[HIGH COURT OF AUSTRALIA.]

PETERS AMERICAN DELICACY COMPANY LIMITED AND ANOTHER . . . PLAINTIFFS, } APPELLANTS;

AND

PATRICIA'S CHOCOLATES AND CANDIES PROPRIETARY LIMITED . . . DEFENDANT, } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 13, 14.

MELBOURNE, *Oct.* 1.

Latham C.J., Rich, Starke, Dixon, McTiernan and Williams JJ.

Contract—Restraint of Trade—Validity—Reasonableness—Wholesaler and Retailer—Injunction.

A contract in writing provided that in consideration of the appellants' undertaking to supply the respondent for a period of sixty months with ice cream and ices of the several descriptions and at the relative prices set out in a schedule, in such quantities as the respondent might from time to time order, the respondent agreed to purchase the goods so supplied. By clause 4 it was provided that the price or prices could be altered by the appellants on giving seven days' notice and if the alteration was by way of increase and the respondent was unwilling to pay such increased prices, it could notify the appellants accordingly and the contract should "thereupon be determined so far only as it concerns or relates to the goods" the prices of which were to be increased. The contract further provided:—"9. So long as you shall be able and willing to supply me/us with ice cream at the respective prices set out in Schedule 1 hereof or at such other respective prices as may from time to time be determined as aforesaid I/we will not during the period mentioned in clause 1 hereof in or on the premises . . ., now occupied by me/us or at any place within a distance of five miles from the said premises manufacture sell serve supply or vend any ice cream other than ice cream manufactured or supplied by you. . . .". "14. In the event of your discontinuing the manufacture of any of the goods other than bulk ice cream . . . then upon your giving to me/us notice in writing of such discontinuance the goods mentioned in such notice shall be deemed to be eliminated from Schedules 1 and 2 . . . and you shall not thereafter be bound hereunder to continue

to supply me/us with such lastmentioned goods." In the Supreme Court a suit to restrain the respondent from committing breaches of the covenant contained in clause 9 was dismissed.

On appeal.

Held by *Latham* C.J., *Rich*, *Starke*, *McTiernan* and *Williams* JJ. (*Dixon* J. dissenting) that as the restraint imposed by clause 9 was reasonable in the interests of the parties to the contract, and not injurious to the public it was valid.

Decision of the Supreme Court of New South Wales (*Roper* J.) reversed.

APPEAL from the Supreme Court of New South Wales.

On 6th September 1945, Patricia's Chocolates and Candies Pty. Ltd., which conducted a milk bar and confectionery business near Wynyard Station, Sydney, entered into a contract in writing with Peters American Delicacy Co. Ltd. and Peters Ice Cream Pty. Ltd., which manufactured and supplied ice cream and ice-cream goods, for the supply of certain ice creams and ices. The material clauses in the contract are set out in the Judgment of *Latham* C.J. hereunder (1) .

Schedule 1, relating to ice creams, set out under a number of headings a scale of prices, wholesale and retail, for ice cream in bulk, and ice cream in various forms such as ice-cream bars coated with chocolate, ice-cream bricks &c. Schedule 2 in a similar form related to ices of various types.

The plaintiffs moved for an injunction against the defendant to restrain it from selling ice cream, other than ice cream supplied by the plaintiffs, in breach of clause 9 of the above-mentioned contract and by consent the motion for injunction was turned into a motion for a decree. On the hearing of the motion it was proved that the defendant sold ice cream other than ice cream manufactured or supplied by the plaintiffs, and that the plaintiffs at all material times were ready and willing to supply ice in accordance with their obligations under the contract.

The evidence also showed that the plaintiffs are one of several manufacturers of ice creams and the like in Sydney who supply retailers.

The Supreme Court (*Roper* J.) held that clause 9 was void as being in unreasonable restraint of trade, and dismissed the suit.

From that decision the plaintiffs appealed to the High Court.

Barwick K.C. (with him *Stuckey*), for the appellants. This is a contract between traders in equal positions of bargaining who are

(1) *Post* p. 577.

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the best judges of what is reasonable between themselves (*English Hop Growers Ltd.* v. *Dering* (1); *Attorney-General (Australia)* v. *Adelaide Steamship Co. Ltd.* (2); *Cooper* v. *Cooper* (3); *Vancouver Malt and Sake Brewing Co. Ltd.* v. *Vancouver Breweries Ltd.* (4); *Servais Bouchard* v. *Prince's-Hall Restaurant* (5); *United Shoe Machinery Co. of Canada* v. *Brunet* (6)). Such contracts are not against the public interest: *Attorney-General (Australia)* v. *Adelaide Steamship Co. Ltd.* (7). The restraint imposed by clause 9 is reasonable; if it is unreasonable it is only because of some improbable and extravagant contingency (*Haynes* v. *Doman* (8); *Frasers Henleins Ltd.* v. *Ramage* (9); *Peters American Delicacy Co. Ltd.* v. *Champion* (10)).

Kitto K.C. (with him *C. M. Collins*), for the respondent. No restriction has been held valid if it covers a wider range of goods than the person in whose favour it is given supplies. That would give the wholesaler no protection but would restrict the retailer. This is a printed contract drawn up by the appellant and not arrived at by negotiation between the parties. A clause similar to clause 9 was considered in *Champion's Case* (11) and was made more stringent and held valid in *Peters American Delicacy Co. Ltd.* v. *Birchmeier* (12). Here it is even more stringent—a retailer may not deal in lines which the wholesaler cannot supply and is not bound to supply.

[DIXON J. referred to *Routh* v. *Jones* (13).]

The onus is on the appellant to show the covenant is valid: *Champion's Case* (14).

Barwick K.C. in reply. As to onus, if the covenant is *ex facie* reasonable then the onus is on the respondent to show there is a trade in the various lines so as to make them distinct from ice cream (*North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.* (15)). The evidence shows that the parties treated the trade as one trade. The issue is, is it unreasonable between the parties and has the vendor sought to protect more than that which he has to protect?

Cur. adv. vult.

(1) (1928) 2 K.B. 174, at p. 180.
(2) (1913) A.C. 781.
(3) (1941) 65 C.L.R. 162, at p. 184.
(4) (1934) A.C. 181, at p. 189.
(5) (1904) 20 T.L.R. 574, at p. 575.
(6) (1909) A.C. 330, at pp. 342, 343.
(7) (1913) A.C., at pp. 795, 796.
(8) (1899) 2 Ch. 13, at p. 26.
(9) (1931) Q.S.R. 388.
(10) (1928) 41 C.L.R. 316, at pp. 321, 326.
(11) (1928) 41 C.L.R. 316.
(12) (1940) 40 S.R. (N.S.W.) 223; 57 W.N. 97.
(13) (1947) 1 All E.R. 758.
(14) (1928) 41 C.L.R., at pp. 325-331.
(15) (1914) A.C. 461, at p. 470, 471.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decree of the Supreme Court of New South Wales in Equity (*Roper* J.) dismissing a motion for an injunction which was treated as the trial of the suit. It was held that a covenant which the plaintiffs sought to enforce against the defendant was void as being in unreasonable restraint of trade.

By an agreement contained in a letter dated 6th September 1945 addressed by the defendant company to the plaintiff companies the defendant agreed in clause 1 that in consideration of the plaintiffs "jointly undertaking to supply me/us for a period of sixty months from 21st August, 1945, with ice cream and ices at the relative prices set out in schedules 1 and 2 hereof or at such prices as may from time to time be determined as hereinafter provided in such quantities as I/we may from time to time order I/we agree to purchase the goods so supplied at the prices and subject to the terms and conditions hereinafter appearing." Schedule 1 related to ice cream and schedule 2 related to ices. The present action relates only to the conditions of the contract dealing with ice cream. Schedule 1 sets out under a number of headings a scale of prices relating to ice cream in bulk (where the specified purchasing price is per gallon) and ice cream put up in various forms, e.g. ice-cream bars coated with chocolate (4d. size); ice-cream bars coated with chocolate (6d. size) ice cream bricks in specified flavours &c. These other items have been referred to in the reasons for judgment as "fancy goods." In the case of these items the schedule provides for a purchasing price and a retail selling price.

Clause 4 of the agreement is in the following terms :—"The purchasing prices or price or any of them may be altered from time to time on your giving me/us seven days previous notice in writing of such proposed alteration. In the event of such alteration resulting in increased prices or price if I am/we are not willing to pay you such increased prices or price or any of them I/we shall notify you in writing accordingly within seven days of receipt by me/us of such notice by you and this contract shall thereupon be determined but so far only as it concerns or relates to the goods the prices or price of which you propose to increase."

Clause 14 is as follows :—"In the event of your discontinuing the manufacture of any goods other than bulk ice cream as set out in schedules 1 and 2 hereof then upon your giving to me/us notice in writing of such discontinuance the goods mentioned in such notice shall be deemed to be eliminated from schedules 1 and 2 or either of them and you shall not thereafter be bound hereunder to continue to supply me/us with such last-mentioned goods."

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Clause 9 contains the terms of the covenant which the plaintiff sought to enforce and is as follows :—" So long as you shall be able and willing to supply me/us with ice cream at the respective prices set out in schedule 1 hereof or at such other respective prices as may from time to time be determined as aforesaid I/we will not during the period mentioned in clause 1 hereof in or on the premises ' Wynyard Milk Bar ', 27-34 The Ramp, George Street, Sydney, now occupied by me/us or at any place within a distance of five miles from the said premises manufacture sell serve supply or vend any ice cream other than ice cream manufactured or supplied by you or one of you in whatever form or style and under whatever name the same may be made up or goods of which ice cream or any substitute for ice cream forms the whole or a part."

This clause first prescribes the condition during the continuance of which the restrictive obligation contained in the operative words of the clause is to take effect. These operative words seek to prevent the defendant from manufacturing, selling &c. any ice cream other than ice cream manufactured or supplied by the plaintiffs. It was proved that the defendant sold ice cream other than ice cream manufactured or supplied by the plaintiffs.

The introductory words of clause 9, constituting what I have described as the condition of the operation of the clause, limit the condition to the period during which the plaintiffs are able and willing to supply ice cream at the prices set out in schedule 1, or at other prices determined under the agreement. Thus these words refer only to ice cream which falls within the scheduled items. But the operative words of clause 9, read apart from any other provisions contained in the contract, relate to the sale of any ice cream in any form. There is nothing in these words which would make it proper to limit the restriction which they impose to ice cream in the particular forms or styles set out in schedule 1.

Clause 9 operates only so long as the plaintiffs " shall be able and willing to supply (the defendant) with ice cream at the respective prices set out in schedule 1 or at such other respective prices as may from time to time be determined as aforesaid." It is necessary, therefore, to consider the other provisions of the agreement which provide for the determination of prices from time to time. Clause 4, which has already been quoted, provides that the prices may be altered from time to time by a notice from the plaintiff, but that if the defendant is not willing to pay the increased prices the defendant shall notify the plaintiff within a specified time and that " this contract shall thereupon be determined but so far only as it concerns or relates to the goods the prices of which we propose to increase."

Thus, where the plaintiffs propose to increase any price and the defendant refuses to agree to the increase, the contract is determined in relation to the goods the price of which it has been proposed to increase. In my opinion this provision should be read as meaning that the contract is determined in all its terms in respect of such goods; that is to say, the contract neither confers rights nor imposes obligations upon either party in respect of those goods. The result is that the initial words of clause 9 relating to the ability and willingness of the plaintiffs to supply ice cream will, in the event of a proposed increase of price which is not agreed to, have no application with respect to the goods as to which the disagreement has taken place. In respect of such goods there would be neither " respective prices set out in schedule 2 hereof " nor " other respective prices . . . determined as aforesaid." Accordingly, the plaintiffs would not be in a position to satisfy the condition upon which the operation of clause 9 depends so far as goods as to which the disagreement as to price had taken place were concerned.

But, so long as the plaintiffs were able and willing to supply other ice cream to which the contract continued to apply at scheduled or agreed prices, the condition upon which clause 9 comes into operation would be satisfied, and the defendant would be bound not to sell &c. any ice cream at all (other than the goods in respect of which the contents had been determined) not manufactured or supplied by the plaintiffs.

Thus, if there is a disagreement as to the price of any item specified in schedule 1, clause 9 does not, in my opinion, prevent the defendant from selling goods of that class obtained from persons other than the plaintiffs. *Roper* J. was of a different opinion on this point, but it appears to me that the provision that, in the event of a disagreement as to increased prices, the contract shall be determined with respect to particular goods means that no contractual rights or obligations thereafter exist on either side with respect to such goods.

The learned trial judge held that if the plaintiff ceased to manufacture fancy goods the defendant would be unable to trade in goods of that nature, with the result that, though unable to obtain such goods from the plaintiff, he would be precluded from obtaining them from other manufacturers. Such a restraint was held to be unreasonable.

The determination of this question depends upon the terms of clause 14, which deals with the discontinuance of the manufacture of any of the goods set out in the schedules other than bulk ice cream. Where there is such a discontinuance and notice thereof is

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given " the goods mentioned in such notice shall be deemed to be eliminated from schedules 1 and 2 or either of them and you shall not thereafter be bound hereunder to continue to supply me/us with such last-mentioned goods." When this clause comes into operation the effect is that the goods mentioned in the notice are eliminated from the schedules and that the plaintiffs are no longer bound to supply them. But it is not provided that the contract is determined in respect of such goods. " Such goods " are ice cream and therefore under clause 9, so long as the plaintiffs are able and willing to supply the items of ice cream which remain in the schedules at scheduled or agreed prices, the operative words of clause 9 apply and, subject to the effect of clause 4 as already explained, the defendant is bound not to sell any ice cream at all other than ice cream manufactured or supplied &c. by the plaintiffs. In other words, elimination of a particular item of ice cream from the schedule is not equivalent to determination of the contract in respect of that item.

Clause 14 refers to discontinuance of manufacture of ice-cream goods " other than bulk ice cream." Upon the discontinuance of the manufacture of such other goods those goods are eliminated from the schedules and the plaintiffs are no longer bound to supply them though the defendant is not at liberty to buy them elsewhere as above stated. But the discontinuance of the manufacture of bulk ice cream would not eliminate it from the schedules. Accordingly, if there were a discontinuance of the manufacture of bulk ice cream (but no disagreement as to prices) the result would be that the plaintiffs would be unable to allege that they were able and willing to supply the defendant with ice cream in accordance with the initial words of clause 9. The restrictive condition contained in the operative words of clause 9 would therefore not come into effect and the defendant would be able to sell bulk ice cream purchased from manufacturers other than the plaintiffs.

The effective area of the restraint is really not very wide. So long as the plaintiffs supply all the items referred to in the contract the restraint operates, and it cannot be said that such a provision is unreasonable. If the plaintiff ceases to manufacture bulk ice cream the restraint does not operate. If there is a failure to agree upon prices in respect of either bulk ice cream or any other of the scheduled items the restraint does not operate. Thus the restraint exists only where there is an obligation to supply, except in the case of discontinuance of the manufacture of fancy goods. In this category the contract, if the interpretation which I have suggested is correct, produces the result that though the plaintiffs

may discontinue the manufacture of certain lines of fancy goods the defendant is bound not to purchase those goods elsewhere.

All the goods to which the contract applies are ice cream in some form or other. Is it an unreasonable provision for the protection of the plaintiffs' trade that if the plaintiffs continue to supply to the defendant ice cream in bulk at agreed prices and other ice cream in respect of which prices are agreed the defendant shall be bound to buy all ice cream (except ice cream in respect of which there has been a disagreement as to prices) from the plaintiffs ? The restraint is really a very limited one. The illustration used by Mr. *Barwick* appears to me to be in point. If a brewer agrees to supply a publican with beer in barrels and beer in pint bottles, it would not be an unreasonable restraint of trade which required the publican to buy all his beer from the brewer, even though the brewer might not supply beer in gallon kegs. The agreement in the present case is not unreasonable on its face and no evidence was adduced to show that in operation it would be unreasonable. In my opinion the appeal should be allowed and an injunction granted as prayed.

RICH J. The question in this appeal is concerned with the validity of a commercial agreement regulating the trading relations of parties engaged in the sale of ice cream and fancy ices. The parties were on equal terms. *Scientia utrinque par pares contrahentes facit.* The agreement presents the familiar problem as to whether a covenant in restraint of trade is reasonable in the interests of the contracting parties. It was not contended and it does not appear that the restraint is injurious to the public. In dealing with questions of this kind courts now allow a wider restraint in the case of contracts between buyer and seller than between master and servant or between an employer and a person seeking employment (*Attwood* v. *Lamont* (1)).

Restrictive clauses in connection with the plaintiff's business have been the subject of two decisions—*Peters American Delicacy Co. Ltd.* v. *Champion* (2) and *Peters American Delicacy Co. Ltd.* v. *Birchmeier* (3). The latter case bears more resemblance to the instant case. *Roper* J. discarded the decision in this case because he mistakenly thought that there was no corresponding provision to clause 14 in that case. We have taken the opportunity of examining the papers in that case and found that clause 13 therein is in the same form as clause 14 in the case under consideration. And I agree with the decision in *Birchmeier's Case* (3).

(1) (1920) 3 K.B. 571, at p. 587.
(2) (1928) 41 C.L.R. 316.
(3) (1940) 40 S.R. (N.S.W.) 223.

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It is unnecessary to refer to the many cases dealing with covenants in restraint of trade. But for the purpose of this present appeal, which relates to a contract between buyer and seller, I adopt with respect the statement of *Wrottesley* L.J. in *Routh* v. *Jones* (1) where it is said . . . "if the legality is challenged . . . the plaintiff must show that, although in restraint of trade, it is not void because in the circumstances it is necessary for the protection of his business and does not go beyond what is reasonable for that purpose." Although this statement of the law dealt with a contract of employment it applies with greater force in the instant case, in which the restraint imposed upon the buyer is proper and necessary for the protection of the seller's business.

In my opinion the appeal should be allowed.

STARKE J. The appellants manufacture and supply ice cream and ices and the respondent carries on the business of a milk bar and confectionery in Sydney.

In consideration of the appellants undertaking to supply the respondent for a period of sixty months with ice cream and ices at the prices set out in the schedules or at such prices as might from time to time be determined the respondent agreed to purchase the goods so supplied at the prices and subject to the terms of the agreement. The first schedule set out various descriptions of ice cream and prices and the second schedule set out various descriptions of ices and prices.

The question is whether the following stipulation in the agreement between the parties is an unreasonable restraint of trade and therefore void.

Clause 9 :—"So long as you shall be able and willing to supply me/us with ice cream at the respective prices set out in schedule 1 hereof or at such other respective prices as may from time to time be determined . . . I/we will not during the period mentioned . . . in or on the premises 'Wynyard Milk Bar' . . . now occupied by me/us or at any place within a distance of five miles from the said premises manufacture sell serve supply or vend any ice cream other than ice cream manufactured or supplied by you or one of you in whatever form or style and under whatever name the same may be made up or goods of which ice cream or any substitute for ice cream forms the whole or a part."

There is a similar restriction in clause 10 in respect of ices, but that clause was not in contest in the action nor is it in contest in this appeal.

(1) (1947) 1 All E.R. 758, at p. 764.

It is now well settled that if the restriction is reasonable, that is, in reference to the interests of the parties concerned and no more than necessary for the protection of the business of the party in whose favour the restriction is imposed and is not injurious to the public, then the restriction is good. The question is one of law for the court after construing the agreement between the parties and considering the circumstances existing when it was made.

The present agreement is not an agreement of service in which the public interest favours freedom from restriction.

It is a restriction upon trading operations which is not injurious to the public. Prima facie, business men may be allowed to know what restrictions are reasonable in reference to their interests. In this case the restriction operates for a limited time and with respect to a limited area and so long only as the appellants should be able and willing to supply the respondent with ice cream at agreed prices. Moreover, in clause 4 is found a stipulation that the prices may be altered, but if the respondent was not willing to pay any increased prices or price then the contract should be determined " but so far only as it concerns or relates to the goods the prices or price of which you propose to increase."

That, in my opinion, withdraws from the restrictive clause the goods in relation to which the prices or price are increased and which the respondent is unwilling to pay.

Another stipulation in the agreement was much relied upon by the respondent. It is clause 14 as follows :—" In the event of your discontinuing the manufacture of any of the goods other than bulk ice cream as set out in schedules 1 and 2 hereof then upon your giving to me/us notice in writing of such discontinuance the goods mentioned in such notice shall be deemed to be eliminated from schedules 1 and 2 or either of them and you shall not thereafter be bound hereunder to continue to supply me/us with such last-mentioned goods." It was said that the appellants, by wholly discontinuing the manufacture of ice cream, would seriously injure the business of the respondent whilst the appellants would not require protection in respect of the business in goods which they discontinued manufacturing.

But it is an unlikely contingency that the appellants would wholly discontinue manufacturing ice cream mentioned in the schedules and the object and the practical operation of the clause is to protect the appellants from any obligation to supply if, for business reasons, the manufacture of any ice cream mentioned in the schedules became unprofitable or even impossible. And in any case the

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obligation under the agreement to supply bulk ice cream is unaffected.

Considering the nature and terms of the agreement and the circumstances existing when it was made, the restriction imposed upon the respondent is, in my judgment, reasonable in the interests of the parties concerned and not more than necessary for the protection of the business of the appellants.

Consequently the appeal should be allowed.

DIXON J. This appeal turns upon the enforceability of a contractual provision in restraint of trade.

From the few facts proved in the proceedings it appears that the defendant company conducts a milk bar in Sydney on the ramp leading from George Street to the Wynyard Station, and that among the things it sells to the public are ice creams and ice-cream goods. It also appears that the plaintiffs are one of several manufacturers of ice creams and the like in Sydney who supply retailers. Very shortly after the close of hostilities in the late war the defendant entered into a contract with the plaintiffs for the supply by the latter to the former of ice creams and ices for a period of five years from 21st August 1945. It was expressed in a document not under seal in a form which, doubtless, the plaintiffs use generally to bind the retailers they supply. There are two schedules, the first containing a list of various kinds of ice cream and of ice-cream goods and the plaintiffs' selling prices to the retailer and the retailer's selling prices to the public and the second containing a similar but less extensive list of ices.

The agreement begins with a somewhat indefinite clause by which, in consideration of an undertaking by the plaintiffs to supply the defendant with ice cream and ices at prices set out in the schedules or at such prices as may from time to time be determined as thereinafter provided in such quantities as the defendant should order, the defendant agreed to purchase the goods so supplied at the prices and on the terms and conditions thereinafter appearing. The explanation of this indefiniteness is found in two subsequent clauses, one dealing with changes of prices and the other with the contingency of the plaintiffs discontinuing the manufacture of some of the scheduled products. The first of these clauses, it is numbered 4 in the document, enables the plaintiffs to alter the purchasing prices or any of them by giving seven days' notice to the retailer. If, however, it is not a reduction but an increase of price and the retailer is unwilling to pay it, then if within seven days of the notice he gives a counternotice that he does not agree, the " contract shall

thereupon be determined but so far only as it concerns or relates to the goods the prices or price of which " the plaintiffs " propose to increase."

There is a corresponding clause, number 8, dealing with changes in the retail selling prices to the public. If the plaintiffs change these and the defendant does not agree to the change, then the contract shall thereupon be determined but so far only as it concerns or relates to the goods referred to in the notice given by the plaintiffs.

There does not appear to be any provision giving the defendant the initiative in raising retail prices when the plaintiffs raise wholesale prices to the defendant.

The second of such clauses, which is numbered 14, provides for the possibilities of the cesser of production of the scheduled goods, but it excepts bulk ice cream. If the plaintiffs discontinue the manufacture of any such goods except bulk ice cream and give a notification thereof to the retailer, then the goods mentioned in the notice are to be deemed to be eliminated from the schedules and the plaintiffs are not to be further bound to supply them.

The first schedule gives the prices for bulk ice cream in 1, 2, 3 and 5 gallon containers, distinguishing between vanilla and other specified flavours. The list also provides for the supply of ordinary ice cream in cups or buckets and in bricks. But the list enumerates other fancy ice-cream goods, as follows—Kreem-B-Tweens (packed slices of ice cream) including wafers, Peters ice-cream smaks (cylindrical ice-cream bars with or without coating), Ice-cream bars coated with chocolate in two sizes and Two-in-Ones (ice cream in twin portions with coating). Except for the foregoing descriptions taken from the schedule there is no information about these articles. We do not know from the evidence whether at the time of the contract the plaintiffs were manufacturing all or any and which of them, a matter about which the restrictions and shortages prevailing at the time cannot but arouse some uncertainty in spite of the express inclusion of the goods in the schedule. We do not know what, if any, demand for them there was at the Patricia Milk Bar and how, if at all, the demand for them or goods of a like description would affect the sale of vanilla ice cream and whether the failure to supply such a demand would prejudice the defendant's trade. We are in fact told nothing of the course of the trade in ice cream or of the circumstances affecting the defendant's particular trade. These are not matters for judicial notice. But they are matters which might possibly affect our decision upon the validity of the clause with which these proceedings are concerned. That clause, which is numbered 9 in the document, contains an agreement by

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the defendant that so long as the plaintiffs are able and willing to supply the defendant with ice cream at the respective prices in the list, or as from time to time may be determined as aforesaid, the defendant would not either at the milk bar on the Wynyard ramp or at any other place within a distance of five miles therefrom manufacture, sell, serve, supply or vend any ice cream other than ice cream manufactured or supplied by the plaintiffs in whatever form or style and under whatever name the same may be made up or goods of which ice cream or any substitute for ice cream forms the whole or a part.

This provision has been held invalid by *Roper* J. on the ground that it amounts to an unreasonable restraint of the defendant's trade and the question before us is whether his decision is right.

The first matter to consider is the operation of the restraint contracted for. In this must be included the operation the contract would have if recourse were had to the provision for proposing an increase of prices and to that dealing with the contingency of the plaintiffs discontinuing the manufacture of some or all of the listed goods other than bulk ice cream.

It is to be noticed that the condition upon which the restraining clause is itself expressed to depend is that the plaintiffs shall be able and willing to supply the defendant with ice cream, that is in effect at the prices fixed by or pursuant to the contract. It is not easy to say what exactly the expression " ice cream " here means. Does this clause mean that, if the restraint is to operate upon the defendant, the plaintiffs must be able and willing to supply all the varieties of ice cream and ice-cream goods which the schedule mentions, except any that may have been in the meantime eliminated from the schedule under clause 14 or excluded from the further operation of the contract under clause 4 ? I think that it should be so interpreted. It is possible that it refers to ice cream in its simple form and does not include the fancy ice-cream goods. It is even possible that it intends that a supply of any of the ice cream contained in the schedule should be enough to support the application of the restriction which the clause imposes upon the defendant. But the condition should be construed in a sense favourable to the defendant the promisor, both because of what the restriction covers and because the document is one prepared and put forward by the plaintiffs, the promisees.

In the next place, it is to be noticed that the commodity, the defendant's trade in which is restricted, is described in the first instance as ice cream and that expression would receive a meaning co-extensive with the meaning assigned to it where it occurs in the

condition with which the clause opens. But that hardly matters, because the restriction proceeds, "in whatever form or style and under whatever name the same may be made up or goods of which ice cream or any substitute for ice cream forms a part." These words embrace much more than a catalogue or list of ice creams and ice-cream goods like that in the schedule. They constitute a generic description applicable to all present and future forms of ice-cream goods and extending even to substitutes. The description neither depends on nor is concerned with the particular enumeration in the schedule. It is general and forbids trade in all goods of which ice cream forms a foundation or an element, unless they are goods of the plaintiffs.

It is necessary to consider how clauses 4 and 14 operate in relation to the foregoing restriction, because the reasonableness or validity of a covenant in restraint of trade must be judged according to the operation it will have in the various contingencies for which the contract provides, not merely those which chance actually to have occurred up to the date as at which the question arises for decision. It is not to be decided by taking imaginary hypotheses which though logically conceivable would be regarded as completely unreal in the world of practical affairs. But you do consider the scope and operation of the restriction upon the covenantor or promisor in the various possible situations for which the contract upon its proper interpretation may be considered to provide, or which may arise out of any natural or probable exercise by the covenantee or promisee of the powers the contract may confer upon him.

In the present case we are in truth not in a very good position to institute a comparison between events that have happened, that might reasonably be expected to happen and that are only logically conceivable. For we are not told anything about the course of events in the trade, past, present or probable.

Now what may occur under the fourth clause, that relating to price? An upward change in prices is a contingency which no one is now likely to regard as a remote and merely theoretical supposition. It is open to the plaintiffs under clause 4 to propose an increase in prices in very many of the scheduled ice-cream goods. It would not be in the least fanciful to suppose that the prices of all but bulk ice cream were put up to a level which the defendant felt unable to pay. An increase in the price of bulk ice cream perhaps could not be made by the plaintiffs from a business point of view as freely as in other ice-cream goods. But that is a matter of speculation depending in some degree on the situation of other suppliers in relation to retail traders and the margin between the purchasing

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and retail selling prices, matters about which we do not know. But suppose under clause 4 descriptions of ice-cream goods material to the defendant's trade were excluded from the contract. That is, suppose, in the words of the clause, that because of the unwillingness of the defendant to pay increased prices proposed for such goods, the contract was determined so far as it concerns or relates to those goods. Could the defendant in that event obtain such goods from other sources of supply? On the construction of the restrictive clause 9, I should say no, the defendant could not. The restriction is against trading in goods of a general description, ice cream in any form and goods of which ice cream or any substitute for ice cream forms a part. It is an entire description. It is not a provision of the contract that concerns or relates to any specific item or items of the schedule. How can it be said of it that it is a portion of the contract that concerns or relates to Smaks, Kreem-B-Tweens, Ice-cream chocolate bars or Two-in-Ones? It is a universal denial of the defendant's liberty to deal in ice cream or ice-cream goods, not concerning itself with or relating to particular articles. Moreover, it is fairly clear from the language of the schedule that Kreem-B-Tweens, Peters Ice-Cream Smaks and Two-in-Ones are proprietary products and sold under a name to the use of which the plaintiffs may be exclusively entitled. How can the defendant obtain these from another source? And would not products of other manufacturers or wholesale suppliers, though not the same as these but sufficiently like them in the features attracting the consumer to take their place in demand, clearly fall within the general prohibition of restraint? By the operation of clause 4 it appears to me that the retailer might be left without supplies from the plaintiffs of scheduled ice-cream goods he required for his trade and yet under a restriction under clause 9 which would prevent his going to other sources of supply for substitutes for them. The same is true of the operation of clause 8 in the event, at present less likely, of the attempted reduction against the will of the defendant of the retail selling price of ice cream or ice-cream goods.

Under both clause 4 and clause 8 it would be open to the plaintiffs to attempt increases or reductions respectively of prices although at the same time selling to other retailers at the former purchase prices or allowing them to sell at the former selling prices.

The operation of clause 14 depends upon the plaintiffs discontinuing the production of goods and that means that, unlike clause 4, it does not allow of preferences to some retailers over others. Moreover, it excepts bulk ice cream. But it eliminates the goods no longer produced from the schedule only, not from the entire

contract. There can, therefore, be no question that the restriction contained in clause 9 continues to prevent the defendant from obtaining supplies elsewhere of the eliminated goods.

The result of the operation of clauses 4, 8, and 14 with reference to clause 9 is that in the event of the plaintiffs ceasing to manufacture any of the scheduled articles, except bulk ice cream, or attempting in respect of any number, short of all, of the scheduled products to increase purchasing prices or reduce retail selling prices to amounts to which the defendant is unable or unwilling to agree, the defendant would be prohibited from obtaining wholesale supplies of such goods from any source though neither entitled to receive nor receiving any from the plaintiffs. This being the operation of the restrictive provision contained in clause 9, is it enforceable or is it invalid as an unreasonable restraint of trade?

The relation between the plaintiffs and the defendant does not fall under any of the familiar categories to which covenants or stipulations in restraint of trade are commonly referred. Clause 9 is not a restraint upon an employee or an agent or a partner, nor does it arise from the sale of the good will of a business. It forms part of an agreement between two independent contracting parties by which one, the manufacturer and wholesaler, undertakes to supply the orders of the other, the retailer, subject to exceptions, limitations and conditions, and the retailer agrees not to sell goods of the contract description except those supplied by the manufacturer and wholesaler.

But the rule of public policy invalidating restraints of trade unless reasonable includes restrictions upon trading in commodities.

In *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.* (1) Lord *Finlay*, after stating the general principle disabling a man from validly contracting in such a way as to deprive himself or the State of his labour, skill or talent, proceeds, "This is equally applicable to the right to sell his goods."

"All restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject matter of contract" Sir *William James* V.C. in *Leather Cloth Co.* v. *Lorsont* (2).

In *Herbert Morris Ltd.* v. *Saxelby* (3) Lord *Parker* said:—"As I read Lord *Macnaghten's* judgment," (in *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.* (4) "he was of opinion that all

(1) (1919) A.C. 548, at p. 572.
(2) (1869) L.R. 9 Eq. 345, at pp. 353-354.
(3) (1916) 1 A.C. 688, at p. 706.
(4) (1894) A.C. 535.

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restraints on trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course, rest on the party alleging them. When once they are proved, it is a question of law for the decision of the judge whether they do or do not justify the restraint. There is no question of onus one way or another."

This is now settled doctrine : see *Attwood* v. *Lamont* (1). Further, it is now settled that " the restraint must be reasonable not only in the interests of the covenantee but in the interests of both the contracting parties." per *Younger* L.J. (2).

At one time a tendency existed of placing the public policy of securing an ample freedom of contract and enforcing obligations assumed in its exercise in opposition to the public policy of preserving freedom of trade from unreasonable contractual restriction. This tendency is seen in *Lorsont's Case* (3) and it reappears in the judgments of *Scrutton* L.J. and *Sankey* L.J. in *English Hop Growers Ltd.* v. *Dering* (4). *Jessel* M.R. described non-interference with freedom of contract as the paramount public policy : *Printing and Numerical Registering Co.* v. *Sampson* (5). " These remarks " says a text writer, " have been much quoted and have greatly influenced subsequent decisions, and represent the high-water mark of the *laissez-faire* doctrine which prevailed since the decision in *Tallis* v. *Tallis* (6) ; but the position has been somewhat modified since 1913 " : *Sanderson* on *Restraint of Trade*, p. 36.

The opposition has been resolved by the adoption of a clear rule making it necessary to justify all contracts in restraint of trade as reasonable in the interests of both the parties and by applying the test of reasonableness according to the situation the parties occupy and so recognizing the different considerations which affect employer and employee and independent traders or business men, particularly vendor and purchaser of the goodwill of a business.

" With regard to the apparent antagonism between the right to bargain and the right to work, the extreme of the one destroys the other, and the law answers the public interest by refusing to enforce agreements when the right to bargain has been used so as to afford

(1) (1920) 3 K.B. 571, at pp. 588-589.
(2) (1920) 3 K.B., at p. 589.
(3) (1869) L.R. 9 Eq. 345.
(4) (1928) 2 K.B. 174, at p. 181 and p. 186.
(5) (1875) L.R. 19 Eq. 462, at p. 465.
(6) (1853) 1 E. & B. 391 [118 E.R. 482].

more than a reasonable protection to the covenantee" *Astbury* J. in *Hepworth Manufacturing Co. Ltd.* v. *Ryott* (1)

"Freedom of trade cannot, without sufficient legal justification, be restricted by agreement simply on the principle of freedom of contract": per *Isaacs* J. in *Bacchus Marsh Concentrated Milk Co. Ltd.* v. *Nathan* (2) and *Heron* v. *Port Huon Fruitgrowers' Co-operative Association Ltd.* (3).

In the same case (4) *Isaacs* J. points out that what may be called the subordinate rules upon this subject, including those specially applicable to cases of employer and employee are only particular rules of a larger principle. "That principle is that true freedom of trade is not to be restricted, but that a provision which, taken by itself, would amount to such restriction may, when considered in conjunction with and as qualified by the surrounding circumstances, prove to be not really a restriction but merely part of a larger transaction which, regarded as a whole, does not restrict, but may even assist, freedom of trade."

In consonance with this principle a restriction upon one party to a transaction may be allowable if the purpose of imposing it is to protect or even to strengthen the interests of the other party, whether already existing or acquired under the contract, against some hazard or prejudice to which the transaction might otherwise expose them. The party may obtain an adequate protection but no more. The restraint must be reasonable, not only in the interests of the covenantee but in the interests of both the contracting parties; per *Younger* L.J., *Attwood* v. *Lamont* (5). Speaking of this, Lord *Parker* said:—"I think it is clear that what is meant is that for a restraint to be reasonable in the interests of the parties it must afford *no more than* adequate protection to the party in whose favour it is imposed. So conceived the test appears to me to be valid both as regards the covenantor and covenantee, for though in one sense no doubt it is contrary to the interests of the covenantor to subject himself to any restraint, still it may be for his advantage to be able so to subject himself in cases where, if he could not do so, he would lose other advantages, such as the possibility of obtaining the best terms on the sale of an existing business or the possibility of obtaining employment or training under competent employers. As long as the restraint to which he subjects himself is no wider than is required for the adequate protection of the person in whose favour it is created, it is in his interest to be able to bind himself for

(1) (1920) 1 Ch. 1, at p. 11.
(2) (1919) 26 C.L.R. 410, at p. 440.
(3) (1922) 30 C.L.R. 315, at p. 334.
(4) (1919) 26 C.L.R., at p. 441.
(5) (1920) 3 K.B., at p. 589.

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the sake of the indirect advantages he may obtain by so doing." (*Morris* v. *Saxelby* (1)).

"The covenants restrictive of competition which have been sustained have all been ancillary to some main transaction, contract, or arrangement, and have been found justified because they were reasonably necessary to render that transaction, contract, or arrangement effective": Lord *Macmillan* speaking for the Judicial Committee in *Vancouver Malt & Sake Brewing Co.* v. *Vancouver Breweries* (2).

Here the main transaction is an agreement by which manufacturers and wholesalers secure the maintenance of the retail selling prices which they fix or may from time to time fix for a list of their products and the retailer becomes entitled, subject to exceptions and qualifications, to the supply of the listed goods for the purposes of his trade in such quantities as he may order. As an incident of that transaction the retailer incurs the restriction in question.

It may at once be conceded that no reason appears for doubting the validity of the price-maintenance provisions: cf. *Palmolive Co. (of England) Ltd.* v. *Freedman* (3). It may further be conceded that a covenant or stipulation on the part of the retailer not to sell, in competition with the goods supplied by the wholesaler, goods of the same description obtained from other manufacturers may be supported as ancillary to the price maintenance provided for and as a reasonable co-relative of the supply by the wholesaler of the retailer's requirements. But the restriction in clause 9 goes beyond the goods for the time being supplied by the wholesalers, the plaintiffs. If valid, it would bar the sale by the defendant, not only of another manufacturer's goods of the same description as those supplied by the plaintiffs under the agreement, but also descriptions of goods which by reason of the operation of clause 4 or clause 14, the plaintiffs were no longer bound to supply and which in fact they did not supply. It would prohibit the sale of such goods and of any other goods based on ice cream or a substitute for ice cream which might be used to replace in the defendant's retail trade the goods no longer supplied by the plaintiffs. This, in other words is a restriction which is co-extensive neither with the benefit conferred on the one party nor the burden imposed on the other by the provisions governing the supply of the plaintiffs' goods.

For anything that appears it might, in given events, spell a serious hindrance to the defendant's trade. Prima facie it is a

(1) (1916) 1 A.C. 688, at p. 707.
(2) (1934) A.C. 181, at p. 190.
(3) (1928) Ch. 264.

restraint larger than the plaintiffs as manufacturers can reasonably require because it extends, in the contingencies contemplated, beyond the description of goods they continue to produce and, among those they do continue to produce, beyond the descriptions of goods they are prepared to supply to the defendant at the prices initially agreed.

Suggestions were made to the effect that a justification for this extension could be found in the nature of the trade, in the part which bulk ice cream played, and in the competition between bulk ice cream and the scheduled fancy ice-cream goods and also between such scheduled goods *inter se*. Suggestions of this kind rest upon facts. It would be rash to deny that in no circumstances, in no special facts, could a justification be found for the apparent want of correspondence between, on the one hand, the extensiveness of the restraint upon the defendant's trade and, on the other hand, the descriptions of goods the plaintiffs bound themselves to supply and in respect of which they might legitimately ask protection. But such facts must be proved. Lord *Macclesfield* in *Mitchel* v. *Reynolds* (1) said :—" The rule is, that wherever such contract *stat indifferenter*, and for ought appears, may be either good or bad, the law presumes it *prima facie* to be bad."

If a covenant or stipulation in restraint of trade is impeached, whether between independent traders or employer and employee, it rests upon the covenantee or promisee to show that it is valid because in the circumstances it is required for the safeguarding of his business or other interests and does not go beyond what is reasonable for the purpose. If the special circumstances upon which he relies do not appear on the face of the transaction itself, he must prove them. When he has done so it becomes a matter of law whether they suffice to make the restriction reasonable having regard to the interests of both the parties. If it so appears, the question of the interests of the public may arise, but there the burden is different.

The law has been settled to the foregoing effect by a series of decisions over the last three decades, the latest of which is *Routh* v. *Jones* (2).

In the present case no circumstances are made to appear which would justify the restraint resulting from the combined operation of clause 4 or clause 14 or both of them with clause 9. Clause 9, in my opinion, cannot be sustained. No attempt was made to show that any part of the clause could be saved by severance.

(1) (1711) 1 P. Wms. 181, at pp. 191, 192 [24 E.R. 347, at p. 351].

(2) (1947) 1 All E.R. 758.

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The clauses of the contracts dealt with in *Peters American Delicacy Co. Ltd.* v. *Champion* (1) and *Peters American Delicacy Co. Ltd.* v. *Birchmeier* (2) were very different in material respects from the provisions of that now in question. I do not think those decisions affect the present case.

In my opinion the appeal should be dismissed.

McTIERNAN J. I am of opinion that the appeal should be allowed. The contract in this case is one for the sale of goods. It is a contract the effect of which, if enforceable, would be to compel the respondent to order all the ice cream needed for sale in its business from the appellants except, in the view which I take of the effect of the last part of clause 4, any line of ice cream about which the parties could not agree upon a higher price than that stipulated in schedule 1 for that line. Clause 9 is in the nature of a tying clause. This clause is not in itself an unlawful restraint upon trade. The considerations stated in *United Shoe Machinery Co. of Canada* v. *Brunet* (3) apply in principle to a sale subject to a condition of the nature of clause 9. The clause has, however, to be considered in relation to clause 4 and clause 14 respectively.

In my opinion, the argument that clause 9 is an unlawful restraint upon trade is not assisted by clause 4. The last part of this clause, providing for the determination of the contract, releases any goods in respect of which the parties fail to agree upon an increased price from the operation of clause 9, because the contract, that is the whole contract, is determined so far as such goods are concerned. But clause 14 does not release any goods of which the appellants discontinue the manufacture from the operation of clause 9. It follows that as regards such goods, the covenant in clause 9 would continue to bind the respondent. There is no evidence of any special circumstances showing what clause 9 was inserted to protect or the thing that it was inserted to oppose. I think it would be mere guess work to speculate on these matters. But I think that it is not necessary that there should be evidence of such circumstances in this case. The argument that clause 9 is an unlawful restraint upon trade is based upon the supposition that the appellants might give up the manufacture of lines of ice cream which other manufacturers would continue to make. Clause 14 excepts bulk ice cream from its operation. I cannot regard the event supposed as other than a remote contingency.

(1) (1928) 41 C.L.R. 316.
(2) (1940) 40 S.R. (N.S.W.) 223.
(3) (1909) A.C. 330, at pp. 342, 343.

It is necessary to consider the contract as a whole. The object of clause 14 seems to be to protect the appellants if the respondent insisted upon ordering any line which the appellants for any reason ceased to manufacture. It is not to be assumed that substantial trade could continue to be done in that line and that the appellants would give up their trade in the line to rival manufacturers: cf. *United Shoe Co.* v. *Brunet* (1). Clause 9 is not, in my opinion *ex facie* an unreasonable restraint of trade. It is in negative form, and is enforceable by injunction.

WILLIAMS J. This is an appeal from a decree made by *Roper* J., sitting as the Supreme Court of New South Wales in its equitable jurisdiction, dismissing a motion for injunction which was by consent turned into a motion for decree. The suit was brought by the appellants as plaintiffs against the respondent as defendant to restrain the defendant from selling ice cream, other than ice cream supplied by the appellants, in breach of clause 9 of a contract made between the parties on 6th September 1945. There was clear evidence of deliberate breaches of the clause by the defendant, but his Honour held that the clause was void because it was in restraint of trade and unreasonable as between the parties.

The appellants are two companies associated in the manufacture and sale by wholesale of ice cream and ices in a large way of business, and the respondent is a company which carries on the business of a milk bar and confectioner at Wynyard Milk Bar, at the entrance to Wynyard Station, George Street, Sydney. The contract in question is a contract by which the appellants bind themselves, subject to the terms and conditions therein contained, to supply the respondent with ice cream and ices for a period of sixty months from 21st August 1945.

The contract is in some respects similar to, and in other respects different from, the contracts which were discussed by this Court in *Peters American Delicacy Co. Ltd.* v. *Champion* (2) and by myself sitting as the Supreme Court of New South Wales in *Peters American Delicacy Co. Ltd.* v. *Birchmeier* (3). The contract in *Champion's Case* (4) related to the sale of ice cream in bulk, flavoured with vanilla and fruit flavours, in 1, 2, 3, and 5 gallon containers, and to the sale of certain goods which consisted mainly of ice cream such as chocolate coated ice-cream bars. The contract in *Birchmeier's Case* (3) contained two schedules. The first schedule, which was headed "Description of Goods," included ice cream in bulk flavoured

(1) (1909) A.C., at p. 343.
(2) (1928) 41 C.L.R. 316.
(3) (1940) 40 S.R. (N.S.W.) 223.
(4) (1928) 41 C.L.R. 316.

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with vanilla and fruit flavours sold in 1, 2, 3, and 5 gallon containers, and ice-cream blocks and certain goods mainly consisting of ice cream such as ice-cream "smaks" and chocolate coated ice-cream bars. The second schedule, which was also headed "Description of Goods," included certain forms of ices. The present contract, like the contract in *Birchmeier's Case* (1) has two schedules. The first schedule, which is headed "ice cream," includes similar forms of ice cream in bulk and other goods mainly consisting of ice cream to those in *Birchmeier's Case* (1). The second schedule, which is headed "ices," refers to certain forms of ices.

The contracts in all three cases contain prices at which the manufacturer is bound to supply the goods ordered by the retailers, and also provisions for the alteration of such prices. The contract in *Champion's Case* (2) provided that prices were subject to alteration on giving the customer seven days' notice in writing. It was held that unless the customer agreed to the alteration the contract came to an end. It was evidently felt that the rights of the appellants to alter the prices, and the effect of an alteration upon the contract as a whole where the altered prices were not agreed to by the customer needed clarification, and a clause which is clause 4 of the present contract was inserted in the contract for this purpose. The text of this clause, which is the same as that of clause 4 in *Birchmeier's Case* (1) is as follows:—"4. The purchasing prices or price or any of them may be altered from time to time on your giving me/us seven days previous notice in writing of such proposed alteration. In the event of such alteration resulting in increased prices or price if I am/we are not willing to pay you such increased prices or price or any of them I/we shall notify you in writing accordingly within seven days of receipt by me/us of such notice by you and this contract shall thereupon be determined but so far only as it concerns or relates to the goods the prices or price of which you propose to increase."

The concluding words of this clause make it clear that in the event of a customer not accepting an increase in price of any form of ice cream or ice described in the schedules, this particular form of ice cream or ice is removed from the operation of the contract for all purposes. The appellants are therefore no longer bound to supply the customer with that particular form of ice cream or ice, and the customer is at liberty to sell supplies purchased from a competitor.

Clause 14 of the present contract, the text of which is the same as clause 13 in *Birchmeier's Case* (1) is as follows:—"14. In the

(1) (1940) 40 S.R. (N.S.W.) 223. (2) (1928) 41 C.L.R. 316.

event of your discontinuing the manufacture of any of the goods other than bulk ice cream as set out in schedules 1 and 2 hereof then upon your giving to me/us notice in writing of such discontinuance the goods mentioned in such notice shall be deemed to be eliminated from schedules 1 and 2 or either of them and you shall not thereafter be bound hereunder to continue to supply me/us with such lastmentioned goods."

This clause authorizes the appellants to discontinue the manufacture of any of the goods described in the first and second schedules other than bulk ice cream, and to eliminate these particular goods from the schedules as goods which the appellants are bound to supply to the customer upon demand. This clause unlike clause 4 does not provide that the contract shall be determined with respect to these particular goods, so that the customer would still be prevented by clauses 9 and 10 from selling these particular forms of ice cream and ices purchased from a competitor.

The present contract, like that in *Birchmeier's Case* (1) contains two restrictive clauses, but they are not in the same terms. Clause 9 relates to the purchase of ice cream and clause 10 to the purchase of ices from a competitor. The text of these clauses is as follows :— " 9. So long as you shall be able and willing to supply me/us with ice cream at the respective prices set out in schedule 1 hereof or at such other respective prices as may from time to time be determined as aforesaid I/we will not during the period mentioned in clause 1 hereof in or on the premises ' Wynyard Milk Bar,' 27-34 The Ramp, George Street, Sydney, now occupied by me/us or at any place within a distance of five miles from the said premises manufacture sell serve supply or vend any ice cream other than ice cream manufactured or supplied by you or one of you in whatever form or style and under whatever name the same may be made up or goods of which ice cream or any substitute for ice cream form the whole or a part." " 10. So long as you shall be able and willing to supply me/us with ices at the respective prices mentioned in schedule 2 hereof or at such other respective prices as may from time to time be determined as aforesaid I/we will not during the period mentioned in clause 1 hereof in or on the premises ' Wynyard Milk Bar', 27-34 The Ramp, George Street, Sydney, now occupied by me/us or at any place within a distance of five miles from the said premises manufacture sell serve supply or vend any ices other than ices manufactured or supplied by you or one of you in whatever form or style and under whatever name the same may be made up or of which ices or any substitute therefor forms the whole or a part."

(1) (1940) 40 S.R. (N.S.W.) 223.

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The clause with which we are concerned on this appeal is clause 9. This is a clause which is in restraint of trade. It is therefore void unless the appellants can establish that it is reasonable as between the parties and consistent with the interests of the public: *Vancouver Malt and Sake Brewing Co. Ltd.* v. *Vancouver Breweries Ltd.* (1).

His Honour held that the contract was unreasonable between the parties partly because he considered that a customer who was unwilling to pay an increase in the price of any particular form of ice cream or ices would not be able to purchase his supplies of these particular goods from some other manufacturer, despite the explicit words of clause 4 that the contract should be determined so far as it concerned or related to such goods. I cannot accept this construction, and adhere to the contrary view already expressed in *Birchmeier's Case* (2). I agree with his Honour that the exercise by the appellants of their right under clause 14 to discontinue the manufacture of any goods of any description other than bulk ice cream as set out in the schedules would not enable the customer to purchase supplies of these particular forms of ice creams and ices elsewhere. But I cannot agree that such a provision is unreasonable. The clause does not give the appellants an arbitrary right to eliminate the goods from the respondent's contract whilst remaining under an obligation to supply the same goods to a competitor. The clause only applies if the appellants discontinue the manufacture of the goods so that they are unable to supply any of their customers.

The appellants must have some control over the various forms of ice cream and ices which they are bound to supply to their customers from time to time. It may become impracticable to manufacture some forms and unprofitable to manufacture others because there is such a small demand for them. The particular forms of ice cream described in the first schedule are either bulk ice cream of various flavours, or ice cream in particular shapes or in particular containers or coated with chocolate or some other substance. Bulk ice cream is expressly excepted from the operation of clause 14, and it is this obligation to supply ice cream in bulk which is the foundation of the contract.

In the *Vancouver Case* (3) Lord *Macmillan* said—" The covenants restrictive of competition which have been sustained have all been ancillary to some main transaction, contract, or arrangement, and have been found justified because they were reasonably necessary to render that transaction, contract or arrangement effective." In *Palmolive Co. (of England) Ltd.* v. *Freedman* (4) Lord *Hanworth* cited

(1) (1934) A.C. 181, at pp. 189-190
(2) (1940) 40 S.R. (N.S.W.) 223.
(3) (1934) A.C., at p. 190.
(4) (1928) Ch. 264, at p. 270.

the following passage from the judgment of Lord *Macclesfield* in *Mitchel* v. *Reynolds* (1): "In all restraints of trade, where nothing more appears, the law presumes them bad; but, if the circumstances are set forth, that presumption is excluded, and the court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained."

It was contended that clause 9 imposed a greater restraint than was reasonably necessary for the protection of the appellants' business because it was not reasonable to require that, if they ceased to manufacture particular forms of ice cream, their customers should be restrained from buying such forms of ice cream elsewhere. But this contention overlooks the whole substance and reality of the matter. The business of the plaintiffs is that of manufacturing and selling ice cream and ices, and it is the goodwill of that business which they are entitled to take reasonable measures to protect. It is not therefore unreasonable that they should require their customers to take all their supplies of ice cream and ices from them, even if they do not manufacture some forms manufactured by their competitors, when they are bound to supply their customers with the forms of ice cream and ices they are manufacturing from time to time. The contract, as pointed out in *Birchmeier's Case* (2) where a number of authorities are cited, is of the same nature as a covenant by which a brewer agrees to supply a hotel-keeper with beer, and the hotel-keeper agrees to buy all his beer from that brewer exclusively. The validity of such a covenant has never been questioned, even where, as in *Catt* v. *Tourle* (3) it is perpetual. It has never been suggested that such a tie is unreasonable because it would prevent the hotel-keeper buying beer of a different quality to that manufactured by the covenantee. In the case of contracts in restraint of trade, such as the present contract, made between parties at arms length, the court is slow to hold a restriction, which they themselves have agreed upon, to be unreasonable. It considers that the parties are usually the best judges of what is reasonable: *North West Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.* (4); *English Hop Growers Ltd.* v. *Dering* (5); *Vancouver Malt and Sake Brewing Co. Ltd.* v. *Vancouver Breweries Ltd.* (6); *Palmolive Co.* v. *Freedman* (7); *Cooper* v. *Cooper* (8).

(1) (1711) 1 P. Wms. 181, at p. 197 [24 E.R. 347, at p. 352].
(2) (1940) 40 S.R. (N.S.W.), at p. 230.
(3) (1869) 4 Ch. App. 654.
(4) (1914) A.C. 461, at p. 471.
(5) (1928) 2 K.B. 174, at p. 181.
(6) (1934) A.C., at p. 189.
(7) (1928) Ch., at pp. 271, 272.
(8) (1941) 65 C.L.R. 162, at p. 184.

H. C. OF A. 1947.

PETERS AMERICAN DELICACY CO. LTD. v. PATRICIA'S CHOCOLATES AND CANDIES PTY. LTD.

Williams J.

Under these circumstances, it appears to me to be reasonable for the appellants to require their customers, so long as they are able and willing to supply them with the goods described in the first schedule (subject to the limited right of elimination conferred by clause 14) at the prices fixed by the contract or at other agreed prices, not to procure their supplies of ice cream or goods of which ice cream or any substitute for ice cream forms the whole or a part from any other manufacturer (other than such goods as to which the contract has been determined under the provisions of clause 4).

It was not contended that, if the contract is reasonable between the parties, it is not consistent with the interests of the public.

For these reasons I would allow the appeal.

Appeal allowed with costs. Decree of Supreme Court set aside. In lieu thereof order that defendant its servants and agents be restrained during the currency of the contract between the parties of 6th September 1945, *so long as the plaintiffs shall be able and willing and obliged to supply the defendant with any of the various forms of ice cream and ice-cream products set out in Schedule* 1 *thereto (or with such products as shall not have been eliminated therefrom under clause* 14) *at the respective prices set out in that schedule or at such other prices as may from time to time be determined under clause* 4 *of the said contract from selling serving supplying or vending at Wynyard Milk Bar,* 27-34 *The Ramp, George Street, Sydney, or at any place within five miles thereof, any ice cream other than ice cream manufactured or supplied by the plaintiffs or one of them in whatever form or style and under whatever name the same may be made up or goods of which ice cream or any substitute for ice cream forms the whole or a part (other than the goods as to which the contract shall have been determined under clause* 4) ; *and that the defendant do pay to the plaintiffs the costs of the suit.*

Solicitors for the appellants, *McDonell & Moffitt.*
Solicitor for the respondent, *Arthur T. George.*

J. P. C. W.