*M. P. Ellinghaus**

AMOCO v. ROCCA: AN ANATONATION

Oppose the party eight-legged essay.—Mao Tse-Tung

1

Amoco entered the Australian petroleum market in 1961. In 1964 it joined with Rocca in establishing a service station on land owned by Rocca near Adelaide in an area then due for development. Rocca built the station, supplying labour and about $24,000. Amoco supplied pumps and other equipment.

In 1966 the parties made a headlease and sublease, both backdated to 1964. Rocca let the premises to Amoco for fifteen years, subject to Amoco's right to cancel after ten, in return for a rebate of 2.5 cents per gallon of petrol supplied to the station.

Amoco sublet to Rocca for fifteen years less one day. The sublease bound Rocca to buy at usual list prices exclusively from Amoco at least 8,000 gallons of petrol and 140 gallons of motor oil per month, to carry on during all trading hours the business of a petrol service station only, and not to alter or leave the premises without consent.

The sublease bound Amoco to supply Rocca's entire requirements of petroleum products unless Amoco was in its own opinion unable to do so, or Rocca had failed to pay for products already supplied. In event 1 but not in event 2 Rocca could buy elsewhere.

In addition to supplying initial equipment Amoco spent some $19,000 on the station in the period 1964 to 1969. In particular in 1968-1969 it co-operated in improving the station to cope with increased business and the threat of competition. In return Rocca extended the headlease by five years.

In 1971 Rocca sought to renegotiate. Amoco refused. Rocca went over to the rival oil company IOC. Amoco sued. Rocca argued unreasonable restraint of trade. Wells held for Amoco. The Full Court (Bray, Hogarth, Walters) reversed unanimously.** The High Court dismissed Amoco's appeal by a majority of three (McTiernan, Walsh, Gibbs) to two (Menzies, Stephen).***

2

August 7, 1972. Bray: [331] I do not expect that the decision of this court will provide more than temporary authority in this field and I am anxious to express myself no more widely than necessary.[1]

[332] The first question is whether there can be no unenforceability if the party restrained gives up no freedom he formerly had, as in the case of a man who buys or leases land subject to a covenant restraining trading on

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** *Amoco Australia Pty. Ltd.* v. *Rocca Bros. Motor Engineering Co. Pty.* (1972) 7 S.A.S.R. 268.

*** (1973) 133 C.L.R. 288. Further proceedings before the Supreme Court, (1974) 7 S.A.S.R. 357, and the Privy Council, (1975) 133 C.L.R. 331, are not here considered.

1. Wells; [280] Comparatively few judgements [are] in their day acknowledged as supreme achievements of the judicial process.

that land. [333] Without deciding I am content to assume [334] that law[,] because I do not think that the present case falls within it. The covenants in the underlease impose not merely negative but positive obligations. They bind Rocca not only not to buy its petrol supplies from anyone else but to keep the station open during all lawful trading hours. More importantly, it is not correct that Rocca was submitting to restraint on a freedom which it never had if we look at realities as opposed to technicalities. Before the agreement Rocca had a freedom to trade on the land as owner, thereafter it had to trade in accordance with the underlease. Any interval between the taking of the lease and the underlease, however important for the technical law of real property, ought not to be allowed to obscure the realities.[2]

[337] Mr. Jacobs contended that the doctrine of restraint of trade should have no application to a land owner who enters for the first time on the business of petrol retailer and who has no practicable way of doing it except by entering into a trade tie. A case like this, where Amoco too was entering the field, was more that of a joint venture than that of supplier and reseller. Though these matters bear on reasonableness they cannot exclude consideration of the doctrine.[3]

[339] I agree that Amoco had proprietary and commercial interests to be protected. That means under modern conditions tied service stations. No one suggests that all solus agreements are unenforceable.[4]

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2. Walsh: [304] I agree with Bray C.J. It is not necessary to examine the principle stated. I should be reluctant to accept that principle.
Gibbs: [313] I do not find it necessary to consider whether a transaction of that kind is not subject to the doctrine. The present is not a case in which the covenantor accepts a lease of land on which he had never previously a right to trade. [314] The positive agreement to carry on business might in itself be a restraint.
Menzies: [293] It is not necessary to determine whether the doctrine can have no application in such a case. Rocca was never out of possession. The lease and underlease were merely machinery.
Wells: [282] A person buying or leasing land had no previous right to be there and is unable to claim that a freedom has been restrained. [309] Mr. Jacobs invited me to hold that Rocca had been let into possession by the oil company and that therefore the tie must be good. It would need a higher authority than this Court to hold as he contended.
Hogarth: [352] A lease with a restrictive covenant may be a contract in restraint of trade. I think it deplorable that not even the highest authorities speak with a clear voice.
3. Gibbs: [314] There is no justification for excluding the doctrine where the covenantor is [315] obliged to accept restrictions; in such cases the doctrine is most likely to be needed. [316] The parties were not joint venturers; Amoco was a supplier endeavouring to bind Rocca.
Walsh: [305] There is no warrant for such rules of exclusion.
Wells: [310] I am inclined to Mr. Jacobs' argument. I do not now endorse it unconditionally because possibly the choice was between *virtually* no hope of success and every hope. [303] Willingness to combine in a business venture tends to establish the reasonableness of an agreement.
Stephen: [322] I regard the doctrine to be inapplicable. Rocca [323] by its arrangements with Amoco acquired the business. But for those arrangements or others of a similar nature Rocca's entry into the trade would not have been possible. Those arrangements were not restrictive but productive of trade.
4. Gibbs: [319] Amoco could not have entered the field unless a sufficient number of stations would sell only its products. It is not suggested that agreements of this kind were in themselves unreasonable.
Walsh: [308] It is not in doubt that Amoco was entitled to a trade tie.
Menzies: [298] Solus agreements are an accepted element of commercial life. The law recognizes this.
Wells: [283] Restraints that have normal currency may be presumed reasonable.

Since the situation has to be judged at June, 1964, Amoco is not entitled to respect of moneys subsequently spent. Nor is it to the point to reproach Rocca with ingratitude in view of 1968. Nor does it matter that it proceeded to remove Amoco's pumps with indecent haste: if the covenants were not enforceable, it was entitled to do that; if they were, Amoco has its remedy.[5]

I recognise that there is a public policy preserving the sanctity of contract. [340] Nevertheless the law relating to restraint to trade remains.[6]

[342] It is necessary to examine individual covenants. Clause 3e contains a covenant not to assign, mortgage or part with possession, to be read as if consent was not to be unreasonably withheld. It might not be unreasonable for Amoco to withold consent to an assignment which might allow Rocca to make the best of a bad bargain. Clause 3g compels Rocca to carry on business during all lawful trading hours [343] and clause 3i binds Rocca to purchase minimum monthly quantities. This compels Rocca to continue trading even at a loss unless released by Amoco.[7]

By clause 4a Amoco agrees to deliver Rocca's requirements. But by clause 4b if Amoco is unable to supply for any reason which is in its sole opinion beyond its control its obligation to do so is suspended.[8] By clause 4c it is not bound to supply unless Rocca has paid for all products previously paid.[9]

It is unnecessary to expatiate on the extent to which Rocca's business is made dependent on the goodwill of Amoco.

The rebate payable by Amoco is fixed for the duration of the term. I do not think we are bound to blind ourselves to inflation. If the rebate proved

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5. Hogarth: [354] The onus is on reasonableness in the circumstances in 1964.
Wells: [301] The fundamental date is 1966. But [302] I ought not to exclude the events of 1964 and 1965.
Walsh: [303] Expenditure after 1966 cannot be part of the consideration provided by Amoco, which has to be assessed at the date when the covenants were made. 1969 has no bearing.
Menzies: [294] I regard it as of weight that Rocca in 1969 agreed to extend. [296] His Honour properly laid stress on substantial benefits over a period of years.
Gibbs: [318] It was conceded that the question be decided as at June, 1964. I am not satisfied that this was correct. Facts that occurred since might be vital.

6 Wells: [281] There is a public policy as to freedom of trade and a public policy as to freedom of contract; it is the court's task to reconcile [282] those two.
Gibbs: [317] There are two principles of policy in opposition—of enforcing contractual obligations and of preserving trade from unreasonable contractual restriction.
Stephen: [323] The doctrine seeks to reconcile two apparently conflicting aspects of public policy, on the one hand the preservation of freedom of the individual to employ his talents and industry, on the other his ability to enforce contracts. With changes in the community the point of balance has shifted and will continue to do so.

7. Gibbs: [321] The interest of Amoco might be served by maintaining an outlet as long as it could.
Walsh: [300] I am not persuaded that if it was difficult for Rocca to trade profitably it would be of no advantage to Amoco to insist.
Wells: [296] The convenantor could rely on the good sense of Amoco. [298] There is something unreal in Amoco insisting on one of its proprietors persevering in a business that was doomed. Clauses not unlike 3g have found their way into common use.

8. Walsh: [302] The liability of Amoco to maintain supplies is limited in a way that could leave Rocca in difficulties.
Wells: [300] The exigencies of international commerce are such that it is not surprising to find Amoco reserving for itself ample protection.

9. Wells: [300] A right that most wholesalers in comparable positions would reserve for themselves.

unremunerative, Amoco had the option of determining the lease at the end of the tenth year.[10]

Mr. Jacobs urged that Amoco was not likely to abuse its powers, since its interest in profitable running was as great as that [344] of Rocca. But commercial good sense could operate in different ways depending on the time.[11]

[345] The covenants in the underlease go beyond what was reasonably necessary for the protection of Amoco. Certainly Amoco has not shown the contrary and the onus is on it. A shorter term or less onerous covenants or both would have been adequate.[12]

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10. Hogarth: [354] Amoco is not interested in a proposition which does not produce 10%.
Wells: [291] Amoco determined that at the end of fifteen years the project would yield 10.2% after tax. [292] Amoco adopted an extremely cautious approach. Other figures yield an estimated 17%. [293] That the company was unreasonable by no means inevitably follows. Profitability is just another circumstance.
Bray: [342] Amoco ought to have estimated that profitability would be much higher.
Gibbs: [320] It was not shown that Amoco's outlay could not be recouped with profit in a shorter period.
Hogarth: [356] Amoco was taking too pessimistic a view. It may have been proper to discount expectations. But there is no evidence to support that supposition.
Walsh: [310] Maybe the officers who decided to use the lower figure had reasons for doing so. But the absence of evidence is [of] importance.
Walsh: [303] Increases in the price of petrol could make the rebate small.
Gibbs: [321] Inflation might greatly reduce the value of the rebate.
Wells: [314] Amoco undertook a rebate materially higher than normal. [316] It is essential for me to weigh the consideration provided by each party in order to satisfy myself that the bargain was not lopsided.
Gibbs: [316] The court may not weigh whether consideration is equal. Nevertheless it is permissible to consider the quantum received by the covenantor.
11. Walsh: [300] I do not question the propriety of disregarding some theoretical possibility, [301] but within very narrow limits.
12. Wells: [314] The Roccas had land, adequate skill, and some money. Amoco had supplies, the organisation for distribution, and the power to help in numerous ways. Amoco furnished substantial aid, it undertook a rebate higher than normal, to treat the new station in the same way as its own, and of course to provide petroleum products. There was no agreement for retail price maintenance, and no power to sell at other than usual list prices. [315] If the terms did not reflect the interest of Rocca and Amoco respectively, and on the [316] part of each the provision of substantial consideration, did not provide for a new venture, jointly undertaken, in an area whose rate and pattern of development was uncertain, I might have regarded fifteen years as too long. On consideration of the circumstances, however, the term is reasonable as between the parties.
Menzies: [294] Rocca could and did freely negotiate and after contact with at least one other supplier made the best bargain it could when there was competition among oil companies to secure solus outlets. [295] The trial judge found the bargain fair to both sides. [296] The Full Court ought not to have substituted its own opinion. Great regard should be accorded a trial judge who applied his mind after careful review.
Stephen: [329] If contrary to my view the doctrine is applicable [330] I would agree with Menzies J.
Hogarth: [356] The evidence falls short of establishing that the covenants were reasonable between the parties.
Walters: [356] The covenants and the term [357] were cumulatively oppressive to an unreasonable degree.
Gibbs: [318] The judge's decision that the covenants were reasonable is not a decision of fact. An appellate court inquires not whether it has been shown wrong but simply whether it is right. [320] It has not been shown that a tie for fifteen years was reasonably necessary. Changes could render covenants intolerably burdensome. [322] The restraints were not reasonable.
Walsh: [305] It is inappropriate to apply the approach made by an appellate court to findings of fact. [308] A decision on reasonableness depends on reasons which do not admit of great elaboration. The term of the tie in conjunction with the covenants was greater than reasonably necessary. At all events its reasonableness was not established.
McTiernan: [290] I had the advantage of considering the reasons prepared by Walsh J. I agree with them.

That makes it unnecessary to consider the public interest.[13]

3

1

A book doesn't begin with its title and stop with the word end. It radiates toward all other books which constitute the text in which we are trapped from our first lispings. So there are not x+1 books, but an indefinite and moving text. The text is never read because it has no end. One dips at random into pieces of the text. It develops a practice that is radiating, divergent, detailed, pluralist.[1]

Even some ideas which I cherished as the unique results of my own speculation turned out to have come from predecessors, parallels, or similar formulations elsewhere. Thus the only merit of this survey seems to be its tendency to focus everything surrounding us on the one point.[2]

Is the High Court able to make better decisions because ninety cases are cited on a constitutional issue? True the court must decide similar cases similarly; but could it secure an equally just result if it went to the constitution itself and ignored the cases?[3]

We are all, after all, driven by the ultimate mystery of our own situation to be ludists of the unknowable. All we can understand, and not very well, are the games we ourselves generate and predictably lose.[4]

2

A satire against lawyers or astrologers: they pretend by rules of art to fortell in what a suit will end, making the matter depend entirely on the influence of stars.[5]

3

What we call "mind" is merely the style of reaction of an organism to its environment. On the simplest level we have the direct reflex. The organism responds to the intrinsic properties of its field. On the next level we have the conditioned reflex. Food and a bell are presented simultaneously, and the dog grows accustomed to associating one with the other. Finally, food is omitted and only the bell is presented, but the animal salivates. On a higher level the animal himself sees a relationship. The chimp uses a stick to knock down a banana suspended out of reach. Finally, we have the highest level of reactivity: symbolic behaviour. Man coins a designation for

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13. Gibbs: [322] Since the restraints were not reasonable it is unnecessary to consider the interests of the public.
Hogarth: [356] I do not find it necessary to consider the interest of the general public.
Walsh: [307] Public policy lies at the root of the rule. Deprivation of liberty is regarded as detrimental to the public interest.
Wells: [284] The onus of proving the public interest lies on the party who impeaches the restriction. [316] Rocca's claim that the arrangement was obnoxious to the public [320] identified the detrimental effect as a reduction in competition between wholesalers for outlets. [323] The difficulty of deciding at what point the reduction outweighs the benefits derived from the solus tie [is] most formidable. Bearing in mind the onus Rocca has not established that the arrangement was contrary to the public interest.
Menzies: [296] The interest of the public [is] in the carrying out of commercial arrangements entered into by parties who appreciate their own interests.
Stephen: [324] No loss of livelihood is present; services were made available to the community; the total number of service stations has been increased. [326] To give effect to public policy it must be to commercial realities that attention is directed.

an object, and responds to that designation. The word "house" has no intrinsic qualities that connect it with an object—we could just as well use *casa* or *maison* or *dom*. The development of mind, then, is a progressive freedom of reactivity.[6]

4

My father had certain persistent pursuits which later produced in me an indisputably beneficent result. During my childhood, when there are formed in man the data for his responsible life, my father took measures so that there should be formed in me, instead of data engendering fastidiousness, repulsion, squeamishness, fear, timidity, and so on, the data for an indifference to everything that usually makes these impulses. He would sometimes slip a frog, a worm, a mouse, or some other animal into my bed, would make me take non-poisonous snakes in my hands, and so on. He always forced me to get up early in the morning, when a child's sleep is particularly sweet, and go to the fountain and splash myself all over with cold spring water, and afterwards to run about naked, and if I tried to resist he would never yield, and would punish me without mercy. I often in later years thanked him with all my being.[7]

The difference between insanity and what we call normal conduct consists largely in the success a person has in conversion. Had Napoleon, for example, merely dreamt his conquests, magnifying them year by year as his malady grew, he would have been confined to an asylum like so many other "emperors of the world" as soon as his conduct conflicted with other people's activities. His paranoia was permitted at large due to his ability to convert it into forms of contemporary social life, politics and military activity.[8]

There was a time when my thoughts on the insanity of our life appeared to me to such an extent in disagreement with the great majority of people that I felt embarrassed and alarmed when attempting to express them. Recently, however, I began to experience just the opposite. I felt embarrassed and alarmed when I refrained from expressing my thoughts on this matter. A few months ago I picked up a paper—I had not done this for a long time—and everything I read was so strange to me that I could scarcely believe that all the events described did actually take place. Why, when told to do so, should people join the army, learn to kill and set out killing people they do not know? Why do they go to the courts and demand that punishment should be meted out to offenders and themselves submit to punishment, knowing that no one is entitled to judge others? Why do people submit to the demands of strangers in the most important matters of the soul, in the acknowledgement of what is sacred, namely good, and what is not sacred, namely evil? To all these questions there can be but one answer, namely that people are in a state of insanity. Not in any figurative or exaggerated sense, but literally, in the most direct sense of the word.[9]

5

There is no logical point of departure, logic has always already departed.[10]

6

I do not know who coined the slogan of the French revolution; he must have been a person of insight. To the pair of opposites, liberté versus égalité, he added a third force—fraternité, brotherliness.[11]

7
Economic exchange is thought to be extremely individualistic. Easy to escape the fact that exchange is a species of human cooperation. There is no one around with whom the true lone wolf can exchange things or services. Nor, of course, can the true lone wolf participate in the specialisation of labour which causes and is caused by exchange.

Exchange involves a mutual goal of the parties, namely the reciprocal transfer of values. The core of cooperation tends to expand if the exchange is extended over time.[12]

Courts in Indonesia will revise mortgage loans by taking the difference between the purchasing power of gold at the time the mortgage was entered into and the time it was discharged, and divide it between the mortgagor and the mortgagee. The attitude of the courts in this respect is contrary to the written law, but is justified as part of the approach which relegates the formal law to the status of commentaries.[13]

The law is immanent in a specific fact pattern. The critical legal institution, therefore, is not the legislature but the court.[14]

8
"Good", "right", "just", "bad", "neither good nor bad", etc., are considered different from "cold", "blue", "old", "heavy", "high". They are not in objects but imputed to objects. A value judgment is justified, a fact judgment is verified.[15]

In the movement of civilization the dying down of the ethical movement was the result of our giving up attempts to bring reasoned ethical ideals into effective relation with reality, like boys who give themselves up exultingly to the forces of nature and whizz down a hill on their toboggan without asking themselves whether they will be able to steer their vehicle when they come to the next unexpected obstacle.[16]

9
Reification involves concentrating on a phenomenon as if it had somehow a life of its own, as if it existed, thing-like, out there, beyond man-kind; seeing the phenomenon as discrete, detached from any social process, apart from any human relationship and therefore understandable simply as it manifests itself, without more.[17]

10
In law the theoretical relationships which create apparently integrated wholes are remarkably artificial.[18] The frustration which one feels is in discovering that there exists a divergence between theory and operation.[19]

11
The dangerous separation of the "theoretical" and practical", *e.g.* Kant, but also the ancients: —they act as if the problems of perception and metaphysics are posed by pure mentation: —as if practice must, whatever the response of theory, be judged by its own criteria. [But] their remotest speculations and their "spirituality" remain always only the last palest imprint of a physiological condition, free will is absolutely missing, everything is instinct, shunted from the outset along fixed tracks . . . I ask whether we know any method of good action other than good thinking; the latter *is* action. Do we have means of judging the value of a way of

life in other terms than the value of a theory? The naive believe that here we are better off, here we know what is "good"—the philosophers follow suit. One must drive one's courage and rigour far enough to experience such a submission as shameful. No living with two measures! —no separation of theory and practice![20]

12
Better vague standards than none at all.[21]

13
One of the important characteristics of civil litigation is that the public interest is not represented.[22]

But now let us skip over this whole process of deformation and decay and attempt to regain the unimpaired strength of language and words; for words and language are not wrappings in which things are packed for the commerce of those who write and speak. It is in words and language that things first come into being and are. For this reason the misuse of language in idle talk, in slogans and phrases, destroys our authentic relation to things.[23]

At the beginning we find medieval form and spirit. Disorder is healed: but replaced, for the most part, by a laboured regularity. Authors seem clumsy, monotonous, garrulous; astonishingly tame and cold or fustian. We come to dread a certain emphasis. Then, in the last quarter of the century, the unpredictable happens. With startling suddenness we ascend. Nothing in the earlier history of our period would have enabled the observer to foresee this transformation.[24]

Sources

1. Duncan and Peraldi, *Discourse of the Erotic* (Meanjin 1, 1974), 62.
2. Hindemith, *A Composer's World* (Anchor Books, 1961), ix.
3. Maher, *Development in Law* (unpublished, 1978), 2.
4. Leff, "Law and", (1978) 87 *Yale L.J.* 989.
5. Swift, "Thoughts on Various Subjects," in *Gulliver's Travels and Other Writings* (Modern Library), 417.
6. Becker, *The Birth and Death of Meaning* (Penguin, 1972), 17-19.
7. Gurjieff, *Meetings with Remarkable Men* (Picador, 1971), 44.
8. Mumford, *Herman Melville* (Secker & Warburg, 1963), 159-160.
9. Tolstoy, *On Insanity* (Walker Press, 1978), 8, 11.
10. Unavoce,*Metamodulations* (unpublished, 1977), 6.
11. Schumacher, *A Guide for the Perplexed* (Abacus, 1977), 143.
12 Macneil, *Cases and Materials on Contracts* (Foundation Press, 1971), 68-69.
13. Allan (ed.) *Asian Contract Law* (M.U.P., 1969), 132.
14. Said to be Llewellyn's view in Winship, "Jurisprudence and the Uniform Commercial Code", (1977) 31 *Southwestern L.J.* 843.
15. Tammelo, *Survival and Surpassing* (Hawthorn Press, 1971), 36.
16. Schweitzer, *The Decay and the Restoration of Civilization* (Unwin, 1961), 44.
17. *Critique of Law/a Marxist Analysis* (Critique of Law Editorial Collective, 1978), 50. 50.
18. Wallace, "Current Problems in Legal Theory", (1978) 4 *Monash Univ. L.R.* 231.
19. O'Brien, *Inchoate Rights to Interstate Communications Under Section 92* (unpublished, 1979), 1.
20. Nietzsche, *Werke III* (Hanser, 1966), 760.
21. Peczenik, "Causation and fault in torts: how to save the lawyers from the philosophers", (1979) *Archiv fur Rechts—und Sozialphilosophie, Beih. N.F.* No. 11, 231, 248.
22. Kahn-Freund, *Labour and the Law* (Stevens, 1972), 2.
23. Heidegger, *An Introduction to Metphysics* (Doubleday, 1961), 11.
24. Lewis, *English Literature in the 16th Century* (Oxford, 1954), 1.