[HIGH COURT OF AUSTRALIA.]

PETERS AMERICAN DELICACY COMPANY LIMITED . . . . . APPELLANT;
PLAINTIFF,

AND

CHAMPION . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 13, 24.

KNOX C.J., ISAACS, HIGGINS, GAVAN DUFFY AND POWERS JJ.

Contract—Implied term—Necessary implication—Restraint of trade—Restrictive clause—Reasonableness—Validity—Injunction.

The respondent in writing requested the appellant to "enter my order for supplies of" your "ice-cream for sixty months to commence 1st April 1927 on the following terms and conditions, and in consideration of your doing so and supplying ice-cream as hereafter stipulated, I agree not to sell, serve, supply or vend any other make of ice-cream or ices, or make any of same myself, during the period this agreement is in force." After setting out the prices for which ice-creams of the various kinds were to be supplied, the document continued: "I will pay for all ice-cream or other goods ordered and supplied c.o.d. (failure to make payment as provided herein releases the supplier from any and all obligations to make further deliveries until the amount owing has been paid). Prices are subject to alteration on giving customer seven days' notice in writing." After deliveries had been made under the contract for a few months and before any attempt on the part of the appellant to alter the prices, the respondent ceased to take his supplies of ice-cream from the appellant, and proceeded to procure them from other manufacturers.

Held, by *Knox* C.J., *Isaacs* and *Gavan Duffy* JJ. (*Higgins* and *Powers* JJ. dissenting), that the appellant was entitled to an injunction against the respondent, as the contract on its proper construction did not involve an undue restraint of trade:

By *Knox* C.J., *Isaacs* and *Gavan Duffy* JJ.: (1) The undertaking by the respondent not to sell, &c., ice-cream other than the appellant's "during the period this agreement is in force" was not synonymous with the obligation of the appellant to supply ice-cream "for sixty months"; (2) on the construction of the contract as a whole, the effect of the clause as to alteration of prices would be that upon a notification of an increase of prices (which had not been given) there would be a cesser of the contractual obligations; (3) the restraint was not unreasonable in the circumstances.

Decision of the Supreme Court of New South Wales (Full Court): *Peters American Delicacy Co. Ltd.* v. *Champion*, (1928) 28 S.R. (N.S.W.) 253, reversed, and order of *Long Innes* J. restored in modified form.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court in its equitable jurisdiction by Peters American Delicacy Co. Ltd. against Ernest Simon Champion in which the statement of claim was substantially as follows:—

1. The plaintiff is a company duly incorporated according to the laws of the State of New South Wales with power to sue and be sued in its said corporate name.

2. By a contract in writing made between the plaintiff and the defendant on 1st April 1927 the plaintiff agreed to supply to the defendant and the defendant agreed to purchase from the plaintiff ice-cream manufactured by the plaintiff for sixty months to commence on 1st April 1927 on the terms and conditions set out in the said contract. By the said contract the defendant agreed not to sell, serve, supply or vend any other make of ice-cream or ices or make any of same himself during the period of the contract.

3. By a further contract in writing made between the plaintiff and the defendant dated 1st April 1927, which referred to the said contract mentioned in par. 2 hereof, the plaintiff agreed to let to the defendant and the defendant agreed to take and hire from the plaintiff all that power ice-cream cabinet of manufacture for the term of sixty months at the rent and subject to the conditions and provisions therein contained. By the said further contract the defendant agreed that he would not so long as the hiring of the said cabinet continued sell ice-cream of any other manufacture than that of the plaintiff nor sell any ices or ice-cream substitutes whatever and would not use the said cabinet or permit the same to

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be used for any purpose other than the containing of ice-cream supplied by the plaintiff.

4. The plaintiff has recently discovered and the fact is that the defendant in breach of the contract referred to in par. 2 hereof is selling, serving, supplying and vending other makes of ice-creams or ices than those manufactured by the plaintiff.

5. The plaintiff has recently discovered and the fact is that the defendant in breach of the contract referred to in par. 3 hereof is selling ice-cream of a manufacture other than that of the plaintiff.

6. The plaintiff requested the defendant to refrain from committing the breaches of the said contracts and each of them referred to in pars. 4 and 5 hereof, but the defendant has neglected and refused to do so and threatens and intends to continue to commit similar breaches of the said contracts and each of them.

7. By reason of the said breaches of the said contracts and each of them the plaintiff has suffered grave and irreparable damage and injury and will continue to do so if the defendant is permitted to continue committing breaches of the said contracts and each of them in the future.

8. The plaintiff has performed the said contracts and each of them on its part and is ready and willing and hereby offers to perform the said contracts and each of them on its part in the future.

The plaintiff claimed (*inter alia*) (1) that the defendant, his workmen, servants and agents may be restrained by the order of this Honourable Court from selling, serving, supplying or vending any other make of ice-cream or ices than that of the plaintiff during the period of the said contract referred to in par. 2 hereof; (2) that the defendant, his workmen, servants and agents may be restrained by order of this Honourable Court during the hiring of the said cabinet by the plaintiff to the defendant under the contract referred to in par. 3 hereof, and (3) that the plaintiff may have such further or other relief as the nature of the case may require.

In an affidavit the defendant stated that the sale of ice-cream constituted a very substantial part of the trade done by him; that he had not received any notice from the plaintiff of any variation in the prices of ice-cream, and other goods referred to in the contract, pursuant to the terms of such contract, and that there were in

addition to the plaintiff two large companies manufacturing and distributing high quality ice-cream in Sydney and suburbs.

On motion by the plaintiff *Long Innes* J. granted an injunction restraining the defendant from selling ice-cream not of the plaintiff's manufacture until the hearing of the suit or for so long a period as the plaintiff was ready and willing to supply to the defendant ice-cream of reasonable quality at the prices stated in the contract or after due notice at other reasonable prices.

An appeal by the defendant to the Full Court was, by majority (*Harvey* C.J. in Eq. and *Davidson* J., *Street* C.J. dissenting), allowed, and the order of *Long Innes* J. set aside: *Peters American Delicacy Co. Ltd.* v. *Champion* (1).

From that decision the plaintiff now appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Weston (with him *D. Williams*), for the appellant. The clause in the agreement by which the respondent agreed not to sell, serve, supply or vend any other make of ice-cream or ices, or to make any of the same himself, during the period the agreement was in force, must be construed with the implication "provided the Company is able and willing to supply the same at the prices hereinafter mentioned or at such other prices, being reasonable, as the Company may notify to the retailer." The respondent chose to be protected by an implication of law rather than to trust to the Company fixing prices at a reasonable figure of its own volition. If the proposed prices were reasonable, then the Company would be bound to supply the commodity and the respondent to accept such supplies; but, if the prices sought to be imposed by the Company were unreasonable under the proviso it seeks to imply, the Company would still be bound to supply but the respondent would not be bound to accept (*The Moorcock* (2)). Alternatively the contract would become automatically determined on the notification by the Company to the respondent of fresh prices unless, at any rate, the respondent assented to the fresh prices. The agreement, being a reasonable one *inter partes*, is not invalid on the ground of restraint of trade.

(1) (1928) 28 S.R. (N.S.W.) 253.

(2) (1889) 14 P.D. 64.

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E. M. Mitchell K.C. (with him *J. W. Shand*), for the respondent. The Court will hesitate to introduce into the contract an implied term concerning something which was not expressed by the parties (*Brodie* v. *Cardiff Corporation* (1)). Provision was made in the contract in respect of prices and therefore no implication can arise. Prices were to be those as fixed in the agreement, subject to any alteration made by the Company on seven days' notice. During the sixty months all the terms of the contract were to apply, and the respondent was thereby precluded from trading with any other company or person during that period. The terms of the contract are harsh and unreasonable inasmuch as the respondent is bound to obtain his supplies from the Company only and must pay whatever prices the Company demands. The seven days' notification of any proposed alteration in the prices was not for the purpose of giving the respondent an opportunity of making arrangements to obtain supplies elsewhere, but was to enable him to inform his customers of the proposed alteration. It must have been within the contemplation of the parties that prices would be increased from time to time, and the Company would certainly not agree to a clause under which the respondent had the right, when an increase of prices was notified, to cancel the contract and go elsewhere for his supplies. The dominant object of the contract was to prevent the respondent from dealing with anyone else.

[ISAACS J. referred to *L. French & Co.* v. *Leeston Shipping Co.* (2) ; *Lewis* v. *Davison* (3).]

The natural meaning of the words, as expressed, ought not to be departed from in order to keep the agreement alive. Here the right to cancel the contract is expressly dealt with ; therefore the implication which the appellant seeks to establish cannot be supported.

Weston, in reply, referred to *Halsbury's Laws of England*, vol. XVIII., par. 1099, p. 573 ; vol. XXVII., pp. 569, 570 ; *Mills* v. *Dunham* (4).

Cur. adv. vult.

(1) (1919) A.C. 337, at p. 358.
(2) (1922) 1 A.C. 451, at p. 454.
(3) (1839) 4 M. & W. 654.
(4) (1891) 1 Ch. 576.

The following written judgments were delivered :—

KNOX C.J., ISAACS AND GAVAN DUFFY JJ. A suit in equity was instituted by the appellant, an ice-cream manufacturer, to restrain the respondent, a retail vendor, from selling ice-cream and ices other than those manufactured by the appellant, in breach of a negative clause in a contract between the parties. There were in fact two separate instruments of contract, one being a trade contract, and the dominant one, the other, a hiring contract subsidiary to the first and admittedly having no independent efficacy if the former fails. The matter by common consent turns on the legal effect of the trade contract. The defence is confined to one contention, namely, the invalidity of the contract by reason of the unreasonableness of one clause in restraint of trade.

The contract was made on 1st April 1927, and by it the appellant undertook that it would during sixty months supply the respondent with all ice-cream ordered " on the following terms and conditions." In consideration of that undertaking and of supplying the ice-cream " as hereafter stipulated," the respondent agreed not to deal in ice-creams of any other make, and not to make them himself " during the period this agreement is in force." The " terms and conditions " referred to were numerous. First, there was a detailed list of seven different kinds of ice-cream, each with its own separate designation and a fixed price for each, some prices per gallon and others per gross. Then it was stated that " the above prices " are for delivery to shop or ferry or consignments f.o.b. Sydney. There followed an undertaking to pay for all goods supplied c.o.d., in default suppliers to be released from further deliveries until payment. Then came a clause on which the case turns. It says : " Prices are subject to alteration on giving customer seven days' notice in writing." Several clauses followed, stipulating for no delivery on certain holidays, and for minimum weekly orders, failing which suppliers might cancel agreement, provision as to containers, show-cards, strikes, and cancellation on breach of contract by customer. It is obvious, to begin with, that the obligation to supply " during the period this agreement is in force " is not synonymous with an obligation to supply " during sixty months."

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Before the learned primary Judge in Equity and before the Full Court the parties respectively set up two rival contentions. The respondent urged that the clause quoted as to alteration of prices was one purporting to confer on the appellant an arbitrary right of demanding and insisting on any price it chose at any time or times to fix. For the appellant it was contended that it merely empowered the Company to insist on reasonable prices, there being an obligation to pay them, even though unalterably fixed. It was admitted that if the first view was correct the suit must fail. And on the other hand it was admitted that if the second view was right the suit succeeded. The question, then, was which of these provisions was necessarily to be implied in the contract.

In our opinion, and with great deference to the view taken by the Full Court, neither implication can properly be made. In L. *French & Co.* v. *Leeston Shipping Co.* (1) Lord *Buckmaster* says: "It is always a dangerous matter to introduce into a contract by implication provisions which are not contained in express words, and it is never done by the Courts excepting under the pressure of conditions which *compel* the introduction of such terms for the purpose of giving what Lord *Bowen* once described as 'business efficacy' to the bargain between the parties." The principle of implication stated by *Kay* L.J. in *Hamlyn & Co.* v. *Wood & Co.* (2) has been approved by the Privy Council in *Douglas* v. *Baynes* (3). It is that "The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is *necessarily driven* to the conclusion that it must be implied." Usually it is sought to imply an unexpressed term to provide for some event, not actually present to the minds of the parties at the time of making the contract, and wholly unprovided for. Then the question arises: What would the parties, as reasonable men, *certainly* have provided with respect to that event if it had occurred to their minds? What provision is the Court *compelled* or *necessarily driven* to presume that the parties would have made?

(1) (1922) 1 A.C., at p. 454.
(2) (1891) 2 Q.B. 488, at p. 494.
(3) (1908) A.C. 477, at p. 482.

It is essential to bear in mind that the implication, if made, is of a term that the Court presumes represents the intention of *both* parties (see per Lord *Parmoor* in *Kelantan Government* v. *Duff Development Co.* (1), and that intention must be *clear* (per Lord *Sumner* in *United States Shipping Board* v. *Frank C. Strick & Co.* (2)). For two reasons no implication of either of the rival terms can be made. The first is that the event with which we are concerned, namely, the alteration of prices, did occur to the minds of the parties, and they expressly made a provision with respect to it. The other is that, having regard to the circumstances stated in *Hamlyn & Co.* v. *Wood & Co.* (3), the Court is not compelled or necessarily driven to introduce either of the rival contentions of the parties. It is apparent from inspection of the original contract exhibited in this case that the appellants had prepared a multiple machine-made form, presumably for distribution to retail dealers. The forms had blanks for dates and duration of the contract. The detailed list of articles and prices would have bound the suppliers to supply at those prices for the whole period at the will of the dealer who was not affirmatively bound to order at any price. When these forms were handed to the dealers, the clause as to alteration of prices was a distinct intimation that although the price-list was then the settled list of prices on which the business was invited, yet the wholesale manufacturer reserved the right at any time to alter its prices, provided only it gave the dealer seven days' notice in writing. This was one of the " terms and conditions " on which the offer was invited. The possible fluctuations in the price of raw material or machinery, of wages, and all other eventualities of trade, made this a most reasonable provision, so far as it enabled the supplier to retire from a losing contract, and did so after fair notice. Seven days' notice would enable the retailer to secure elsewhere a continuance of his commodity, if at all procurable, on better terms. At his choice he could accept the situation and agree afresh, expressly or tacitly, to continue his contractual relations at the altered prices ; or he could decline so to continue, and then, the obligation of supplier being gone, the period the agreement was in force would be ended, and

(1) (1923) A.C. 395, at p. 420. (2) (1926) A.C. 545, at p. 585.
(3) (1891) 2 Q.B. 488.

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consequently the negative stipulation would disappear. The clause read as a whole leads, in the circumstances, as we think, to this conclusion, if not irresistibly at least most persuasively. It is certainly impossible to say it was the clear intention of both parties to agree to any term that would be unfair or unreasonable as regards either of them. It would be both unfair and unreasonable to imply that the retailer is bound to pay without question whatever price the supplier at any time during five years chooses to demand. It would be both unfair and unreasonable, from the supplier's standpoint, if it notified a rise of (say) 10s. a gross or 1s. a gallon, to compel him by litigation, if necessary with every retailer, to enter into a full examination of his manufacturing costs and expenses to prove that the rise was reasonable, with the alternative of continuing to supply at a loss. It would be equally unfair and unreasonable to the retailer to compel him to pay any price, however great, which from the manufacturer's point of view alone was reasonable. This obligation would be most oppressively embarrassing to the retailer. He must either (1) submit to any price demanded, or (2) face litigation to determine its reasonableness either as plaintiff or defendant in a suit like the present or (3) close up his business. To us either implication is unthinkable.

The proper course is to reject both suggested implications and to construe the debated clause as it stands. Of course, it means that the "alteration," if it takes place, is to be by the supplier. And then, as to the legal consequence of any alteration, that would have to be ascertained by considering the effect of such a step, lawful because agreed to, which is produced by the law acting on the altered situation of the parties in view of the expressed terms of the contract read as a whole. The position is well stated in the apposite passage taken from the judgment of Lord *Atkinson* in *Brodie* v. *Cardiff Corporation* (1). Lord *Atkinson* says:—"This conclusion does not involve the introduction of an implied term into the contract of the parties which can only be justified when the implied term is not inconsistent with some express term of the contract, and where there arises from the language of the contract itself, and the circumstances under which it was entered into, an inference that it is

(1) (1919) A.C., at pp. 358, 359

absolutely necessary to introduce the term to effectuate the intention of the parties (*Hamlyn & Co.* v. *Wood & Co.* (1)). The conclusion merely involved the consideration of the contract as a whole, and the construction of its language, according to its natural measure, in such a way as will best reconcile its provisions the one with the other, and carry out the intention of the parties as disclosed by the language they have used." When this is done, it is seen that upon a notification of alteration by rise of price there would be a cesser of contractual obligations. The retailer has only agreed to pay the stated prices, and any further obligation would require his further assent.

The clause, then, is not invalid and, as it has never been acted on, the appellant was entitled to an injunction. The form of the order would correspond exactly to the obligation if the words " or after due notice at other reasonable prices " were excised from the order of the learned primary Judge.

It may be added that if the main agreement came to an end the restrictive clause in the hiring agreement would be patently invalid as an unreasonable restraint of trade. It would then be supported only by the hire of a machine which contractually must not be used at all, except for ice-cream which *ex hypothesi* was not to be ordered or supplied.

The appeal should be allowed and the order for injunction restored, modified as stated.

HIGGINS J. This is an appeal by the plaintiff from an order of the Full Court of the Supreme Court of New South Wales allowing, by a majority, an appeal from the Judge in Equity. The learned Judge in Equity had granted in favour of the plaintiff an interlocutory injunction restraining the defendant from selling ice-cream not of the plaintiff's manufacture until the hearing of this suit or for so long a period as the plaintiff is ready and willing to supply to the defendant ice-cream of reasonable quality at the prices stated in the said exhibit A or after due notice of other reasonable prices ; but that order has been set aside by a majority of the Full Court on the ground of undue restraint of trade. The plaintiff's case is

(1) (1891) 2 Q.B. 488.

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based on two documents dated 1st April 1927, each referring to the other—exhibits A and B.

Exhibit A is in the form of a letter, addressed by the defendant, a restaurant-keeper at the Sydney Central railway station, to the plaintiff; but the form was supplied by the plaintiff to its customers. It is a form skilfully devised with the double purpose of not frightening customers and of meeting the more acute reasonings of lawyers; and it is likely to come up repeatedly for interpretation and discussion. It begins:—"Please enter my order for supplies of Peters' ice-cream *for sixty months* to commence 1st April 1927 on the following terms and conditions and in consideration of your doing so and supplying ice-cream as hereafter stipulated: I agree not to sell, serve, supply or vend any other make of ice-cream or ices or make any of same myself, *during the period this agreement is in force.*" Then follow the "prices" for ice-cream and ices as detailed. The defendant promises to "pay for all ice-cream or other goods ordered and supplied c.o.d. (failure to make payment as provided herein releases the suppliers from any and all obligations to make further deliveries until the amount owing has been paid). *Prices are subject to alteration on giving customer seven days' notice in writing.* . . . The suppliers reserve the right in the event of customer taking less than a minimum quantity of 12 gallons of ice-cream per week . . . to *cancel this agreement* at the option of the suppliers." Then follows a clause making the defendant responsible for all containers and for advertising matter furnished by the plaintiff:—"The suppliers are not to be held responsible for non-delivery of supplies of ice-cream in the event of accidents strikes fires breakdown of machinery or any other cause beyond the control of the suppliers, and this contract is *subject to cancellation* on giving 24 hours' notice in the event of any breach or default on the part of the customer in the performance thereof. Any default under the agreement of even date herewith between yourselves and me relating to the hiring" of "an ice-cream cabinet shall entitle you to *cancel this agreement* forthwith."

Taking this agreement by itself, it seems clear that "the period the agreement is in force" is sixty months (five years) from 1st April 1927; but subject to earlier determination by the plaintiff should it exercise its power to cancel. There is no power for the defendant

to cancel the agreement. Taking the literal meaning of the words of the agreement—and we have to find what the agreement means on its true construction before we proceed to apply the doctrine as to undue restraint of trade—the defendant agrees not to sell any other ice-cream than the plaintiff's for sixty months or such shorter time as may elapse before the plaintiff should cancel the agreement for cause. Some controversy has taken place as to the power to alter prices—whether the defendant is bound to submit to any price that the plaintiff might dictate; I do not think that the solution of this question is necessary for this case; but even if the defendant was not bound to submit to any increased price that the plaintiff should dictate, the defendant, on an increase in the price, would be put in the dilemma, either to pay the increased price or to lose his ice-cream business. The promise not to sell any other ice-cream for five years or until the plaintiff exercised its power to cancel the agreement still would remain binding on the defendant. The obligation not to sell any ice-cream other than the plaintiff's remains even if the plaintiff ceased business or supplied no more ice-cream to the defendant or if the defendant ceased to order ice-cream from the plaintiff. There is nothing whatever in the words of exhibit A to show that the period of the agreement being in force was to end with the cessation of orders by the customer at the altered prices; if orders cease to such an extent as to fall below 12 gallons per week, the customer is liable to have the agreement cancelled at the option of the supplier: that is all. This construction of the promise is unavoidable unless other words are necessarily to be implied in the promise, after the words "during the period this agreement is in force," such words as "or until the supplier alters its list of prices." But we cannot treat a limitation of the promises as necessarily implied unless it is clear that the parties —both parties—*must* have intended the limitation to exist. Here the supplier merely says that it will not treat the defendant as a customer at all, on any terms as stipulated, unless the defendant promise not to sell other producers' ice-cream for five years (or until cancellation by the supplier) (see *Hamlyn & Co.* v. *Wood & Co.* (1); *L. French & Co.* v. *Leeston Shipping Co.* (2)).

(1) (1891) 2 Q.B. 488.

(2) (1922) 1 A.C., at p. 454, per Lord *Buckmaster*.

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There is no doubt on the facts that the defendant broke this promise. By a letter of 10th October 1927 to the plaintiff, the defendant coolly said :—" For various business reasons I find it imperative to make other arrangements for ice-cream supplies. I shall therefore be glad if you arrange to fetch away the Nizer cabinet installed here, not later than Thursday next." The defendant wrote this although he had not received notice from the plaintiff of any alteration in prices. The only defence set up by the defendant is that the agreement is invalid as being in undue restraint of trade.

Even if there were any doubt as to the true construction of the clause in this agreement, there can be no doubt as to clause 7 of exhibit B, the agreement for the hiring of the plaintiff's cabinet for the term of sixty months :—" 7. The hirer will not *so long as the hiring of the said cabinet* continues sell ice-cream of any other manufacture than that of the owner (nor sell any ices or ice-cream substitutes whatever) and will not use the said cabinet or permit the same to be used for any purpose other than the containing of ice-cream supplied by the owner." At the end of exhibit A there is a clause that " any default under the agreement of even date herewith between yourselves and me relating to the hiring " of " an ice-cream cabinet shall entitle you to *cancel this agreement* forthwith." But if the plaintiff should not elect to cancel exhibit A for default of the defendant, the defendant remains liable under clause 7 of exhibit B. Perhaps I should add, to prevent any misunderstanding, that I am not aware of any " common consent " or admission as to the relations of exhibits A and B ; and that in any case I cannot treat any such consent or admission as binding on me in a matter of law.

Having ascertained the construction of the agreement—or, rather agreements—without regard, in the first instance, to the consequence, we have next to determine whether the provisions involve an undue restraint of trade. In my opinion, they do : they afford more than adequate protection to the plaintiff, within the principle laid down in *Herbert Morris Ltd.* v. *Saxelby* (1) and cases there cited. To provide that the defendant, if the prices are raised too high, is not to be at liberty to buy his ice-cream elsewhere during the balance

(1) (1916) 1 A.C. 688

of the five years (or until the plaintiff choose at its own untrammelled will to "cancel the contract") is practically to put an end to the defendant's business in ice-creams—whether a legal obligation lies on the defendant to take the goods from the plaintiff or not, at the increased prices. For even if the defendant has an option not to take the goods at the increased prices, he cannot, under the agreement, sell ice-creams that are not the plaintiff's. He must take ice-creams from the plaintiff at the increased prices or not sell ice-creams at all. It is interesting to note that not only *Harvey* C.J. in Eq. and *Davidson* J. but the Chief Justice of New South Wales, who delivered the dissenting judgment, read exhibit A as enabling the plaintiff to make the alteration in prices as it chose; the only difference was that the Chief Justice considered that the alteration in price must be *reasonable*. For my part, I think that the observations of *Esher* M.R. in *Hamlyn & Co.* v. *Wood & Co.* (1), cited by the learned Chief Justice, show clearly that we have no right to treat the word "reasonable" before "prices" as *necessarily* implied. As the Master of the Rolls said, "the Court has no right to imply in a written contract any such stipulation, unless . . . an implication *necessarily* arises that the parties must have intended that the suggested stipulation should exist. *It is not enough to say that it would be a reasonable thing to make such an implication.*" This, as *Davidson* J. shows in his judgment, is quite consistent with the case of *The Moorcock* (2)—the case of the wharfingers' jetty. *Davidson* J. puts the undue restraint of trade in this way (3):—"The power of increasing prices under the contract is capable of being used in such a manner as to prevent the defendant from profitably dealing with the plaintiff and *from dealing with anyone else at all if the restrictive clause is allowed to stand.* This in my opinion imposes too severe a penalty on the defendant for refusing to accept increased prices, particularly as the plaintiff reserved to itself the right to rescind" (cancel) "the agreement if the defendant did not take a minimum quantity." In substance, the mind of the learned Judge was influenced by one of the facts which influence me—that the defendant was (whether expressly or practically does not matter)

(1) (1891) 2 Q.B. at p. 491.
(2) (1889) 14 P.D. 64.
(3) (1928) 28 S.R. (N.S.W.), at p. 264.

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prevented by the agreement from dealing at all with anyone else than the plaintiff during the rest of the period of five years (or until cancellation by the plaintiff).

Personally, I concur with *Street* C.J. in his view that, on the evidence before us, the defendant "presents himself in a very unfavourable light" (1). During the argument I ventured to call his conduct "shabby," on the evidence before us, because he repudiated his agreement before prices were altered, and before any oppressive use by the plaintiff of its extraordinary powers. But such a consideration must not induce me to strain the law applicable to the facts before us and thereby bring confusion into future cases. We have reached the haven of fairly settled principles on this unsatisfactory portion of the law, and we must not yield to the temptation of leaving our anchorage because of the conduct of a particular defendant.

My opinion is that the appeal of the plaintiff should be dismissed, and the decision of the Full Court affirmed.

POWERS J. I agree with my brother *Higgins* that the appeal should be dismissed. I do so for the reasons given by the majority of the Supreme Court of New South Wales, and for the additional reasons given by my brother *Higgins* in his judgment on the appeal to this Court.

In the argument before the Court a new interpretation of the contract, not mentioned in the Court of first instance or in the Full Court, was suggested, namely, that the clause "Prices are subject to alteration on giving seven days' notice in writing" only amounted to a reservation by the dealer of a right to alter the prices on seven days' notice to avoid continuing a losing contract, and if the prices were altered the retailer could secure supplies elsewhere if he thought fit. The retailer would also, on the alteration of the prices, be released from all the covenants contained in both agreements. That, as I understand it, means, in effect, that the clause in question should be read as if the following words, or words to a like effect, were added: "Provided that if the prices are altered at any time reasonably or unreasonably the buyer will *ipso facto* be relieved from

(1) (1928) 28 S.R. (N.S.W.), at p. 257.

all covenants set out in both contracts" (the "purchasing" and the "hiring" agreements). I do not think such an implication can be properly made in this case, where all the express rights to cancel the agreements are retained by the dealer and none are given to the retailer.

The appeal of the plaintiff should, in my opinion, be dismissed and the decision of the Full Court affirmed.

Appeal allowed. Order of Long Innes J. for injunction restored, modified by the deletion therefrom of the words "or after due notice at other reasonable prices."

Solicitors for the appellant, *McDonell & Moffitt.*

Solicitors for the respondent, *Faithfull, Maddock, Oakes & Baldock.*

J. B.

[HIGH COURT OF AUSTRALIA.]

WEBB . . . . . APPELLANT;
PLAINTIFF,

AND

BLOCH AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

MELBOURNE, *April* 30; *May* 1, 2; *June* 14.

ON APPEAL FROM STARKE J.

Starke J.

Libel—Joint liability—Privilege—Publication by agent—Malice of agent—Knowledge of untruth of statements—Liability for agent's statements—"Publication"—Justification—Appeal—Duty of appellate Court—No disputed evidentiary facts—Jurisdiction.

ADELAIDE, *Sept.* 25-28.

MELBOURNE, *Nov.* 5.

Knox C.J., Isaacs and Gavan Duffy JJ.

The plaintiff in an action for libel was the chairman of the South Australian Wheat Compensation Committee, the object of which was to endeavour to obtain compensation from the Government of South Australia for alleged