Privy Council Appeal No. 8 of 1974

Amoco Australia Pty. Limited – – – – – *Appellant*

v.

Rocca Bros. Motor Engineering Co. Pty. Limited – – *Respondent*

FROM

THE SUPREME COURT OF SOUTH AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JANUARY 1975

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD CROSS OF CHELSEA
LORD KILBRANDON
LORD SALMON
LORD EDMUND-DAVIES

[*Delivered by* LORD CROSS OF CHELSEA]

This is an appeal by special leave from a judgment of the Full Court of the Supreme Court of South Australia dated 18th January 1974.

The appellant Amoco Australia Pty. Limited is a Company incorporated in the Australian Capital Territory which carries on business in the Commonwealth as a refiner and distributor of petroleum products. The respondent Rocca Bros. Motor Engineering Co. Pty. Ltd. was incorporated in South Australia in February 1964 with the object of carrying on business in that State as a Service Station Proprietor. On the 19th June 1964 the respondent and the appellant entered into an agreement in writing under which:

(*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 the appellant was to equip the service station by providing and installing plant and equipment at the appellant's expense which were to be lent to the respondent on the terms of an equipment loan agreement to be executed by the parties.

(*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 appellant was to grant an underlease of the premises to the respondent for the said term less one day at a yearly rent of £1.

(*e*) The lease and underlease were to be in the forms annexed to the agreement with such modifications as the parties should agree upon.

The Service Station, which was built by the respondent at the cost of about £12,000, was opened on 10th December 1964—the appellant having previously installed its equipment thereon at the cost of 7,775 dollars.

The land on which the station was built had been purchased before the date of the agreement by one of the members of the Rocca family. It was transferred by him into the name of the respondent in July 1965 and on 19th May 1966 the lease and underlease contemplated by the agreement were executed by the parties substantially in the terms of the forms annexed thereto.

By the lease the respondent leased to the appellant the land on which the service station was built " together with all buildings, improvements, equipment, fixtures and appliances owned or controlled by the Lessor and located thereon or on some part thereof or to be erected or installed by the Lessor thereon " for a term commencing on 30th November 1964 and ending on 30th November 1979 subject to the " powers, provisos, conditions, covenants, agreements and restrictions " thereinafter set out. Clause 1 provided that the lessee should pay to the lessor as rental for the demised premises (A) £1 a year and (B) a sum equal to three pence per gallon on all petrol delivered by the lessee to the demised premises for sale. By Clause 3 the lessee covenanted to pay the rent thereby reserved and to yield up the demised premises at the determination of the lease. The lease further provided by Clause 4 (*h*) that the lessee should have power at any time without the consent of the lessor to assign or sublet the demised premises; and by Clause 9 that the lessee could determine the lease after the expiry of the first ten years of the term on giving the lessor three months notice in writing. Clauses 18 and 19 were in the following terms:

> " 18. The Lessor and the Lessee agree that this Lease is not in consideration for or dependent or contingent in any manner upon any other contract, lease or agreement between them and that the term, rental or other provisions of said Lease are not intended by said parties to be tied in with any other such contract, lease or agreement, but on the contrary this Lease and all of its provisions are entirely and completely independent of any other transaction or relationship between the parties.
>
> 19. This Lease embodies the entire agreement between the parties hereto relative to the subject matter hereof, and shall not be modified, changed or altered in any respect except in writing and in the event of any termination of this Lease pursuant to any right reserved by the Lessee herein, all liability on the part of the Lessee for payment of rent shall cease and determine upon payment of rent proportionately to the date of such termination of this Lease."

By the underlease the appellant subleased the premises demised by the lease to the respondent for the term of 15 years less one day from the 30th November 1964 at the rental therein provided and subject to the powers, provisos, conditions, covenants, agreements and restrictions therein contained. Clause 1 provided that the respondent should pay the appellant as rent £1 a year. Clause 3 contained a number of covenants by the respondent; 3 (*a*) was a covenant to pay the rent; 3 (*e*) a covenant not to assign or sublet; 3 (*g*) (*h*) and (*i*) were in the following terms:

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

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

(*i*) To purchase at least 8,000 gallons of petrol and at least 140 gallons of motor oil from the Lessor in every month during the term of this lease."

Clause 4 contained a number of further agreements between the parties including the following:

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

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

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

.....

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

.....

(*h*) That this lease and the rights of the Lessee hereunder are subject to all the terms and conditions of the lease under which the Lessor is entitled to the demised premises and the Lessee will not do or suffer to be done upon the demised premises any act, matter or

thing which if done or suffered to be done by the Lessor would constitute a violation of any of the said terms and conditions and if for any reason whatsoever the Lessor's tenure of the demised premises is determined or surrendered, cancelled or otherwise terminated, this lease and the term hereby created shall automatically determine simultaneously therewith without notice or further act of the Lessor or the Lessee and without any liability on the part of the Lessor."

The lease and underlease were duly registered under the Real Property Act of South Australia. By two agreements made between the parties on 15th September 1969 it was provided that in consideration of the appellant making at its expense certain additions and alterations to the demised premises and increasing the rebate provided for in the lease from 3 pence —that is to say 2·5 cents—per gallon to 4 cents per gallon the terms of the lease and underlease should each be extended for a further five years.

In 1971 the respondent having tried unsuccessfully to re-negotiate the terms of its agreement with the appellant entered into negotiations with a rival oil company and on 12th November wrote a letter to the appellant requiring it to remove its pumps and signs from the premises by 11 a.m. on the 15th November 1971, stating that in default it would remove them itself. On the 16th November the respondent began to repaint the service station and to replace the appellant's petrol pumps with pumps belonging to the rival company and on the same day the appellant issued a writ against the respondent claiming injunctions restraining the respondent from breaking various covenants in the underlease in particular those imposing the trade tie. The appellant took out a summons for interlocutory relief and on 18th November Wells J. made an order based on various undertakings so as to maintain the state of affairs existing before November 16th pending the determination of the question whether or not the trade tie was enforceable. In December he made a further order dispensing with pleadings and directing that the action should proceed on the basis of the following agreed issues:

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

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

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

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

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

In a full and careful judgment delivered on 12th April 1972 Wells J. reviewed the law as to restraint of trade and the evidence which had been called on each side. Applying the law to the facts as he found them the conclusion at which he arrived was that even assuming—contrary to his own opinion—that the respondent was entitled to assert that the covenants in the underlease or any of them were unenforceable as in restraint of trade the restraints were reasonable and that accordingly issue 2 must be answered in the negative. It followed, of course, that issues 3, 4 and 5 did not arise.

The respondent appealed from this judgment to the Full Court (Bray C. J., Hogarth and Walters JJ.) which on 7th August 1972 reversed it and answered issues 1 and 2 in the affirmative. Bray C. J. expressed his conclusion in the following words:

> " The conclusion I have reached is that the covenants in the underlease go beyond what was reasonably necessary for the protection of Amoco. Certainly Amoco, in my view, has not shown the contrary and the onus is on it. A shorter term would, in my view, have been adequate to afford ample protection to its proprietary interest in its investment: and a shorter term or less onerous covenants or both would, in my view, have been adequate to protect its commercial interests. I do not decide that a restraint for a shorter term but containing these covenants would necessarily be bad; or that a restraint for fifteen years with less onerous covenants, particularly when there was some provision for review and possible escape for Rocca at some point during the term, would necessarily be bad. All I decide is that, in my view, this restraint for this term with these covenants is unenforceable.
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> That makes it unnecessary to consider the question of public interest."

After saying that the answers to issues 1 and 2 were " Yes " he added:

> " These affirmative answers are of necessity ambiguous because of the alternatives in each question between the covenants as a whole and any of them severally, but no other answers can be given since the question of severability has not yet been argued."

Hogarth J. and Walters J. delivered judgments concurring with that of the Chief Justice.

The appellant appealed to the High Court of Australia from the judgment of the Full Court on issues 1 and 2 and on 11th October 1973 that Court dismissed the appeal by a majority (McTiernan A.C.J., Walsh and Gibbs J.J., Menzies and Stephen JJ. dissenting). Walsh J.—in whose judgment the Acting Chief Justice concurred—expressed his conclusion in the following words—

> " The question is whether or not the Full Court was in error in holding that the second issue should receive an affirmative answer. In my opinion, it was not in error . . . . A decision upon the question of reasonableness depends upon a judgment the reasons for which do not admit of great elaboration. In my opinion it was not shown that the restrictions placed upon Rocca did not go beyond what was adequate for the protection of Amoco's interests. It is not in doubt, in my opinion, that Amoco was entitled in the circumstances to obtain the benefit of a trade tie in aid of recoupment of its investment and in aid of the trading interests arising out of its agreement to supply its products to Rocca. The question is whether or not the terms of the tie, considered in conjunction with the covenants to which I have referred, was greater than was reasonably necessary. In my opinion it was. At all events its reasonableness was not established. In his judgment Bray C. J. said:
>
> > ' The conclusion I have reached is that the covenants in the underlease go beyond what was reasonably necessary for the protection of Amoco. Certainly Amoco, in my view, has not shown the contrary and the onus is on it. A shorter term would, in my view, have been adequate to afford ample protection to its proprietary interest in its investment; and a shorter term or less onerous covenants or both would, in my view, have been adequate to protect its commercial interests.'

I find myself in agreement with that statement, subject to the qualification that in my opinion the same conclusion would have been correct even if the covenants (other than the exclusive trade tie) had been less onerous."

The most important passages in the judgment of Gibbs J. are the following: —

"In deciding upon the reasonableness of the restraint it is not possible to regard the length of the tie apart from the provisions of the covenants—all must be considered together. Perhaps it should be said that some covenants found objectionable in other similar cases do not appear in the present case. For example, there is no covenant giving Amoco the right to fix the price at which Rocca might sell its products. Further, it is expressly provided (by cl.4 (*a*)) that Amoco will sell to Rocca at its usual list prices. It is true that Amoco if so minded might sell at a discount to a competing retailer and it is also true that cl. 4 (*b*) gives Amoco power to suspend supply in certain circumstances, but I do not regard these provisions as of cardinal importance. The covenants which seem to me most to require further mention, apart from cl. 3 (*h*) which binds Rocca to buy exclusively from Amoco, are the following. The obligation cast on Rocca by cl. 3 (*i*) to purchase a specified minimum gallonage of petrol and motor oil would not have been unreasonable had it enured only for a short period, since the evidence shows that the gallonage fixed (at least that of petrol) was by no means excessive. However, if over a long term the business of the service station declined, the covenant could impose an unreasonable burden on Rocca. However, the most onerous of the covenants in the underlease is cl. 3 (*g*) which requires Rocca to carry on the business of a petrol service station for the whole period of fifteen years unless Amoco releases it from this obligation. Perhaps cl. 3 (*e*), which prevents Rocca from assigning, subletting or otherwise parting with possession of the demised premises should also be mentioned in this connection. It may be assumed that Amoco's consent to an assignment or sublease could not be unreasonably withheld, but there might be practical difficulties in finding a person willing to take an assignment or sublease on terms which included cl. 3 (*g*), particularly if the business got into difficulties. It is true that provisions in the form of cl. 3 (*g*) are not uncommonly inserted in leases of various descriptions. However, as I have already indicated, the clause was not inserted in the present case by an owner of land to protect his interests when he leased it, but for the purpose of imposing a restriction on the owner itself. Moreover, the long period of the underlease renders the possible operation of the clause unduly harsh. During the period of fifteen years, trade at the service station could become quite unprofitable for a variety of reasons, including some of those mentioned by Diplock L. J. *in Petrofina (Gt. Britain) Ltd. v. Martin* [1966] Ch. 146 at p. 189: 'Better or cheaper products may be discovered. New or improved highways may divert the motor traffic from passing the filling station, other filling stations may be opened in the vicinity—even by the appellants themselves.' However, Rocca is obliged to carry on the business even if it is trading at a loss. It was said that in practice Amoco would be likely to release Rocca from its obligation if in fact the business became unprofitable, but the interests of Amoco might well be served by maintaining the service station as an outlet for its products as long as it could, notwithstanding that Rocca was making an inadequate profit or even trading at a loss.

After full consideration of all the circumstances, I have reached the conclusion that it has not been shown that a tie for fifteen years on the terms of the underlease was reasonably necessary to protect

the interests of Amoco. On the one hand, the great changes that might occur in the space of fifteen years could render the covenants intolerably burdensome on Rocca and the effect of inflation during that period might well greatly reduce the value of the fixed rebate which formed an important part of the consideration receivable by Rocca. On the other hand, there is nothing whatever to show that a tie for fifteen years was necessary to ensure for Amoco the stable outlet and economical system of distribution at which it was entitled to aim. Further, it was not shown that Amoco's outlay—even taking it as $18,955—could not be recouped with profit in a shorter period."

As the decision of the Full Court on issues 1 and 2 had been affirmed by the High Court the other issues arose for determination and it was agreed between the parties with the assent of Wells J. and the Full Court that, instead of going back to the judge of first instance, these issues should be determined by the Full Court constituted as before. That Court gave judgment on issues 3 and 4 on 10th December 1973. As appears from the judgments to which reference has been made, the vice in the underlease as it stood was in the opinion of the Full Court and the High Court the cumulative effect of a number of covenants restricting the respondent's freedom to trade and a term as long as fifteen years. It would not, of course, have been possible for the Full Court on the further application to remedy the position by shortening the term but either party could have submitted that even though the term could not be shortened the covenants in restraint of trade could be " severed " and not all of them treated as unenforceable. In order to decide whether " severance " was possible it would have been necessary for the Full Court—which, of course, had available all the evidence given before Wells J.—first to decide which of the covenants in restraint of trade must go and which, if any, could still stand—whether, for example, if covenant 3 (*h*) was deleted covenants 3 (*g*) and 3 (*i*) would or would not constitute unreasonable restraints. Having identified the covenants which would have to go the Court would then have had to decide whether what was left of the underlease could remain on foot or whether the whole underlease should be treated as at an end. It is clear from the terms of their judgments on issues 1 and 2 that all three members of the Full Court realised that when issues 3 and 4 came to be debated they might be called upon to pronounce on the question of severance;—but in fact they were not asked to do so since at that stage neither side wanted the underlease to remain on foot. What was argued by the appellant on the fresh application was that the underlease was unenforceable *in toto* but that the lease remained in full force and effect. Bray C. J., in whose judgment Hogarth J. concurred, and Walters J. both emphasise in their judgments that Counsel for the appellant never suggested that the underlease might be left standing shorn of some of its covenants. The main argument for the respondent on the other hand was that not only the underlease but also the head lease was unenforceable *in toto*. It is true that its Counsel submitted—very much as a " second best "—that if his main argument failed then the underlease should remain on foot with any offending covenants deleted, but the Court did not find it necessary to give any formal decision on the question of severance since it accepted the respondent's main argument. At the same time it is clear enough that the members of the Court did not think that this was a case in which if it had been necessary to decide the point severance would in fact have been possible—indeed Walters J. said this in terms. On the question argued before it the Full Court had no doubt that the head lease must share the same fate as the underlease. Both were integral parts of the same transaction; the statements to the contrary in Clauses 18 and 19 of the lease were untrue: and as public policy was involved the respondent was not estopped from asserting that they were

untrue. But for the fact that the lease and underlease were registered and that, by virtue of that fact, legal estates in the land were vested in the lessee and underlessee respectively, the Court would have declared that both instruments were void. As it was it answered issues 3 and 4 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."

Counsel for the appellant suggested in his argument before the Board that in its order the Full Court meant by the word " covenants " only such obligations as were expressly so described in the two instruments. Their Lordships have no hesitation in rejecting this suggestion. They have no doubt that the Full Court meant to declare unenforceable all obligations contained in or arising out of the execution of the lease and the underlease as opposed to their registration; on the other hand they left over to be dealt with under issue 5 all questions arising out of the continued existence of the two bare legal estates.

On its appeal to the Board Counsel for the appellant adopted a totally different approach from that taken on its behalf before the Full Court for he placed in the forefront of his argument the contention that Clause 3 (*h*) of the underlease (which was, he submitted, the only offending covenant) should be treated as deleted and that the underlease shorn of that covenant should be left standing. This change of front places their Lordships in a position of some difficulty. The point that the covenants in the underlease could be severed was never strictly speaking " abandoned " by the appellant since it never took it and the point was in a sense before the Full Court in the shape of the subsidiary argument on behalf of the respondent. On the other hand it is not a pure point of law such as their Lordships would normally allow to be taken before them even if it had not been taken below since it depends on a finding of fact which the Full Court has not made. It does not in the least follow that if the Full Court had found it necessary to give a decision on the question of severance it would have held on the evidence which was before it that the deletion of Clause 3 (*h*) would have sufficed to make the remainder of the underlease unobjectionable. It might well have held that not only Clause 3 (*h*) but also Clauses 3 (*g*) and (*i*) or one or other of them would have to be deleted and their Lordships who have not the evidence before them have no means of reaching any conclusion of their own on the point. In the end Counsel for the appellant was constrained to admit that this was so; but he submitted that even on the assumption that Clauses 3 (*g*) (*h*) and (*i*) were all deleted the rest of the underlease should still be left standing. Their Lordships have no hesitation in rejecting this submission.

As Kitto J. remarked in *Brooks v. Burns Philp Trustee Co. Ltd.* (1969) 121 C.L.R. 432 at 438, " Questions of severability are often difficult ". The answer depends on the intention of the parties as disclosed by the agreement into which they have entered; but generally, of course, they have not foreseen that one or more of the provisions in their agreement will be unenforceable. Various tests have been formulated which might not in every case lead to the same result—*e.g.* is that which is unenforceable " part of the main purport and substance " of the clause in which it appears? (*per* Lord Moulton in *Mason's* case [1913] A.C. 724 at 745); does the deletion " alter entirely the scope and intention of the agreement? " (*per* Lord Sterndale M.R. in *Attwood v. Lamont* [1920] 3 K.B. 571 at 580); does the deletion of the covenant in question " leave the rest of the deed a reasonable arrangement between

the parties? " (*per* Denning L.J. in *Bennett v. Bennett* [1952] 1 K.B. 249 at 261); does what is left constitute an " intelligible economic transaction in itself . . . even though it furnished the occasion for " the unenforceable restraint? (*Kelly v. Kosuga* (1959) 358 U.S. 516 at 521). But whatever test be applied the answer must, their Lordships think, be the same in this case. It is inconceivable that any petrol company would grant a dealer a lease at a nominal rent of a site on which it had spent a substantial sum in installing pumps and other equipment without imposing on the dealer any obligation to buy petrol from it or even to carry on the business of a petrol station on the demised premises. Clauses 3 (*g*) (*h*) and (*i*) were the heart and soul of the underlease. It is, of course, true that the appellant—perhaps because it had little faith in the point on which it rested its case in the Full Court—now thinks that it is to its advantage to affirm the continued existence of the underlease even though shorn of those three subclauses; but that fact has no bearing on the question at issue. Their Lordships would only add on this aspect of the case that they must not be taken to be expressing any view—one way or the other—on what the position with regard to " severability " would have been if it had been established on the facts that the only provision in the underlease which had to be excised in order to make the rest unobjectionable from the point of view of restraint of trade was Clause 3 (*h*).

At this point their Lordships must refer to a submission made by Counsel for the appellant based on some words used by Lord Reid in his speech in the " *Esso* " case [1968] A.C. 269 at p. 299. One of the documents to be considered in that case was a mortgage of the petrol station in question by its owner to the oil company in consideration of a loan. The mortgage provided (*inter alia*) (A) that the loan should be repaid by annual instalments spread over twenty-one years and (B) that during the term of the mortgage the owner of the petrol station would buy petrol exclusively from the oil company. The owner contended that the covenant was an unreasonable restraint of trade and expressed his willingness—indeed claimed the right—to repay the loan forthwith notwithstanding the provision for repayment by instalments. It appears that the question must have been mooted in argument whether the owner could have insisted on the unenforceability of the trade tie contained in the mortgage while at the same time taking advantage of the right which it gave him to repay the loan by instalments for Lord Reid touched on that point in the following words—

> " I am prepared to assume that, if the respondents had not offered to repay the loan so far as it is still outstanding, the appellants would have been entitled to retain the tie."

The appellant argued that what was true of a mortgage—which takes effect by way of lease to the mortgagee—must also be true of an ordinary lease and that where a lease contains a covenant which is unenforceable as being in restraint of trade the covenantor—in this case the respondent—must elect either to give up the lease or to perform the covenant notwithstanding its unenforceability.

It is clear—as Counsel indeed conceded—that no such election is required of the covenantor when the unenforceable promise is contained in a bare contract. Provided that the unenforceable part is severable the rest of the contract remains in force and either party can rely on its terms. It would be odd if the position should be different when the promise in question is contained in a lease. The fact that a

covenantor has obtained and will continue to enjoy benefits under the relevant agreement which formed part of the consideration for the covenant which he claims to be unenforceable is no doubt *pro tanto* a reason for holding that the covenant is not in unreasonable restraint of trade. But once it is held that it is in unreasonable restraint of trade, there seems to be no reason for drawing any distinction with regard to the consequences between provisions in contracts and covenants in leases. If in a case where severance was possible the party who had entered into a covenant in a lease which was unenforceable because it was in unreasonable restraint of trade was forced to make the election suggested by Counsel he would be put under pressure to observe a promise which public policy said he should be free to disregard. Lord Reid was not expressing any opinion on the point and as at present advised their Lordships do not think that the assumption which he was prepared to make was justified. But even if the appellant was right in saying that had the covenants been severable the respondent would have been put to his election either to observe the unenforceable restraint or to give up the lease its case would not be advanced in the least since the covenants are not severable and the respondent has always been willing—indeed anxious—to give up the underlease provided that the headlease also disappears from the scene.

Finally their Lordships turn to consider whether the headlease can remain on foot if the provisions of the underlease disappear. On this point again they have no doubt that the Full Court reached the right conclusion. It is not possible to regard the two leases as separate dispositions of property. The agreement of 19th June 1964 shows clearly that they were parts of a single commercial transaction under which the respondent was to get a supply of petrol at an agreed rebate and the appellant a trade tie with security for its investment in the station. The statements to the contrary in Clauses 18 and 19 of the headlease are simply untrue and it may well be that they were inserted in order to strengthen the position of the appellant in the event of the validity of the trade tie in the underlease being challenged. If there was no question of public policy in the case then no doubt the respondent would be estopped from denying that the headlease was independent of the underlease but if there was such an estoppel here it would deter the respondent from asserting that the trade tie was unenforceable on grounds of public policy, since, as Bray C.J. points out, its position if the underlease went but the headlease remained in force would be far worse than if it acquiesced in the trade tie and retained the benefit of the underlease. On this aspect of the matter their Lordships agree entirely with the passages in the judgments of Taylor J. and Owen J. in *Brooks v. Burns Philp Trustee Co. Ltd.* (*supra*) at pp. 444 and 482 to which Bray C.J. and Walters J. refer in their judgments.

In the result therefore their Lordships will humbly advise Her Majesty that the appeal be dismissed and that the appellant pay to the respondent its costs of it. The question whether the bare legal estates must remain on the register and if so whether the parties enjoy or are subject to any, and if so what, rights and obligations by reason of the mere fact of registration will have to be decided—in default of agreement—with any other questions arising under issue 5.

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