Lobb (Garages) Ltd & Ors v Total Oil (GB) Ltd [1984] EWCA Civ 2 (08 November 1984)
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IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(MR PETER MILLETT, Q.C. Sitting as a DEPUTY HIGH COURT JUDGE)

Case No. No. 1979 A. 1771
Royal Courts of Justice,
8th November 1984

BEFORE:

LORD JUSTICE WALLER
LORD JUSTICE DUNN
LORD JUSTICE DILLON

ALEC LOBB (GARAGES) LTD., & ORS.

- v -

TOTAL OIL (G.B.) LTD.

(Transcript of the Shorthand Notes of The Association of Official Shorthand-writers Ltd., Room 392
Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London, W.C.2.)

MR T. CULLEN, Q.C., and MR E.W.H. CHRISTIE (instructed by Messrs. Holmes & Hills, Solicitors,
Braintree) appeared on behalf of the Appellants.
MR JOHN PEPPITT, Q.C., and MR PETER CRESSWELL, Q.C., and MR M. KAY (instructed by Messrs.
Denton, Hall Burgin) appeared on behalf of the Respondents.

JUDGMENT

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LORD JUSTICE DILLON: This is an appeal from a decision of Mr. Peter Millett Q.C., sitting as a
deputy High Court Judge in the Chancery Division. There is also a cross-appeal. They raise
questions as to the validity of a lease/lease back arrangement entered into in July 1969 in relation to
a garage and petrol filling station (“the property”) in South Street, Braintree, Essex. The facts are set
out with admirable clarity in the judgment of the learned deputy Judge, which is reported, and I do
not need for the moment to do more than briefly summarise what happened in a very general way in order to make the issues intelligible.

In 1968 a Company, Alec Lobb (Garages) Ltd. ("the Company") which was the first plaintiff in the action as originally constituted, was the owner of the freehold of the property and carried on the business of a garage and petrol filling station there. It was the Company's only garage. The Company was a private company whose only directors and shareholders were Mr. Alec Lobb and his mother Mrs Bertha Lobb, the second and third plaintiffs in the action as originally constituted. The Company had since 1964 obtained its supplies of petrol exclusively from the Respondents ("Total"). By the latter part of 1968 there were a number of agreements outstanding between the Company and Total including mortgages on the property, guaranteed by Mr and Mrs Lobb personally, to secure moneys advanced by Total to the Company which were either interest free or carried interest at relatively low rates, and including also various hire or hire-purchase agreements in respect of fuel tanks and other equipment, under one of which certain underground petrol tanks provided by Total, would at the end of 20 years from 1964, become the property of the Company without more than nominal further payment. One effect of the mortgages was, as is not disputed, to impose a valid petrol tie on the Company in respect of the property, obliging the Company to take all petrol supplies for the property from Total and to keep the filling station on the property open at all reasonable times for a period of which some 4 years remained unexpired by the end of 1968.

The Company was seriously under-capitalised. Though it traded at a small profit in the 6 months to the 30th November, 1968, there had been substantial earlier losses. Cheques given to Total for the supply of petrol had been dishonoured on presentation, and Total very early in 1969 insisted that supplies could only be continued on the basis of payment by banker's draft for each load against delivery. Apart from indebtedness to Total, by November, 1968 the Company was in serious difficulties with its bankers who also had a charge on the property, and was under pressure to reduce its overdraft.

Against that background, Mr Lobb wrote to Total on the 28th November, 1968, proposing that in order to solve the Company's financial difficulties the forecourt of the property should, for a premium, be leased to Total for a number of years and leased back to the Company. Discussions followed. Separate solicitors were instructed by each party, and ultimately on the 25th July, 1969 a Lease and Lease back were executed. The Lease was a Lease of the whole of the property and not merely the forecourt, by the Company to Total for a term of 51 years at a peppercorn rent in consideration of a premium of £35000 paid by Total. The Lease back was a Sub-Lease granted by Total to Mr. and Mrs Lobb, rather than to the Company, for a term of 21 years, with a right for either party to terminate the Lease back at the end of the 7th or 14th years at an initial rent of £2250 p.a. with upwards only rent reviews at the end of the 8th and 15th years of the term. The Lease back also contained an absolute prohibition on assignment and tie provisions throughout the term requiring the lessees to take all supplies of petrol from Total exclusively and to keep the filling station open at all reasonable times and provide a proper and efficient service to the public.

In the action, commenced on the 11th June, 1979, the Company and Mr. and Mrs Lobb claimed to set aside the Lease and Lease back on a variety of allegations, including an allegation that the 21 year tie provision in the Lease back constituted an unreasonable restraint of trade with, it was alleged, the result that the Lease and Lease back were wholly void. The learned deputy Judge held that the tie provisions in the Lease back were indeed void as an unreasonable restraint of trade but that they were severable from the remaining provisions of the Lease back. He rejected all the other allegations of the plaintiffs and accordingly held that the Lease and the remaining provisions of the Lease back, other than the tie provisions which he identified, were valid.

I should at this juncture mention certain changes among the Plaintiffs in the action. In the first place the Company has been put into creditors' voluntary liquidation. In the next place, Mr. Lobb died in July, 1979; his personal representatives were added as plaintiffs by order to carry on before the trial. Finally, Mrs Lobb has died since the decision of the learned deputy Judge. The appellants to this Court are her personal representatives, but no argument was advanced to the effect that they have no locus standi to pursue an appeal which, if successful, would enure to the benefit, primarily, of the Company which has not appealed.
Several arguments which were pressed in the Court below are not raised on this appeal. In particular the appellants do not rely in this Court on the tort of economic duress or on any allegations of undue influence and they do not submit that the Lease and Lease back are, despite their form, in reality a mortgage and to be treated as such. In addition the appellants have accepted the Judge's identification of the provisions of the Lease back which are struck down if only the tie provisions of the Lease back are invalid.

The appellants therefore, put their case in this Court on two grounds only. They say firstly that the tie provisions of the Lease back, which the Judge held to be void as an unreasonable restraint of trade, are not severable and that the Lease and Lease back, which have to be taken together as parts of one transaction, are therefore wholly void. They say alternatively that the Lease and Lease back, taken together as one transaction, ought to be set aside in equity because at the material time in 1969 there was inequality of bargaining power as between Total on the one hand and the Company and Mr and Mrs Lobb on the other hand, and Total has not established that the terms of the transaction were in point of fact, fair, just, and reasonable.

Total disputes both these contentions of the appellants. Total further submits that any claim to set aside the Lease and Lease back on equitable grounds ought to be held to be barred by laches on the part of the Company and Mr and Mrs Lobb. The learned deputy Judge held that a somewhat different formulation of the Plaintiffs’ claim — that Total exercised coercive pressure on Mr Lobb and the Company — was indeed barred by laches and delay on the part of the Plaintiffs. In addition, however, by the cross-appeal Total challenges the findings of the learned deputy Judge that the tie provisions of the Lease back are void as an unreasonable restraint of trade. Total advances three submissions on the cross-appeal, viz:—

(1) that the Lease back is not an agreement in restraint of trade at all because the restrictions on trading in the Lease back derive from the disposal by the Company of substantially all its interest in the property by the grant of the 51 years’ Lease to Total

(2) that the Lease back is not an agreement in restraint of trade at all because the Lease back was granted to Mr and Mrs Lobb and not to the Company and

(3) alternatively that even if the Lease back is an agreement in restraint of trade the restrictions on trading in the Lease back are, in all the circumstances, reasonable and are therefore valid.

It is logical to consider the cross-appeal first, and I can deal very shortly with the second of the above arguments. In Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. (1969) AC 269, it was held that the doctrine of restraint of trade had no application to restraints imposed on persons who, before the transaction by which the restraints were imposed, had no right whatsoever to trade at all on the land in question. Their Lordships had in mind in particular the case where an owner of land grants a lease of the land to a person who had no previous right to occupy the land, and imposes by the Lease restraints on the lessee's power to trade as he likes on the land. Such a Lease would ordinarily not be regarded as an agreement in restraint of trade. In the present case however the granting of the Lease back to Mr and Mrs Lobb rather than to the Company was a palpable device in an endeavour to evade the doctrine of restraint in trade. Mr and Mrs Lobb were only selected as lessees because they were the proprietors of the Company previously in occupation. The Court has ample power to pierce the corporate veil, recognise a continued identity of occupation and hold, as it should, that Total can be in no better position quoad restraints of trade by granting the Lease back to Mr and Mrs Lobb than if it had granted the Lease back to the Company. See generally: Gilford Motor Co. v. Home (1933) Ch.93 at 961 - 2, and D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council (1976) 1 WLR 852.

As for the argument that the Lease back is not an agreement in restraint of trade because the restrictions in the Lease back derive from a disposal by the Company of a large part of its interest in the property, I have had considerable difficulty in understanding the argument. It is of course clear that there is no agreement in restraint of trade where a person deprives himself of all right to trade as he wishes on land by selling all his interest in that land. In the present case, however, that is not what the Company did and the whole object was that trade should continue in the property. The Lease and Lease back have to be taken together as two essential parts of one transaction, and in my judgment it follows from the reasoning of their Lordships in Esso v. Harper's Garages that the
agreement constituted by the Lease and Lease back is an agreement in restraint of trade in as much as it subjects the Company to a continuation for a longer period of the restraint on trading which had validly been imposed for a much shorter period before the 25th July 1969.

I turn then to consider the third argument on the cross-appeal, that the restrictions on trading in the Lease back are reasonable since it is clear law that a term in restraint of trade will not be enforced unless it is reasonable.

The decision in Esso v. Harper's Garages has been generally taken as laying down a rule of thumb that a petrol supply restraint, requiring a dealer to take all his petrol from one petrol company, is reasonable and valid if it will last for no more than 5 years, but if it will last for significantly more than 5 years, e.g. for 21 years, it is unreasonable and invalid unless the petrol company can prove that a tie for the longer period is an economic necessity for it. No such evidence of economic necessity has been put forward by Total in the present case, but the contention that the longer tie is in all the circumstances reasonable has been urged on a different ground.

In Esso v. Harper's Garages both Lord Reid at page 300 and Lord Pearce at page 323 referred with approval to the statement of Lord Macnaghten in the Nordenfelt case (1894) AC 535 that "of course the quantum of consideration may enter into the question of the reasonableness of the contract". Moreover in Amoco Australia Pty v. Rocca Brothers Ltd. (1975) AC 561, Lord Cross commented at page 579 that the fact that a covenantor had obtained and would continue to enjoy benefits under the relevant agreement which he claimed to be unenforceable was pro tanto a reason for holding that the covenant was not in unreasonable restraint of trade.

In the present case the consideration for the grant of the Lease and thus the consideration for the restraint, since the Lease back was part of the same transaction as the Lease, was the payment by Total to the Company of the premium of £35,000. That figure was arrived at by a professional valuation as being the value of the 51 year Lease, subject to the Lease back, the initial rent under which, of £2250 p.a. was significantly below a full market rent. The Lease back thus had a capital value, but the real value of the property was in the value of the Lease, and, because the Lease was for such a long term at a peppercorn rent, the value of the reversion on the Lease, the Company's underlying freehold interest subject to the Lease, was of the very slight value of some £600 to £1000 only.

The choice of 51 years as the term of the Lease came about originally because it was common ground that if the term of the Lease had not exceeded 50 years the premium of £35,000 would have been taxable as income in the Company's hands, and that would have defeated the object of the whole transaction, viz recapitalising the business of the Company in an endeavour to keep it afloat. But despite its provenance the 51 year length of the term is a very real factor in the case, firstly because that is what Total paid for by the premium and secondly because, despite some pressure, Total refused to grant the Lease back for more than 21 years with the mutual breaks which I have mentioned.

Against this background certain factors are clear. The first is that for planning reasons the property is most unlikely to be used, during the 21 year term of the Lease back, for any purpose than that of a garage and filling station. The next is that it can make no significant difference to the public at large whether the petrol sold there comes from Total or from Esso or Shell or any other major oil company. The next point is that the lessees under the Lease back are not locked into trading in Total's products from the property for 21 years. If they find this unattractive, they are free to exercise the break clause under the Lease back at the end of the 7th or 14th years of the term and leave; if it seems harsh that the Company may be compelled by adverse conditions to leave the property which it formerly owned the answer is that it has already received the substantial value of the property in the shape of the premium of £35,000 for the grant to Total of the 51 year lease of the property at a peppercorn rent.

Finally if the Lease back had been granted for 5 years only, with the result that the tie in it would have been unquestionably valid the lessees would have been left at the end of the 5 years with the choice of either leaving the property or applying for a new tenancy under the Landlord and Tenant
Act 1954- But any new tenancy would, like any new tenancy which might be granted under the Act at the end of the 21 year term of the Lease back, have been likely to have been for a maximum of 5 or 7 years only (subject to the possibility of application for a further new tenancy under the Act) subject to the same tie provisions as are to be found in the Lease back. It was the lessee's interest that required that the Lease and Lease back arrangement should be for a significantly long term since the premium payable by Total for a short term, such as a mere 5 year term, could not conceivably have been enough to recapitalise the Company and solve the Company's financial difficulties.

In the circumstances of this case, and not least because at the time of the grant of the Lease and Lease back the Company was subject to a valid tie for a term of three to four years, I can see no real significance in the difference between a tie for 5 years and the term of 7 years to the first break under the Lease back.

In the light of these factors the restraints on trading in the Lease back were in my judgment reasonable. Accordingly I would allow the cross-appeal.

It follows that the question of severance which is sought to be raised by the appellants' first ground of appeal does not arise. None the less in deference to the argument and in case this dispute goes further it may be appropriate that I should express my view.

The Appellants support their case by reference to the Amoco case, a petrol case where because of the restraints by way of tie to Amoco in the Lease back the whole of a Lease/Lease back transaction was held to be void. The case is the less helpful, however, in that Lord Cross did not find it necessary to lay down any clear test for whether invalid covenants in restraint of trade could be severed from the rest of the agreement or composite agreement in which they appeared; he merely referred to several possible tests, and held that by any of them the whole of the lease/lease back arrangement in the Amoco case was void.

In the Amoco case however the invalid tie was the sole object or subject matter of the contract, as was also the case in Vancouver Malt and Sake Brewing Co. Ltd. v. Vancouver Breweries Ltd. (1934) A.C.181. In such a case the whole contract, or in the case of a Lease/Lease back the whole of the composite contract, must fall with the tie. That is not however the present case. I find the most helpful test in the judgment of Somervell L.J. in Bennett v. Bennett (1952) 1 KB 249, and Goodinson v. Goodinson (1954) 2 QB 118. In the former case at page 254 he posed the question whether the invalid promise was the whole or main consideration for the agreement moving from the Plaintiff, and, finding that it was, he held the whole agreement void. In the latter case he held, at pages 123 -4 that there was ample consideration to support the agreement apart from the void covenant and so other covenants in the agreement could be enforced. The judgment of Goff L.J. in Chemidus Wavin Ltd. v. Sociéte pour La Transformation et L'exploitaton des Resines Industrielles SA (1973) 3 C.M.L.R. 514 at 523 approves a test to the same effect.

In the present case, in July 1969 Total had no particular need to impose a petrol tie on the property since they already held a valid tie with, as I have mentioned, several years unexpired. The main object of the Lease/Lease back transaction was to refinance the Company by the payment of the £35,000. The tie provisions were, no doubt, in the eyes of Total an inevitable consequence but they were not either the sole consideration for the tie or the sole object of the transaction. The important consideration for Total was the grant of the 51 year lease, on the value of which the amount of the premium had been calculated, and with this went the agreement to pay rent under the Lease back which provided Total with an essential financial return on its outlay. I have no doubt therefore that in this case the tie provisions, if invalid, would, as the learned deputy Judge held, be severable from the remaining provisions of the Lease back; these remaining provisions and the Lease itself remain valid.

The contract is of course changed by the excision of the tie, and obviously Total would not have granted a Lease back which did not contain such a tie. But I do not think that is good enough to prevent severance and lead to the conclusion that the whole of the Lease and Lease back is void. A mortgage to a petrol company containing a tie would, in my judgment, remain in all other respects valid despite the invalidity of the tie as an unreasonable restraint of trade, although the petrol company would not have contemplated making any advance on mortgage to a dealer without a tie.
I turn therefore to the appellants' case on equitable grounds.

The basis of the contention is that the transaction of the Lease and Lease back ought to be set aside in equity as it is submitted, and in the Court below was accepted on behalf of Total, that during negotiations for the Lease and Lease back the parties did not have equal bargaining power, and it is further submitted that a contract between parties who had unequal bargaining power can only stand and be enforced by the stronger if he can prove that the contract was in point of fact, fair, just and reasonable. The concept of unequal bargaining power is taken particularly from the judgment of Lord Denning, M.R. in Lloyd's Bank v. Bundy (1975) QB 326. The reference to a contract only standing if it is proved to have been in point of fact fair, just and reasonable is taken from the judgment of Lord Selborne L.C. in Earl of Aylesbury v. Morris LR 8 Ch.App 484 at 490-491. Lord Selborne was not there seeking to generalise; he was dealing only with what he regarded as one of the oldest heads of equity, relieving against fraud practised on heirs or expectants, particularly fraud practised on young noblemen of great expectations, considerable extravagance and no ready-money. It is none the less submitted that the logic of the development of the law leads to the conclusion that Lord Selborne's test should now be applied generally to any contract entered into between parties who did not have equal bargaining power.

In fact Lord Denning's judgment in Lloyd's Bank v. Bundy merely laid down the proposition that where there was unequal bargaining power the contract could not stand if the weaker did not have separate legal advice. In the present case Mr Lobb and the Company did have separate advice from their own solicitor. On the facts of this case, however, that does not weaken the appellants' case if the general proposition of law which they put forward is valid. Total refused to accept any of the modifications of the transaction as put forward by Total which the Company's and Mr Lobb's solicitor suggested, and in the end the solicitor advised them not to proceed. Mr Lobb declined to accept that advice because his and the Company's financial difficulties were so great, and, it may be said, their bargaining power was so small, that he felt he had no alternative but to accept Total's terms. Because of the existing valid tie to Total which had, as I have said, three to four years to run, he had no prospect at all of raising finance on the scale he required from any source other than Total. There is no suggestion that there was any other dealer readily available who could have bought the property from him subject to the tie. The only practical solutions open to him were to accept the terms of the Lease and Lease back as put forward by Total on which Total was not prepared to negotiate, or to sell the freehold of the property to Total and cease trading. In these circumstances, it would be unreal, in my judgment, to hold that if the transaction is otherwise tainted it is cured merely because Mr Lobb and the Company had independent advice.

But on the learned deputy Judge's findings can it be said that the transaction is tainted? Lord Selborne dealt with the case before him as a case of fraud. He said at pages 490-1: "The usury laws, however, proved to be an inconvenient fetter upon the liberty of commercial transactions; and the arbitrary rule of equity as to sales of reversions was an impediment to fair and reasonable, as well as to unconscionable, bargains. Both have been abolished by the Legislature; but the abolition of the usury laws still leaves the nature of the bargain capable of being a note of fraud in the estimation of this Court; and the Act as to sales of reversions (31 Vict. c. 4) is carefully limited to purchases "made bona fide and without fraud or unfair dealing", and leaves under-value still a material element in cases in which it is not the sole equitable ground for relief. These changes of the law have in no degree whatever altered the onus probandi in those cases, which, according to the language of Lord Hardwicke, raise "from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness"—a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscionable use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable.*

The whole emphasis is on extortion, or undue advantage taken of weakness, an unconscientious use of the power arising out of the inequality of the parties' circumstances, and on unconscientious use of power which the Court might in certain circumstances be entitled to infer from a particular—and in these days notorious—relationship unless the contract is proved to have been in fact fair, just and reasonable. Nothing leads me to suppose that the course of the development of the law over the last 100 years has been such that the emphasis on unconscionable conduct or unconscientious use of power has gone and relief will now be granted in equity in a case such as the
present if there has been unequal bargaining power, even if the stronger has not used his strength unconscionably. I agree with the judgment of Browne-Wilkinson J. in Multiservice Bookbinding Ltd. v. Marden (1979) Ch. 84 which sets out that to establish that a term is unfair and unconscionable it is not enough to show that it is, objectively, unreasonable.

In the present case there are findings of fact by the learned Deputy Judge that the conduct of Total was not unconscionable, coercive or oppressive. There is ample evidence to support those findings and they are not challenged by the appellants. Their case is that the Judge applied the wrong test; where there is unequal bargaining power, the test is, they say, whether its terms are fair, just and reasonable and it is unnecessary to consider whether the conduct of the stronger party was oppressive or unconscionable. I do not accept the appellants' proposition of law. In my judgment the findings of the learned Judge conclude this ground of appeal against the appellants.

Inequality of bargaining power must anyhow be a relative concept. It is seldom in any negotiation that the bargaining powers of the parties are absolutely equal. Any individual wanting to borrow money from a bank, building society or other financial institution in order to pay his liabilities or buy some property he urgently wants to acquire will have virtually no bargaining power; he will have to take or leave the terms offered to him. So, with house property in a seller's market, the purchaser will not have equal bargaining power with the vendor. But Lord Denning did not envisage that any contract entered into in such circumstances would, without more, be reviewed by the Courts by the objective criterion of what was reasonable. See Lloyd's Bank v. Bundy at page 336. The Courts would only interfere in exceptional cases where as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall. The concepts of unconscionable conduct and of the exercise by the stronger of coercive power are thus brought in, and in the present case they are negatived by the deputy Judge's findings.

Even if, contrary to my view just expressed, the Company and Mr and Mrs Lobb had initially in 1969 a valid claim in equity to have the Lease and Lease back set aside as a result of the inequality of bargaining power, that claim was, in my judgment, barred by laches well before the issue of the Writ in this action.

The rescue operation by way of recapitalisation of the Company was never successfully achieved. The £35,000 paid by Total was almost entirely absorbed in satisfying the Company's existing liabilities, and the Company was left still without working capital. Moreover Mr. Lobb did not take into account, and was not advised, that the grant of the 51 year Lease to Total at a premium was likely to amount to a disposal of the property for capital gains tax purposes and to involve liability for that tax. That the premium did not go far enough was partly due to the actions of other creditors; the Company's bankers insisted on the Company's secured overdraft being cleared and on its account being kept in credit thereafter, without overdraft facilities, and United Dominions Trust Ltd. insisted on a stocking loan being reduced to within its agreed limit. Total contributed to these difficulties partly because Total did not proceed very expeditiously to completion (primarily because Total was reluctant to enter into a transaction which it never found particularly attractive) and partly because Total insisted on deducting from the premium the full amount required to clear all subsisting hire purchase agreements on plant and equipment including a capital sum in respect of the underground tanks. The Judge regarded this insistence as unreasonable, though not oppressive.

All this, however, apart from the substantial capital gains tax liability, became known to the Company and Mr and Mrs Lobb in 1969 very soon after the grant of the Lease and Lease back. But the Writ was not issued until June, 1979) and the first intimation of a possible claim that the Lease could, on unspecified grounds, be set aside on repayment of the premium was not given to Total until the 22nd July, 1976.

In the meantime, however, trading from the property had continued and in 1973 Total, with the concurrence of the Company and Mr. Lobb, had spent £19,000 on the property in converting it to a self-service filling station. The rent under the Lease back was consequently increased, but Total would of course never have spent that money on the property if it had previously been made clear that the validity of the Lease/Lease back arrangement was to be disputed. Even after the intimation of a possible claim on the 22nd July, 1976 the Lobbs continued to negotiate with Total and alternative terms were put forward by Total which are described by the learned deputy Judge in his judgment, but no Writ was issued for nearly three years.
Mr Cullen submits on behalf of the appellants that there can be no laches so long as the Company's and Mr. Lobb's financial difficulties continued, and they did continue up to the issue of the Writ and afterwards. I do not accept this. Even though the Company's cheques were again being dishonoured by December 1969, the immediate pressure was removed in July. Apart from that the Company and Mr and Mrs Lobb were at all times free to consult solicitors and accountants. This is a clear case of laches. I would dismiss the appeal and allow the cross-appeal.

**LORD JUSTICE DUNN:** The following questions appear to arise for decision in this appeal and cross-appeal.

1. Did the underlease contain covenants in unreasonable restraint of trade?

2. If so are both the lease and the underlease to be regarded as unenforceable, or can the offending covenants be severed leaving the lease, and so much of the underlease as is valid, to stand?

3. In any event can both lease and underlease be set aside in equity?

4. If so are the plaintiffs barred from relief by laches?

The Judge answered question 1. in the affirmative. He held that the offending covenants could be severed, and answered question 3. in the negative. He did not find it necessary to deal with question 4. Questions 1. and 4. accordingly arise on the cross-appeal, and questions 2. and 3. on the appeal.

**UNREASONABLE RESTRAINT OF TRADE**

The Judge held:-

1. That the lease and underlease formed the component elements of a single transaction.

2. That in the circumstances of this case the doctrine of restraint of trade applied to such a transaction since, although the underleases were not the original lessors of the lease, the reality of the transaction was that the plaintiff company raised finance on its land by a lease and underlease rather than by a mortgage, and that the business continued to be carried on by and for the benefit of Mr. and Mrs. Lobb who were the sole proprietors of the company. The underlease to Mr. and Mrs. Lobb was no more than a device to avoid the application of the restraint of trade.

3. That the doctrine of restraint of trade was applicable when the restraint was imposed as a term of the rescue of an insolvent trader.

He relied on Vancouver Malt & Sake Brewing Co. v. Vancouver Breweries (1934) A.C. 181 per Lord MacMillan at page 191.

With respect to the arguments of Mr. Peppitt to the contrary in my judgment the Judge was right to come to the conclusion which he did on those matters in holding that the doctrine of restraint of trade applied to the transaction. The remaining question on the cross-appeal is whether the defendants, on whom the onus lies, have proved that the restraint was reasonable.

The Judge felt unable to distinguish the case from Esso Petroleum Co. v. Harpers Garage (Stourport) Ltd. (1968) A.C. 269. He held: "In the present case, the defendants have not attempted to call evidence to justify the length of the tie; nor have they relied on the existence of the mutual break clause to argue that the tie was only for a period of seven years. Mr. and Mrs Lobb could of course have freed themselves from the tie after the expiry of that period, but only by ridding themselves of the underlease and losing the right to trade altogether from the site.” Mr. Peppitt agreed that he had not attempted to justify the length of the tie as such, but said that he had submitted that there were special circumstances in this case upon which the restrictions could be justified, and which distinguished the case from Harper’s case supra. In Harper’s case the House of Lords was careful not to find that a twenty-one year tie was unreasonable in all circumstances. Each case depended on its own facts, and all their Lordships emphasised that it was ultimately public policy which prohibited the enforcement of covenants in restraint of trade.(See especially Lord Pearce at pages
In Amoco Australia Pty Ltd. v. Rocca Bros. Motor Engineering Co. Pty. Ltd. (1975) A.C. 561, Lord Cross, giving the advice of the Board, emphasised at page 579 that the adequacy of the consideration received by the covenantor for the benefits which he obtained from the agreement, was relevant to the question of the reasonableness of a restraint imposed by the agreement. In Foley v. Classique Coaches Ltd. (1934) 2 K.B. 1, the fact that the petrol was to be purchased by the covenantor at a reasonable price was held to be relevant to the question of the reasonableness of the covenant.

The special circumstances relied on by Mr. Peppitt as justifying the covenants in restraint of trade may be summarised as follows. The defendants had paid the market price for a fifty-one year lease, which was for all practical purposes equivalent to a freehold. The plaintiff company was insolvent, and the sum of £35,000 was designed to enable it to pay its debts, and to save the Lobbs from personal bankruptcy. Fifty-one years was the shortest term which would justify a payment sufficient to discharge the debts of the company. Without such a sum there was no realistic prospect that the company would be able to continue in business for any length of time. The company was independently advised with regard to the transaction by its solicitors and accountants, and insisted on proceeding contrary to their advice. By reason of the underlease, Mr. and Mrs. Lobb were able to continue to trade and to pass on the business to their sons. In July 1969 by reason of the terms of certain mortgages the plaintiff company was already bound to buy all its petrol from the defendants for a number of years. Hence the company's freedom to trade was already restricted, and the further restrictions imposed by the underlease were illusory. The term of twenty-one years was the maximum term the plaintiffs were prepared to grant, although Mr. Lobb would have preferred a longer underlease.

In my judgment the transaction in question amounted to a rescue operation for the benefit of the company and the Lobbs which the defendants were reluctant to undertake, but which they undertook in order to preserve the site as an outlet for their petrol. The break clauses in the underlease enabled the company to cease to trade if the rescue operation should fail. The transaction was of advantage to the plaintiffs since it enabled the company to continue to trade from the site, which it did for another 10 years, and was of advantage to the defendants since it preserved an outlet. In Harper's case none of these circumstances existed. There was a loan to the dealer of £7,000 secured by a mortgage, and there was no special reason for a tie as long as twenty-one years. In the instant case the defendants paid a fair price for the fifty-one year lease and the covenants in restraint of trade only lasted for twenty-one years. There was ample consideration for the grant of the lease, and the underlease was necessary if the Lobbs were to continue trading from the site. In my judgment public policy does not require that such arrangements should be unenforceable. On the contrary, it seems to me that public policy should encourage a transaction which enabled trading by the plaintiff to continue, and preserved an outlet for the defendant's products. I would hold that in the special circumstances of this case the defendants have established that the covenants in restraint of trade were reasonable.

SEVERANCE

On the view that I have formed of the reasonableness of the covenants, the question of severance does not arise for decision. But since the question was fully argued, and since the cases on the subject are not easily reconcilable, I will state my views upon it on the basis that the covenants were, as the Judge held, in unreasonable restraint of trade.

We are not here concerned with severance in the sense of the reduction or modification of an objectionable covenant, as in such cases as Mason v. Provident Clothing & Supply Co. Ltd. (1913) A.C 724; Goldsoll v. Goldman(1915) Ch. 292; or Attwood v. Lamont(1920) 3 K.B. 571. We are concerned here with the question whether the objectionable covenants can be cut out altogether from the underlease, leaving the lease and the rest of the underlease valid and enforceable. As Lord Denning M.R. said in Kingsway Investments Ltd. v. Kent C.C. (1969) 2 Q.B. 332 at page 354: "This question of severance has vexed the law for centuries." He followed the notes to Pigot's case 77 E.R. 1179: "The general principle is that if any clause etc. void by statute or by the Common Law be mixed up with good matter which is entirely independent of it, the good part stands, the rest is void; but if the part which is good depends on that which is bad, the whole instrument is void". In Kearney v. Whitehaven Colliery Co. (1893) I Q.B. 713 Lord Esher. M.R. held at page 713: "Where there is no illegality in the consideration, and some of the provisions are legal and others illegal, the illegality of those which are bad does not communicate itself to, or contaminate those which are good, unless
they are inseparable from and dependent upon one another”. In Horwood v. Miliars Timber & Trading Co. Ltd., (1917) 1 K.B. 305, the Court of Appeal held that the good and bad obligations were so closely linked that there could be no severance. In Bennett v. Bennett (1952) 1 K.B. 249 Somervell L.J., held that where the main consideration for the deed was an illegal covenant the whole deed was void. Denning L.J. said at page 261: “If the void covenant goes only to part of the consideration, so that it can be ignored and yet leave the rest of the deed a reasonable arrangement between the parties, then the deed stands and can be enforced in every respect save in regard to the void covenant.” In Goodinson v. Goodinson (1954) 2 Q.B. 118 Somervell L.J., held at page 124 that there was ample consideration to support the agreement apart from the illegal covenant. Romer L.J. also decided the question &a being one of consideration. In Stenhouse Australia Ltd. v. Phillips (1974) A.C. 391, Lord Wilberforce said at page 403: “Clause 4 is in no way dependant upon other clauses declared to be unenforceable, and since the effect of holding that a contractual provision is in unreasonable restraint of trade is merely to render that provision unenforceable, without destroying the rest of the contract, there is no reason against enforcement of Clause 4 alone.” In the Amoco case supra, Lord Cross, at page 578 having referred to various tests as to severability which might not in every case lead to the same result said: 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. (The restrictive clauses) were the heart and soul of the under-lease.” Hence no severance. In the case of Chemidus Wavin Ltd. (l978)CMLR 514, Buckley L.J. said at page 520: “Applying article 85 to an English contract, one may well have to consider whether, after the excisions required by the Article of the Treaty had been made from the contract, the contract could be said to fail from lack of consideration, or any other ground, or whether the contract would be so changed in its character as not to be the sort of contract that the parties intended to enter into at all.”

Goff L.J. said at page 523: “If a promisor claims the enforcement of a promise, and the promise is a valid promise and supported by consideration, the Court will enforce the promise notwithstanding the fact that the promisor has made other promises supported by the same consideration, which are void, and has included valid and invalid promises in one document.” The Judge in the instant case held that since, even without the restrictive covenants, the lease and underlease constituted "a recognisable and commercially intelligible transaction" severance of the restrictive covenant was permissible leaving the lease and the remainder of the underlease valid. In adopting that test he followed the U.S. case of Kelly v. Kosuga 1959 358 U.S. 516 at 521. With respect to the Judge, although the case was referred to as providing a possible test by Lord Cross in the Amoco case, I do not think its adoption is warranted by the English authorities to which I have referred. The preponderance of these authorities seems to me to indicate that if the valid promises are supported by sufficient consideration, then the invalid promises can be severed from the valid even though the consideration also supports the invalid promises. On the other hand if the invalid promise is substantially the whole or main consideration for the agreement then there will be no severance.

In the Amoco case the lease and underlease were co-terminous at a nominal rent. In the instant Case a premium representing full consideration was paid for the lease. There remained a reversion of twenty-nine years in the lessor. The underlease was near a rack rent and, because of the break and was rent review clauses, a full rack rent/payable after eight years. Ample consideration was given for the transaction as a whole, though no doubt part of the consideration was applicable to the restrictive covenants. But the main consideration was that given for the lease and the transaction was not dependent on the unenforceable clauses in the underlease. For those reasons in my judgment the Judge was right to sever the unobjectionable clauses from the underlease.

**EQUITABLE RELIEF**

Mr. Cullen conceded that he could not bring himself within any of the established categories of equitable relief, but relied on the dictum of Lord Denning, M.R. in Lloyds Bank v. Bundy (1975) Q.B. 326 at page 339 and case submitted that the circumstances of this case disclosed a classic of inequality of bargaining power of which the defendants had taken advantage by entering into the transaction, although he did not suggest any pressure or other misconduct on their part. He submitted that if it was necessary to categorize the grant of relief sought, it was an unconscionable bargain. He reminded us that the categories of unconscionable bargains are not closed (per Browne-Wilkinson J. in Multiservice Bookbinding Ltd. v. Marden (1979) Ch. 84 at page 110) and sought to
distinguish the instant case from that case by submitting that here the plaintiffs were under a compelling necessity to accept the loan, so that misconduct by the defendants was unnecessary. The fact of their impecuniosity, that they were already tied to the defendants by mortgages, that there was no other source of finance, and that they could not sell the equities of redemption under the mortgages without giving up trading, coupled with the knowledge of the defendants of those facts rendered the transaction unconscionable, and placed the onus upon the defendants to show that its terms were fair and reasonable.

I find myself unable to accept those arguments. Mere impecuniosity has never been held a ground for equitable relief. In this case no pressure was placed upon the plaintiffs. On the contrary the defendants were reluctant to enter into the transaction. The plaintiffs took independent advice from their solicitors and accountants. They went into the transaction with their eyes open, and it was of benefit to them because they were enabled to continue trade from the site for a number of years. In my view the Judge was right to refuse equitable relief.

LACHES

If I am wrong, and the plaintiffs are entitled to equitable relief, I would hold that they are barred by laches for the reasons given by Dillon L.J.

Accordingly I would allow the cross-appeal and dismiss the appeal.

LORD JUSTICE WALLER: I agree. I will however briefly express my own view of the two main issues. The first is whether or not there was an unreasonable restraint of trade in the agreements made between the parties and the second one is whether or not, if there was unreasonable restraint of trade, the tie provisions can be severed from the rest of the contract.

In this case one of the parties to the lease was different from one of the parties to the sub-lease. The effect is that the sub-tenants are strictly not giving up any right which they had enjoyed before. But since they controlled the company which had enjoyed unrestrained rights of trade, in my opinion the lease and the lease back have to be considered as though they were made between the same parties. I say this reluctantly because it is the party which is not before the Court that would benefit if the Court came to the conclusion that the tie for 21 years was in unreasonable restraint of trade. However, Mr Cullen sought to meet this by giving certain undertakings to the respondents.

The learned deputy Judge found in favour of Total save in respect of the length of the tie in the lease back. He came to the conclusion that having regard to the fact that the defendants Total did not call evidence to justify the length of the tie and the decision in Esso Petroleum v. Harper he had to find that the tie in this case was an unreasonable restraint of trade. Mr. Peppitt accepted that he did not call evidence to justify the length of the tie. He relied on the 51 year lease which granted to Total an outlet for 51 years. The 21 years with a tie and break at 8 and 15 years was the most Total were prepared to grant and it did not require evidence to justify this. Mr. Peppitt further submitted that the facts in this case were very different from either the Cleveland case or the Harper case. In Esso Petroleum Co. Ltd. v. Harpers Garage (Stourport) Ltd. (1968)A.C. 269, Lord Reid said: "It is now generally accepted that a provision in a contract which is to be regarded as in restraint of trade must be justified if it is to be enforceable and that the law on this matter was correctly stated by Lord Macnaghten in the Nordenfelt case. He said: '..... restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable — reasonable that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public'. So in every case it is necessary to consider first whether the restraint went farther than to afford adequate protection to the party in whose favour it was granted, secondly whether it can be justified as being in the interests of the party restrained, and, thirdly, whether it must be held contrary to the public interest. I find it difficult to agree with the way in which the Court has in some cases treated the interests of the party restrained. Surely it can never be in the interest of a person to agree to suffer a restraint unless he gets some compensating advantage, direct or indirect. And Lord Macnaghten said: "... of course the quantum of consideration may enter into the question of the reasonableness of the contract." The circumstances which existed in the months immediately before and at the time when the lease and
lease back were executed were fully set out in the judgment of the learned deputy Judge and are set out in the judgment of Dillon L.J. I will summarise those facts which are relevant when seeking to answer the three questions posed by Lord Reid. Alec Lobb (Garages) Ltd. was in serious financial trouble. Not only had they borrowed £24,000 from Total which had a charge with a tie as security for the loan but the company also had borrowed from the bank. Furthermore its trading position was not satisfactory. Because of its loans from Total the company was not in a position to raise money elsewhere. In these circumstances Mr. Lobb approached Total for help suggesting lease and lease back of the forecourt. Mr. Storey of Total was not enthusiastic. Total suggested a purchase of the freehold, but Mr. Lobb would not agree. Finally it was agreed that there should be a lease of 51 years. This was at Mr. Lobb's request to avoid income tax but the premium of £35,000 was based on the market value and anything less would not have begun to solve the company's financial difficulties. From Total's point of view they were providing £35,000 which would be sufficient to pay the debts which they knew about and leave Alec Lobb Ltd. with some spare capital. They knew he was advised by his solicitor and by an accountant. They did not know what the advice was. They were acquiring an outlet for 51 years at a price based on market value. The lease back was for 21 years which was the most Total would grant. No pressure whatever was put on by Total. In fact, Mr. Lobb had other debts unknown to Total and he was soon in trouble again. Total were making a decision to help Lobb to save him from bankruptcy which would have been the almost certain alternative. Did the restraint go further than to afford adequate protection to Total? The restraint was for 21 years with a break at 8 and 15. As a result of the lease and lease back Total were virtually the freeholders saving one of their customers and one of their outlets which might be lost in the event of bankruptcy of the company. In Amoco Australia Pty. Ltd. v. Rocca Bros. Motor Engineering Co. Pty. Ltd. (1975) A.C 561, Lord Cross, at page 579t said: "The fact that a covenator 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." And Lord Reid, in the passage I have cited, quotes Lord Macnaghten to the same effect. Having regard to all the circumstances and in particular the amount of the consideration in my opinion the restraint did not go farther than was necessary to afford adequate protection. Could this be justified in the interests of Mr. Lobb? The bargain has to be examined and judged at the time it was struck and if the facts were only those known to Total they were saving Mr. Lobb from bankruptcy. There were however other circumstances, other liabilities unknown to Total which produced a different result. These other liabilities meant that although Mr. Lobb was saved from immediate bankruptcy he did not have the working capital which Total had expected. Judged by the facts known to Total at the time of making the contract the existence of the tie can, in my opinion, be justified in the interests of Mr. Lobb. In the words of the learned deputy Judge it was not "in any way unfair or unreasonable". Without it or some other arrangement the consequences would have been early trouble.

Must the contract be held contrary to the public interest? In my judgment the answer is "No". It is clearly in the public interest to save a firm from bankruptcy provided that the terms are not unfair and that improper pressure has not been exerted. No improper pressure, indeed no pressure, was exerted by Total. The initiative came from Mr. Lobb. When Total suggested a sale of the freehold and a lease back Mr. Lobb said "No". Total accepted his suggestion of a 51 year lease and paid for it at market value. Total was then not prepared to grant more than 20 years with a break at 8 and 15. In my judgment, although it is unusual to have a tie of this length this tie was not contrary to the public interest. Accordingly I am of opinion that the restraint of trade imposed was reasonable.

If I am wrong in my conclusion that there was no unreasonable restraint of trade, it is submitted by Mr. Cullen that the learned Deputy Judge was in error in finding that the clauses enforcing a restraint of trade were severable and that the contract remained enforceable when those clauses were severed. When Dunn L.J. asked counsel what test had to be applied we were not only referred to a number of authorities setting out tests which varied in some degree the one from the other but also certain textbooks, (e.g. Cheshire and Fifoot 10th Edition, page 373, Treitel 6th Edition page 382 et seq and Chitty 25th Edition, page 644). I do not here set out those cases save to say that there is a clear distinction between the severability of a covenant, i.e. whether a covenant itself can be divided leaving part of it effective and those cases where the whole covenant is struck out and the decision then has to be made as to whether that which is left is enforceable or not. The instant case is, of course, in the latter category and in my opinion the test to be applied is best set out in the judgment of Buckley L.J. in a Common Market case in the English Court of Appeal Chemidus Wavin Ltd. v. Société pour la Transformation et L'Exploitation des Resines Industrialles SA (1973) C.M.L.R. 514, at 519:
"(18) So, the position appears clearly to be this, that where in a contract there are certain clauses which are annulled by reason of their being in contravention of Article 85, paragraph (l), of the Treaty, one must look at the contract with those clauses struck out and see what the effect of that is in the light of the domestic law which governs the particular contract. In the present case, we have to consider what effect the invalidity, if any, of the clauses in the licence agreement by reason of Article 85 would have upon that contract as a whole. Whether it is right to regard the matter as one of severance of the contract or not, I do not think it is necessary for us to consider now. I doubt whether it is really a question of severance in the sense in which we in these Courts are accustomed to use that term in considering whether covenants contained in contracts of employment and so forth are void as being in restraint of trade, and, if they are to any extent void, whether those covenants can be severed so as to save part of the covenant, although another part may be bad. It seems to me that, in applying Article 85 to an English contract, one may well have to consider whether, after the excisions required by the Article of the Treaty have been made from the contract, the contract could be said to fail for lack of consideration or on any other ground, or whether the contract would be so changed in its character as not to be the sort of contract that the parties intended to enter into at all."

Can this contract be said to be so changed in its character as not to be the sort of contract that the parties intended to enter into at all? In my judgment the consideration was twofold. There was the 51 year term for which a sum based on the market price was paid and there was the tie. If the tie is removed there is a lease for which a substantial sum was paid and there is a lease back at a rent which is not nominal. While the purpose of the contract included a tie, the contract was a contract for letting a petrol station. With the tie removed it is still a contract for letting a petrol station. Even though Total would not have entered into the contract without the tie it remained a contract for letting a petrol station and it was at a rent which was not nominal therefore the sort of contract which the parties intended to enter into.

ORDER: Appeal dismissed.

Cross-appeal allowed. Declaration in terms set out in Prayer. Leave to appeal to the House of Lords refused.