7 of 1975

IN THE PRIVY COUNCIL No. 8 of 1974

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

B E T W E E N :

AMOCO AUSTRALIA PTY. LIMITED Appellant

- and -

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

# CASE FOR THE RESPONDENT

Record

1. This is an appeal by leave of Her Majesty In Council granted by Order in Council at the Court of Saint James on the 20th day of February 1974 from a decision of the Full Court of the Supreme Court of South Australia dated the 18th day of January, 1974. p.262-263 p.260

2. The questions raised by the appeal are 2 in number, as follows :-

(1) That the question numbered 3 in the said Statement of Issues namely "If the covenants in Memorandum of Underlease No.2775160 or any of them are unenforceable is the whole of the said Memorandum of Underlease void?". p.6

(2) That the question numbered 4 in the said Statement of Issues namely "If the said Memorandum of Underlease is void is Memorandum of Lease No.2775159 also void?". p.7

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p.261

3. To which the Full Court gave the following answers :

(1) The Memorandum of Underlease is not void, but neither party thereto can enforce any of the covenants in it against the other.

(2) The Memorandum of Lease is not void, but neither party thereto can enforce any of the covenants in it against the other.

## F A C T S

4. In 1963 the Rocca Family, the important members of which for the present purposes are the father and two sons, were minded to establish a service station at Para Hills, some few miles to the North of the City of Adelaide.

5. In that year the land in question at 450 Bridge Street, Para Hills West was purchased by Pat Rocca, one of the sons. Para Hills was then in the course of development, or, it might be more accurate to say, about to be developed.

6. The Roccas had discussions with representatives of another oil company, but eventually they came to terms with the Appellant, then just entering the South Australian field as a marketer of petroleum products. The only economically practicable way for the Appellant to do this was to establish its own tied service stations. The Respondent company was incorporated in February 1964, though the land in question was not transferred into its name until July 1965. Negotiations between the Roccas and the Appellant proceeded. At some time, probably about the middle of February 1964, the Respondent and the Appellant signed an undated document described as a reseller trading and rebate agreement, but this was partly in blank and has little significance except as part of the history. On the 19th June 1964 an agreement for lease and

underlease was executed by the Respondent and the Appellant. It recites erroneously that the Respondent was at that date the registered proprietor of the land.

7. Its terms, briefly stated, were as follows :-

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

(2) An equipment loan agreement was to be executed between the parties in the form annexed to the agreement. The agreement was executed by the Respondent - not apparently by the Appellant - on the same day. It specifies the equipment to be lent. It was intended that the Appellant should install it on the land at its own cost, as in fact it did. The equipment loan agreement provided for cancellation by either party on 30 days' notice.

(3) If the service station should be completed on or before the 31st March 1965, the Respondent would grant and the Appellant would accept a lease of the land for 15 years from the date of completion or the 31st March 1965, whichever should be the earlier, "with a right of determining the lease at the expiration of the first 10 years" at a yearly rental of £1, plus 3 pence a gallon for all petrol (not including certain allied products not customarily used in motor vehicles) delivered by the Appellant to the premises for sale.

(4) The Appellant would grant and the Respondent accept an underlease for the land for 15 years less 1 day,

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subject to the right of earlier determination by the Appellant just mentioned, at the yearly rental of £1.

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

8. The forms were annexed to the agreement. They made it plain that the right of determination at the end of the 10 years was to be vested in the Appellant only. There were, however, certain blanks in these documents. The amount of the rebate, was left blank, but the figure of 3 pence per gallon could be supplied from the agreement. The form of underlease contained a clause providing for the purchase by the underlessee of minimum monthly quantities of petrol and oil. Not only were the blanks in this clause not filled in, but the clause itself was struck out of the form and the words "not applicable", preceded by a question mark, were written in the margin opposite the clause.

9. The service station was duly erected at a cost to the Roccas of about £12,000, but they did much of the work themselves and obtained materials cheaply and it would have cost very much more to have had the service station built by a contractor.

10. The Amoco equipment was installed. Its cost, including the cost of installation, was fixed by the Appellant at $7,775. The service station was opened on the 10th December, 1964. Besides the initial equipment, the Appellant spent other moneys on the project. The total of these up to the end of 1969 is estimated at $18,995. There was however, no contractual obligation on the Appellant to supply anything beyond the initial equipment.

11. On the 19th day of May 1966 the Lease No.2775159 and underlease No.2775160 were

executed. In each case the term was expressed to run from the 30th November 1964. These documents correspond pretty well to the forms annexed to the agreement, with the blanks filled in to correspond with the agreement itself and the commencing date mentioned. The minimum quantity clause in the underlease, bound the Respondent to purchase at least 8,000 gallons of petrol and 140 gallons of motor oil from the Appellant each month. One of the covenants bound the Respondent to purchase its supplies exclusively from the Appellant. The underlease covered and protected equipment, the value of which, including the cost of installation, amounted in June 1964 to $7,775.

12. Things went well until 1968. It was found then that the facilities and the holding area were not enough to deal swiftly with customers at peak periods and a rival service station in the area was mooted. The Respondent approached the Appellant for help. The lease and sublease were extended for a further 5 years in consideration of the Appellant effecting certain alterations to the service station and increasing the rebate from 2.5 cents (3 pence) per gallon to 4 cents per gallon. The extensions were executed on the 15th September, 1969.

13. In addition to its covenanted obligations, the Appellant treated the Respondent as if it were a company owned station rather than a privately owned station by providing it with certain benefits in the way of sales promotions, sales aids, advertising etc.

14. In 1971 the Respondent was, starting to chafe under the restrictions imposed by the trade tie. It tried unsuccessfully to re-negotiate the terms of the underlease. It then entered into negotiations with I.O.C. another oil company. On the 12th November, 1971 the Respondent sent a letter to the Appellant requiring the latter to remove its pumps and signs from the premises by 11 a.m. on the 15th November, 1971 and stating that in default the Respondent would remove these

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articles itself. The Appellant did not comply. The Respondent began the removal: simultaneously the Appellant commenced proceedings. Interlocutory injunctions were granted holding the status quo in many respects and the order of the Trial Judge contains the appropriate injunctions to restrain breaches of the underlease on the assumption of its validity.

15. Owing to the urgency of the matter pleadings were dispensed with and the action proceeded on the basis of agreed issues as under -

p.5

p.6-7

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

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

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

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

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

16. The first two issues have been answered in the affirmative. The Full Court has answered issues 3 and 4 as set out in the first paragraph hereof and it is from the decision embodying these answers that the appeal arises.

p.260-261

S U B M I S S I O N S

17. In the Court below it was contended for the Respondent as follows :

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As to question 3 the answer should be yes on the basis that the unreasonable restrictions are inseparable from the agreement as a whole and they vitiate it altogether.

As to question 4 the answer should also be yes on the basis that the lease and underlease must be read together as 1 commercial transaction.

18. The Appellant did not contend to the contrary in respect of question 3 but based its approach on the contention that whilst the underlease was void the head lease stood as valid and enforceable.

19. The general approach of the Respondent is to the effect that there is here as has been found by members of the Full Court and the High Court but 1 commercial transaction and thus either the transaction as a whole must fall or the Court should delete the offending clauses by running the blue pencil through them. The Respondent acknowledges the commercial weakness of the latter alternative as without doubt the solus trading arrangements were of the essence of the bargain between the parties. However this conclusion does not have such absurd results as are the consequences of striking down the underlease and leaving the head lease in full force. There is no doubt that the Respondent would not have granted the head lease if it was not aware it was to be given a sublease. Likewise the Appellant entered into the head lease knowing that the Respondent was to take a sublease on already agreed terms.

20. The arguments of the Respondent to the effect that there is but 1 commercial transaction can be summarised as follows :-

(a) The terms of the arrangement between the parties were agreed simultaneously and recorded in 1 agreement, namely that of 19th June, 1964. p. 13

(b) In looking at the terms of the Memorandum of Lease it becomes p. 16

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apparent that it is not possible to disengage the lease from the underlease.

(c) The parties did not ever contemplate that the one would be entered into without the other.

(d) That in applying and carrying into effect the provisions of the doctrine of restraint of trade the Court must take cognizance of the commercial realities.

(e) It follows that it would be wholly unrealistic and unjust to allow the covenants of the head lease to stand as enforceable in the circumstances that the covenants in the sublease are unenforceable.

21. The Respondent respectfully adopts the conclusion and the reasoning in support thereof of the members of the Full Court of the Supreme Court of South Australia.

22. The Appellant in the Court below submitted 3 reasons why the answer to question 4 should be in the negative.

(a) The first of these contentions was to the effect that assuming there is but 1 transaction the underlease can notwithstanding still be severed from the head lease. This submission was rejected in the Court below and in our respectful submission correctly rejected. As Mr. Justice Walters pointed out the whole of the circumstances raised an implication of dependence of the headlease and the underlease upon each other. This implication His Honour said must obviously be necessary to carry into effect the intention of the parties from the agreement executed on the 19th June 1964 and upon the face of the 2 instruments when taken together.

p.257 L.44

p.258 L.1

(b) Secondly it was contended that there were in fact 2 contractual transactions which contention was likewise rejected. The Chief Justice pointed out that the commercial realities were that despite the form ultimately taken the whole transaction was 1 transaction and both the lease and the underlease were part of that 1 transaction. His Honour pointed out that this was said by the Judges of the Full Court of the Supreme Court in the reasons given in the earlier proceedings and by the majority of the High Court. However, the Chief Justice continued, the subsequent execution of 2 simple contracts with the objectionable covenants all contained in 1 of them would not have prevented the striking down of both if they were in reality part of 1 illegal transaction. In our respectful submission this contention was also correctly rejected.

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p.249 L.15

p.249 L.18

p.249 L.23

(c) The third submission of the Appellant was that quite apart from the contractual rights of the parties and the possible application of the doctrine of severance from a property point of view the lease and underlease were severable. This submission likewise was rejected and in our respectful view correctly rejected.

23. The Full Court in addition gave consideration to the question whether the provisions of clauses 18 and 19 of the lease might assist the contentions of the Appellant. The contention of the Appellant was to the effect that these clauses raised an estoppel by deed against the Respondent. The Chief Justice rejected this argument on the ground that the Court could not be prevented by an estoppel from ascertaining the truth in order to decide whether a contract was void or unenforceable on the ground of illegality or public policy and in our respectful submission this rejection was also correct.

p.250 L.6

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24. The Respondent respectfully submits that the judgments in the Court below were correct and that this Appeal shall be dismissed for the following, amongst other

R E A S O N S

(1) That the principle of severance cannot be applied to the lease and underlease leaving the covenants in the one in full force and effect and in the other as unenforceable.

(2) That there was 1 commercial transaction and the covenants in the lease and underlease must stand or fall together.

(3) That the Court cannot and should not be prevented by the provisions of clauses 18 and 19 of the lease from finding that the lease and underlease are dependent the one upon the other.

FRANCIS ROBERT FISHER, Q.C.

ROBIN MILLHOUSE.

No.8 of 1974

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Appellant

- and -

ROCCA BROS. MOTOR ENGINEERING
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Respondent

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# CASE FOR THE RESPONDENT

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