful trading hours, the obligation to buy certain minimum quantities per month, the solus trading clause and the force majeure clause, the right to determine at the end of 10 years and the amount of rebate payable, but he declined to express a view as to which of these provisions be regarded as in unreasonable restraint of trade. He concluded that a shorter term could have been adequate to protect the Appellant's proprietary interest in its investment: and a shorter term or less onerous covenants or both would have been adequate to protect its commercial interests. He expressly refrained however from deciding whether a restraint for a shorter term but containing these covenants would necessarily be bad or that a restraint for 15 years with less onerous covenants would necessarily

p.172. l.40 be bad. "All I decide" he concluded "is that, in my view this restraint for this term with these covenants is unenforceable." It seems therefore to have been His Honour's view that what was unenforceable was "the restraint" (i.e., semble, the restraint from purchasing petrol other than the Appellants) and that it was unenforceable because it endured for the term of the lease and

pp.173 to 189 was conjoined with other covenants. Hogarth J. had a somewhat different approach. He classified the covenants in two groups, first the solus provisions restricting sale to the Appellant's products for 15 years and secondly the positive requirement to keep the service station in operation, but concluded that ultimately everything hinged upon the reasonableness and otherwise of the period of the underlease. He held that the evidence fell short of establishing that "the tying covenants" were reasonable as between the

pp.189 and 190 parties. Walters J. held that the doctrine of restraint of trade applied to "the tying covenants" of the underlease and concluded that "the restraint" imposed on the Respondent by reason of "covenants contained in the underlease" and the term fixed by the underlease, went beyond what was reasonably necessary to afford protection to the proprietary and commercial interests of the Appellant.

19. The Appellant then appealed to the High Court of Australia. The said Appeal was heard by the Full Court of the High Court of Australia consisting of McTiernan A.C.J., Menzies, Walsh, Gibbs and Stephen JJ, on the 25th, 26th, 27th and 28th days of September 1972 and in a reserved judgment dated the 11th day of October 1973 the Court (Menzies and Stephen JJ. dissenting) dismissed the appeal with costs. p.244

20. Walsh J. (with whom McTiernan A.C.J. concurred) held that the doctrine of restraint of trade applied to the underlease. He held the second issue involved whether or not the term of the tie in clause 3(h) of the underlease, considered in conjunction with the other covenants in the underlease, was greater than was reasonably necessary to protect the interests of the Appellant. He held that it was. pp.200 to 218 p.215. l.28

21. Gibbs J. held that the doctrine of restraint of trade applied to the underlease. He held that prima facie the covenants in the underlease operated in restraint of the Respondent's trade and that the Appellant had not shown that a tie for 15 years on the terms of the underlease was reasonably necessary to protect the interests of the Appellant pp.218 to 233 p.233. l.31

22. Having regard to the form of the questions postulated by the Learned Trial Judge it was not necessary for the High Court to make any finding as to whether any (and if so which) of the covenants in the Underlease other than the solus trading covenant were in unreasonable restraint of trade and the Justices of the High Court who constituted the majority in favour of dismissing the appeal did not in fact do so. Walsh J. (with whom McTiernan J. agreed) after quoting the solus covenant (clause 3(h)) which he said had to be considered having regard to the length of the term of the Underlease, said "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 clause 3 (h) might operate and in so far as they have been relied on 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". He stated the question as being "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" and he concluded that it was and agreed with Bray C.J. in the Full Court save that he thought that his conclusion would have been the same even if the covenants other than the exclusive trade tie had been less onerous. Gibbs J. specifically mentioned the exclusive trade the minimum monthly purchase, the covenant to carry on business and p.203. l.43 p.215. l.29 p.216. l.1

p.233. l.31

the prohibition against assigning or sub-letting and concluded that in all the circumstances it had not been shown that a tie for fifteen years on the terms of the Underlease was reasonably necessary to protect the interests of the Appellant.

p.244

23. The Appellant's appeal to the High Court of Australia having been dismissed by a majority of the High Court of Australia, the Appellant sought leave to appeal to Her Majesty in Council by Petition. In the meantime the Respondent applied to Full Court of the Supreme Court of South Australia for a determination of issues 3 and 4 settled by the Learned Trial Judge.

24. Upon the hearing of the Respondent's said application on the 10th December 1973 the Appellant argued at the outset that such hearing should be postponed until after the hearing of the pending Petition to Her Majesty in Council on issues 1 and 2 and of any subsequent appeal if leave should be granted but such argument was rejected and the Full Court of the Supreme Court of South Australia proceeded to hear the argument on the said two issues viz. -

"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?"

pp.260 and 261

25. On the 18th January 1974 the Full Court of the Supreme Court of South Australia (Bray C.J., Hogarth and Walters JJ) delivered judgment on the said tw issues and unanimously answered the questions raised by the said two issues 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".

26. On the 14th day of February 1974 Her Majesty in Council heard the Appellant's Petition for leave to appeal from the High Court of Australia on issues 1 and 2 and the Appellant's

supplementary petition for leave to appeal from the Full Court of the Supreme Court of South Australia on issues 3 and 4.

27. On the 20th day of February 1974 Her Majesty in Council dismissed the said Petition for leave to appeal from the High Court of Australia on issues 1 and 2 and granted the Appellant leave to appeal to Her Majesty in Council on issues 3 and 4. pp.262 and 263

28. The present appeal challenges the correctness of the decision of the Full Court of the Supreme Court of South Australia upon issues 3 and 4.

SUBMISSIONS

29. Bray C.J. (with whom Hogarth J. agreed) arrived at his conclusion by the following process of reasoning: pp.245 to 254

(a) The Lease and Underlease both formed part of a single transaction even though the Lease provided expressly (in Clause 18) that it was entirely independent of any other transaction or relationship between the parties.

(b) No estoppel arose from the express provisions of the Lease because the unenforceability of unreasonable restraints is based on public policy and an estoppel cannot over-ride public policy.

(c) Because the tie provisions in the Underlease were unenforceable (although not illegal) the whole transaction, viewed as a single contract for the grant of a Lease and Underlease, was unenforceable in all respects.

(d) But because the documents had been registered pursuant to the Real Property Act 1886-1963 it could not be contended that the registered proprietors were not proprietors of the estates in respect of which they were respectively registered.

(e) Accordingly, both the Lease and the Underlease must stand but, on analogy with the English authorities dealing with leases for an illegal purpose, none of the obligations contained in either document was enforceable.

30. Walters J. adopted much the same reasoning viz.- pp.255 to 260

(a) No severance was possible of the unenforceable tie covenants in the Underlease from the other covenants and all must therefore be unenforceable.

(b) Nor was it possible to treat the Lease as separate from the Underlease.

(c) If the Respondent was absolved (as he held that it was) from performance of the covenants in the underlease, equally it must be absolved from the covenants in the head lease.

31. The Appellant submits that the decision of the Full Court on issues 3 and 4 was wrong in law. It has never been the case that a covenant in unreasonable restraint of trade is illegal in any criminal sense, (See, e.g. Mogul Steamship Co. v. McGregor Gow & Co. (1889) 23 Q.B.D. 598 at 619 per Bowen L.J.) so as to vitiate the whole contract in which the covenant is contained. In the instant case the Learned Trial Judge found as a fact that the lease and sub-lease did not constitute a mere vehicle for giving effect to a transaction the commercial character of which was different from its apparent conveyancing character. They were genuine transactions which were to be given their ordinary effect in law according to their character. This finding was accepted both by the Full Court and the High Court and indeed was expressly affirmed by Walsh J. and Gibbs J. The position, therefore, when the matter came before the Full Court for the decision of issues 3 and 4 was that the Respondent held the service station under a genuine and properly granted underlease which contained in addition to the usual lessee's covenants an exclusive tying covenant which the High Court had found to be in unreasonable restraint of trade. It followed that the Court would not enforce such a covenant by injunction. Nevertheless the covenant remained one of the terms compliance with which had been stipulated as a condition of the Respondent's continued enjoyment of the premises and it is the Appellant's primary contention that the Respondent is not entitled to claim to retain the benefit of the Underlease and at the same time to repudiate the burden of the obligations (even though unenforceable directly by injunction or damages) which the Underlease imposed as a condition of the holding (see Halsall v. Brizell [1957] Ch. 169).

p.116. l.47
p.210. l.21
p.222. l.38

32. The Appellant contends that support for this submission is to be found in the Esso Case. In

the Court of Appeal [1966] 2 Q.B.514 although Diplock L.J expressed some hesitation in accepting that the restrictions were inseverable from the postponement of redemption, both Denning L.J. (p.566) and Harman L.J. (p.571) approached the problem on the footing that, so long as the security remained outstanding, the mortgagor could not continue to have the advantage of the loan and at the same time repudiate the burden of the tie; and in the House of Lords [1968] AC.269 Lord Reid (p.299) was prepared to assume that the tie could be retained so long as the loan remained outstanding; Lord Morris (p.314) and Lord Hodson (p.321) treated the restrictions as inseverable from the postponement of the right to redeem; Lord Pearce (p.325) thought it intolerable that a man taking a tenancy of land subject to a tie could repudiate the tie while retaining the benefit: and Lord Wilberforce (p.342) regarded it as permissible to tie a mortgagor during the period of the loan. The Appellant accordingly submits that it is implicit on analysis that the reason why the mortgagors in the Esso case were permitted to redeem notwithstanding the decision in Knightsbridge Estates Trust Ltd. v. Byrne [1940] A.C. 613 was that it was only in this way that they could terminate the obligation to observe the tie provisions.

Accordingly the Appellant's submission in the instant case is that the question raised in issue 3 ought to be answered in the negative and that the Respondent must elect between retaining the benefit of the underlease and observing the tie or surrendering the Underlease or submitting to a forfeiture.

33. The Appellant submits in any event that the Full Court was wrong in law in approaching the question of the effect of the tying provisions in the Underlease on the footing that the Lease and Underlease fell to be regarded as one transaction. It is of course perfectly true that the Lease and Underlease were part of the same transaction in the sense that they stemmed from a single agreement between the parties. The Appellant submits however that this is irrelevant to a consideration of the rights and duties created by the documents actually executed to give effect to the Agreement there being no suggestion that they were so executed in order to effect or facilitate some unlawful or immoral purpose. It is in the Appellant's submission otiose to inquire (as Bray C.J. did) whether the original agreement could have been specifically enforced if dispute had arisen prior to completion for on completion the provisions of the Agreement merged in the Deeds (Leggott v. Barrett 15 Ch D 306, 309, 311) and it is from those documents and those documents alone that the rights

p.248. l.38

and duties of the parties are to be ascertained.

34. In the instant case the parties did in fact expressly provide and agree in clause 18 of the Lease that it should be treated as independent of any other transaction between them. The Appellant accepts that such a provision does not preclude the Court from inquiring into the prior dealings between the parties but contends that it constitutes an express agreement between the parties that the transaction is not to be affected by the abrogation, variation or invalidity of any other transaction between them. In the Appellant's submission in the absence of any suggestion that the transaction forms part of a larger transaction which is in some way tainted by an immoral or illegal purpose there is no reason in law why such a provision should not take effect according to its terms.

35. The Appellant accordingly submits that whatever the effect of the inclusion in the Underlease of provisions held in the event to be in unreasonable restraint of trade the Lease stands and takes effect according to its terms.

36. In the Appellant's submission however the Full Court was fundamentally in error in its approach to the provisions in the Underlease (whether conjoined with or divorced from the Lease). The conclusions at which their Honours arrived was based upon a series of propositions each of which was, in the Appellant's submission, wrong in law. These were

(1) that the transaction was an illegal transaction;

(2) that because the doctrine of restraint rests upon public policy it is not possible to ignore that which cannot be enforced and to enforce the remainder;

(3) that that part of the Underlease which imposed an unreasonable restraint was inseparable from the remainder of the Underlease because it constituted "the main purport and substance" of the instrument.

(4) that that part of the Underlease which imposed an unreasonable restraint was inseparable from the remainder because on the analogy of a contract for an illegal or immoral purpose it tainted the whole of the remainder of the transaction.

37. Although Walters J. expressly affirmed the distinction between illegality and non-enforceability Bray C.J. (with whom Hogarth J. agreed) seems clearly to have regarded a transaction involving the imposition of unreasonable restraints as illegal and indeed referred to Kenyon v. Darwen Cotton Manufacturing Co. Ltd. [1936] 2 KB. 193 as justifying the "striking down" of the lease as well as the Underlease on the footing that they constituted part of a single illegal transaction. The Appellant will contend that that case (the decision in which depended on express statutory provisions requiring the Court to link the documents together) was not in point but will submit in any event that the approach of the Chief Justice was based upon the false hypothesis that because a purpose (and as he thought the primary purpose) of the transaction was the imposition of a tie which it was the policy of the law not to enforce it therefore followed that the whole transaction was illegal and incapable of enforcement. This hypothesis was indeed entirely contrary to the whole basis of the approach both of the Court of Appeal and of the House of Lords in the Esso case where the primary purpose of the mortgage was to secure the (unenforceable) tie but where it was never doubted from first to last that the mortgage itself was a valid and enforceable instrument so long as it remained unredeemed. His Honour was it is submitted wrong in saying that in the Esso case the House of Lords "held the whole transaction to be invalid".

p.259. l.17

p.249. l.22

p.252. l.8

38. The same reasoning led His Honour to reject the possibility of severance of the covenants in the Underlease which he did not consider in any detail in his judgment. He did however consider the question raised by the existence of two separate documents and the difficulty raised by the express terms of clause 18 of the Lease. He concluded that "If it were not for the question of public policy these clauses would, ... create a potential estoppel of the kind relied on....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". The Appellant of course accepts this as a proposition of law but contends that there is no public policy which prevents parties at arm's length from concluding a bargain that one of two documents (albeit factually linked) shall as a matter of contract between the parties have an independent validity notwithstanding the invalidity of the other or the non-enforceability of one or more of the terms of that other.

p.250. l.26

39. It is submitted that as a result of the High Court of Australia's decision on issues 1 and 2 the only covenant per se unenforceable is the tie covenant. Other covenants such as the keep open covenant and the advance purchasing covenant were held unreasonable in combination with the tie covenant but not per se in restraint of trade. The majority of the High Court of Australia did not specifically hold any covenants other than the tie covenant to be per se unenforceable as being in unreasonable restraint of trade and in so far as the Full Court treated covenants other than the tie covenant as unenforceable as being in unreasonable restraint of trade the Full Court was wrong in law.

40. As to the question whether such restraints as were contained in the Underlease and were held to be unreasonable could be ignored and the remaining covenants and restrictions enforced their Honours approached the problem in rather different ways.

p.247. l.33 Bray C.J. said that such cases as Attwood v. Lamont [1920] 3 K.B. 571 and Putsman v. Taylor [1927] 1 K.B. 637 were not applicable because they involved severance in the context of striking out part of a covenant rather than the elimination of a covenant in toto and went on to say that severance was not possible because entry into the tie constituted a substantial part of the consideration given by the Respondent. The Appellant submits that this was wrong.

41. In the first place while a distinction has been suggested (e.g. in Cheshire v. Fifoot 2nd Australian Edition p.501) between a severance cutting down a restraint and the elimination in toto of a restraint from a document the distinction is not a valid one and in fact the test enunciated in Putsman v. Taylor [1927] 1 K.B. 637 at 640/641 has been applied in Australia in relation to the elimination of promises in McFarlane v. Daniell [1938] 38 S.R. (NSW) 337 at 345 - a case approved and applied by the High Court of Australia in Thomas Brown v. Faziel 108 CLR 391 at 411.

Secondly although there are cases both in England and Australia in which the Court has, notwithstanding that an obligation has been undertaken by deed, inquired into the substance of the consideration furnished by the covenantee where the covenantee's counter-promise has proved to be unenforceable (see, for instance,

Bennett v. Bennett [1952] 1 K.B. 249 O'Loughlin v. O'Loughlin [1958] V.R. 649) and has held the covenantor's promise equally unenforceable such cases are it is submitted exceptional having their basis in the principle enunciated by Lord Mansfield in Boone v. Eyre (1773) 1 H.Bp.273 that "where mutual covenants go to the whole of the consideration on both sides they are mutual conditions the one precedent to the other". This principle has it is submitted no application to a case such as the instant case in which on a grant of an estate in land a series of stipulations are entered into by the parties respectively and where the promises of the Appellant are amply supported by promises of the Respondent other than the promise to purchase only the Appellant's fuel (see for instance.
Re Prudential Assurance Trust Deed [1934] Ch. 338.
Goodinson v. Goodinson [1954] 2 Q.B. 118.
Stenhouse Australia Ltd. v. Phillips 47 A.L. J.R. 699).
By virtue of section 57 of the Real Property Act of South Australia the Underlease became on registration a deed and it is in the Appellant's submission contrary to principle that its enforceability should depend either upon the adequacy or inadequacy of consideration or upon the enforceability of individual obligations assured by the Lessee.

42. Promises given or grants made in consideration of a number of promises some only of which are void (but not illegal) are inherently capable of being enforced (Mark Bros. v. Park 18 C.L.R.1, 13) and this is, as the Appellant submits, a fortiori so in a case such as the instant case where there are mixed independent promises and the elimination of that which is unenforceable by law makes no difference in substance to the transactions of lease and sub-lease entered into by the parties.

43. Walters J. adopted a rather different approach from that of Bray C.J. and Hogarth J. He declined to disregard such of the covenants in the underlease as were unenforceable and to give effect to the remainder because, he said, this would "not only split the covenants in the underlease but would also destroy the "main purport and substance" of the instrument". The Appellant submits that this approach begs the question and is in any event wrong. If by "the main purport and substance of the instrument" His Honour intended to refer to the transaction of underlease the conclusion was insupportable in fact because the sublease, as a sublease, is wholly unaffected in substance by the unenforceability of the tying covenant. If on the other hand His Honour intended by this reference to infer that the sublease was a mere

p.257. l.20

vehicle for the imposition of an unenforceable trading tie such a conclusion was directly contrary to the trial judge's express finding that the lease and sublease were not mere vehicles but were to be given their ordinary effect in law according to their tenor - a finding which was neither challenged nor controverted on appeal and indeed was supported by the judgments of the majority of the High Court on the appeal in respect of issues 1 and 2.

44. Although Walters J. did not in terms say that he was adopting the reasoning of Bray C.J. in applying to the transactions of lease and underlease the analogy of Alexander v. Rayson [1936] 1 K.B. 169 and Gas Light & Coke Co. v. Turner 5 Bing (N.C.) 666 his reference to both lease and underlease being "tainted by the offending provisions" indicates that he must have done so. The Appellant submits that this was a wrong application of the principle of those cases which is restricted to situations in which some part of a transaction or purpose of a transaction is "illegal" in the sense of oriminal or fraudulent or contra bonos mores. To apply that to a case in which a situation is merely a promise of a kind which it is not the policy of the law to enforce (because, for instance, it infringes the Rule against perpetuities or attempts on excessive accumulation or is in unreasonable restraint of trade) is an unwarrantable extension of the principle and indeed is contrary to the many authorities in which severed covenants have been enforced.

p.257. l.12

45. As to Issue 4 the Appellant submits that the Full Court was in any event wrong in law in treating the lease and underlease as indissolubly linked together. Such a finding is contrary to the express terms of Clauses 18 and 19 of the lease. Whether or not clauses 18 and 19 are to be given full effect according to their terms, the approach of the Full Court ignored the finding of fact by the Trial Judge that the lease and underlease were genuine commercial transactions and should be given their ordinary effect at law according to their tenor and the Appellant accordingly submits that, even if the Full Court was right in holding all the covenants of the underlease unenforceable, on no analysis was there any ground for arriving at a similar conclusion with regard to the innocuous covenants in the leases. In doing so :-

(i) the Full Court extended the principle of illegal tainting beyond its legitimate sphere;

(ii) the Full Court ignored the Trial Judge's undisputed finding in relation to the genuineness of the transaction and the analogy with Regent Oil v. Strick 1966 A.C. 295;

(iii) the Full Court failed to have proper regard for the parties' intention as manifested by Clauses 18 and 19 of the lease.

46. The Appellant accordingly submits that even if (contrary to their contention) the Respondent is entitled to retain the benefit of the transaction whilst at the same time repudiating some of the conditions upon which it is held the Full Court was wrong in treating all the covenants of both parties in both documents as unenforceable. The Appellant submits that it having been held in answer to issue 2 that some one or more of the covenants in the underlease were unenforceable the Full Court ought to have gone on to inquire which of such covenants was unenforceable and to have held that subject to the covenants so found to be unenforceable being treated as expunged from the underlease the lease and underlease took effect according to their tenor. The Appellant submits that on the facts and on analysis of the judgments of the High Court the only covenant in unreasonable restraint of trade and therefore unenforceable is that which obliges the Respondent to purchase all its supplies of fuel and oil from the Appellant. Such covenant was it is submitted found to be unreasonable because

(a) it was expressed to endure for the full term of the underlease and was therefore too long in point of time and

(b) it was accompanied by other covenants not in themselves either unreasonable or in restraint of trade but which were capable of rendering that covenant unreasonably restrictive having regard to the length of the term.

In particular the Appellant submits that the covenant in the underlease to purchase a certain minimum monthly quantity of fuel although

no doubt properly considered by the Court as an element in determining the reasonableness or unreasonableness of the solus trading covenant cannot on any analysis be in itself a covenant in restraint of trade. Accordingly the Appellant will contend that the Full Court should have determined that the underlease remained fully effective save only that the Respondent was entitled to ignore the solus trading provision and to purchase additional supplies of fuel from sources other than the Appellant if it wished to do so.

47. The Appellant accordingly respectfully submits that the judgments of the Full Court of the Supreme Court of South Australia on Issues 3 and 4 were incorrect and ought to be reversed and that this appeal should be allowed for the following amongst other

R E A S O N S

1. BECAUSE the lease and sub-lease were genuine and effective transactions and take effect according to their tenor save that the Court will not lend its assistance by way of injunction to the enforcement of the solus trading tie.

2. BECAUSE the covenants in the underlease are independent of one another and such covenants as are unenforceable can be expunged from the document without invalidating the entire transaction.

3. BECAUSE in fact the only covenant in the underlease which is in unreasonable restraint of trade is the tie covenant and this is independent of and severable from the remainder.

4. BECAUSE no covenant or combination of covenants in the underlease is of such a nature that its existence "taints" or invalidates the transaction.

5. BECAUSE if the covenants by the Respondent in the underlease constitute one inseverable and unenforceable consideration for the covenants by the Appellant therein contained the effect of such unenforceability is limited to invalidating the covenants of both parties in the underlease

6. BECAUSE even if the lease and underlease comprise one transaction they are not indissolubly linked together having regard to the express provisions of clauses 18 and 19 of the lease and the provision for the surrender or other determination of the underlease independently of the lease;

7. BECAUSE even if the Underlease itself is invalid or the covenants therein contained are unenforceable the Lease to the Appellants remains valid and effective for all purposes.

D. N. ANGEL

No. 8 of 1974

IN THE PRIVY COUNCIL

O N A P P E A L

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. LIMITED Respondent

CASE FOR THE APPELLANT

BLYTH DUTTON ROBINS HAY,
9 Lincoln's Inn Fields,
London, W.C.2.
Solicitors for the Appellant.