justice and obstructing the police.[30] An accessory after the fact receives, relieves, comforts or assists the felon—all active acts of assistance. Compounding is an agreement not to prosecute in consideration for reward. Interfering requires something active to be done to pervert the course of justice. Obstructing the police applies more to wilfully misleading the police. After thus limiting the scope of the charge of misprision by a description of the differences between it and other offences, Lord Denning puts forward another rather interesting limitation.[31] The non-disclosure of the knowledge may be due to a claim of right made in good faith. He suggests that the relationship between lawyer and client, doctor and patient, clergyman and parishioner, may be such that it can never be misprision for the former not to tell to the authorities circumstances told to him in confidence by the latter. He also suggests that in certain cases other relationships may be sufficient to justify non-disclosures: as with teacher and pupil, master and servant. However, Lord Denning agrees with Lord Goddard in that 'close family or personal ties will not suffice where the offence is of so serious a character that it ought to be reported'.[32] Thus the notion of 'desuetude' put forward in the nineteenth century has been cleared away by the House of Lords, and misprision of felony will receive more attention from text writers in their future editions.

J. J. TAIT

PETERS ICE CREAM (VIC.) LTD v. TODD[1]

Contract—Uncertainty—Restraint of trade—Severance—Reasonableness in the interests of the parties

The plaintiff company brought an action against Todd seeking damages and an injunction restraining him from selling, at his shops in East Newborough, ice-cream and kindred products manufactured by persons other than the plaintiff. At the outset, counsel for the plaintiff intimated that he did not intend to press the claim for damages.

This action arose out of an alleged breach of the defendant's covenant:

> Not to sell, serve, supply or vend any other make of ice-cream and/or kindred products or make any of same myself during the period this agreement is in force within a reasonable distance from my present place of business, so long as you are ready and willing to supply me with your ice-cream and kindred products at the undermentioned prices or such other reasonable prices as may for the time being be charged by you to your customers generally.[2]

It was proved at the trial that Todd had, prior to 5 February 1959 and thereafter, sold at his shop at East Newborough 'kindred products' not manufactured by the plaintiff, and that he intended to continue so to do. The evidence also showed that apart from two items the plaintiff company was at all times ready and willing to supply Todd with its

[30] [1961] 3 W.L.R. 371, 382-383. [31] [1961] 3 W.L.R. 371, 385. [32] *Ibid.*
[1] [1961] V.R. 485. Supreme Court of Victoria; Little J. [2] *Ibid.* 486.

ice-cream and kindred products. There was also no contest that the appropriate relief for the Company, if it were to succeed in the action, was an injunction.

In relation to the true construction of the contract, Todd claimed that, as the plaintiff in February 1959 was not ready and willing to supply him with one of its products, he was thereafter released from the promise contained in the restraint clause.

Little J. ruled in favour of the argument put forward by the plaintiff Company, that the true meaning of the clause was that Todd was to be at liberty to purchase and sell the products of other manufacturers on any occasion when the plaintiff was not ready and willing to supply him with any one of its products, but he was to be subject to the restraint clause when the plaintiff company again became ready and willing to supply him with all the items he required.

This decision was based primarily on the provision in the contract exempting the Company from liability in the case of interruptions or shortages in supplies. In view of these clauses the learned trial judge held:

> It would be somewhat strange . . . to attribute to the parties in the language they have used an intention, should any interruption occur, to terminate during the remaining life of the contract one of its principal obligations.[3]

The next, and primary consideration, was the question of the validity of the restraint clause; this question involved two distinct problems. Firstly it had to be determined exactly what restraint the clause imposed, and only then could it be decided whether it was reasonable in the interests of the parties and of the public.

In relation to the first problem it was argued for Todd that the expression 'within a reasonable distance from my present place of business' was too vague and uncertain, and that it amounted to no more than asking the court to make a contract for the parties. It was put by the Company that what was a reasonable distance was a question of fact to be determined by the court with regard to all the relevant surrounding circumstances, such as the nature of the locality and the volume of the business done at the shop.

After examining these two arguments, Little J. concluded that the court was unable to determine the reasonableness of the restraint because the parties had, by the use of imprecise language, failed to define it in such a way that the court could determine whether or not it exceeded the protection to which it might find the promisee was in fact entitled:

> They have, I think, left to the court the task of making their contract for them, and of carving out from time to time a distance which, within the restraint of trade doctrine, is reasonable. It is not for the court, however, to determine what protection could have been validly agreed upon between the parties. The function of the court is to deter-

[3] *Ibid.* 488.

> mine whether a protection agreed upon between the parties is in law valid. The clause is, therefore, in my opinion, void.[4]

This conclusion is supported by observations of Cotten L.J. in the Court of Appeal in *Davies v. Davies*.[5]

It was argued for the Company that if the expression 'within a reasonable distance' was bad, it should be severed from the rest of the clause in either of two ways—by striking out of the contract the whole phrase 'within a reasonable distance from my present place of business', or by striking out the words 'within a reasonable distance'.

Little J. rejected both these proposed means of severance on the grounds that to adopt the first alternative would be to convert into an unlimited restraint, a restraint which was not so intended, and to adopt the second would result in the promise not to sell being limited to sales 'from my present place of business', and the promise 'not to make ice-cream from my present place of business' would be an ungrammatical and meaningless clause, without transposition and addition of words—which could not be severance.

These considerations emphasize the fundamental objection to severance in this case, namely that the promise here involved is a single and indivisible one and thus incapable of severance within the framework of the law as stated by Lord Sterndale M.R. in *Attwood v. Lamont*:[6]

> . . . a contract can be severed if the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part remaining.

This conclusion in favour of the first argument put forward by Todd made it unnecessary for the court to go further and give any ruling as to his second argument that the covenant was unreasonable in the interests of the parties and the public. The latter part of this submission, in relation to the public, was not pressed, and Little J. ruled that the nature of the contract and the evidence tendered did not support such a submission.

Little J.'s excursion into the question of reasonableness in the interests of the parties, although unnecessary to the decision, is perhaps the most significant feature of the whole case and leaves the interesting question as to what line of approach in this matter the Australian courts will in the future adopt.

The old established attitude of the courts in both England and Australia was that, provided the contracting parties did not stand in a master and servant relationship to each other—or more generally, provided they were contracting on an equal footing, the law would not interfere with an agreement voluntarily entered into by them.

In England this approach has not been favoured in recent years, and the courts are now prepared to examine the question of reasonableness as between the parties, no matter what their relationship. For example, in *Kores Manufacturing Co. Ltd v. Kolok Manufacturing Co. Ltd*[7] the

[4] *Ibid.* 490.
[5] (1887) 36 Ch. D. 359, 387.
[6] [1920] 3 K.B. 571, 577.
[7] [1958] 2 W.L.R. 858.

Court of Appeal held an agreement between two parties to be unreasonable in their own interest even though they were contracting at 'arms' length'. In the words of Jenkins L.J.:

> . . . the mere fact that parties dealing on equal terms have entered into an agreement subjecting themselves to restraints of trade does not preclude the court from holding the agreement bad where the restraints are clearly unreasonable in the interests of the parties.[8]

The question arises as to the future attitude of the Australian courts in this matter. The attitude of Little J. in not rejecting out of hand the evidence tendered as to unreasonableness[9] would suggest that this question will no longer be disregarded, as previously, simply by showing that no master and servant relationship exists. Perhaps the courts will adopt the English approach and go carefully into this question of reasonableness, regardless of the relative bargaining positions of the parties.

The alternative approach is to follow the old principle in form by refusing to re-open a contract made at arms' length but, at the same time, to preserve a contact with the reality of the relationship between the individual and the large commercial corporation of today, by adopting a narrow construction of a contract made at arms' length. Thus parties would no longer be deemed to be on equal footing merely because there exists between them some recognized legal relationship which would suggest undue influence.

Following this perhaps preferable approach, the Court, after carefully scrutinizing the true bargaining position of the parties and fully satisfied that the contract was truly entered into at arms' length, would then, and only then, abide by the traditional learning as stated by Lord Haldane in 1914 who regarded the parties themselves as 'the best judges of what is reasonable as between themselves'.[10]

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[8] *Ibid.* 868.
[9] [1961] V.R. 485, 493-495.
[10] *North Western Salt Co. Ltd v. Electrolytic Alkali Co. Ltd* [1914] A.C. 461, 471.