CASE NOTES

THE AMBIT OF QUIET POSSESSION

The decision of the Court of Appeal in *Microbeads A. C.* v. *Vinhurst Road Markings Ltd.*[1] is short, predictable and concise. It nevertheless covers an entirely novel point of law and carries wide potential implications for buyers whose possession and enjoyment of goods is, after the sale, disturbed.

Between January and April, 1970, the plaintiffs, a Swiss company, sold to the defendants a number of road-marking machines. These machines proved unsatisfactory and the defendants, in response to an action for the price, first pleaded a breach of the implied condition of reasonable fitness for use. It was then discovered that in November 1970, another English company (Prismo Universal Ltd.) had acquired patent rights over the goods. Prismo brought a successful action for infringement of patent against the defendants in 1972. The defendants accordingly modified their defence to the original claim, alleging breaches of ss. 12 (1) and 12 (2) of the *Sale of Goods Act* 1893.[2]

This plea was tried as a preliminary issue before Mars-Jones J. who dismissed the defendants' contention on both points. The Court of Appeal agreed that there had been no breach of s. 12 (1). The operative time in relation to s. 12 (1) is the date of the contract of sale, and there could be no doubt that between January and April 1970, the plaintiffs had every right to sell the goods. Nor were they in any way disabled from conferring on the buyer at that time the undisturbed possession of the goods.[3] 'There was then no subsisting patent. The specification had not been published. No one could sue for infringement. The buyers could, *at that time*, use the machines undisturbed.'[4]

As regards the second defence, however, the Court unanimously agreed that the trial judge's decision should be reversed. Section 12 (2) was not confined to disturbances resulting from a defect in the seller's right to sell at the time of the sale. It might be invoked whenever the

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1 [1975] 1 All E.R. 529.

2 Now revised and reconstituted as ss. 12 (1) (a) and (b) of the Act of 1893, by virtue of s. 1, of the *Supply of Goods (Implied Terms) Act*, 1973, which came into force on 18th May of that year. The Tasmanian equivalents are ss. 17 (a) (b) *Sale of Goods Act*, 1896.

3 A duty imposed upon the seller by s. 12 (1) irrespective of whether he enjoys the right to pass title in the goods; see *Niblett, Ltd.* v. *Confectioners' Materials, Ltd.* [1921] 3 K.B. 387.

4 [1975] 1 All E.R. 529 at p. 532, *per* Lord Denning, M.R.; see also Roskill, L.J. at pp. 535, 536; Sir John Pennycuick, at p. 536.

buyer's quiet possession had been disturbed, irrespective of whether such disturbance emanated from circumstances existing at the contract date or from circumstances arising thereafter.[5] Nor was the subsection subject to an exception in the case of an eviction by title paramount, as counsel for the plaintiffs, relying on a parallel with conveyancing cases, had sought to argue. Such a contention, although supported by a circuit decision of Lord Russell of Killowen C.J. in 1895,[6] was clearly discountenanced by the Court of Appeal in two later decisions[7] and could no longer be sustained.[8]

By drawing so sharp a distinction between subsections 12 (1) and (2), both as regards the chronology and the origins of breach, the Court of Appeal confuted those authorities[9] who had concluded that the two provisions covered much the same ground and that s. 12 (2) was substantially otiose. The latter now emerges as a vigorous and independent remedy of questionable and possibly extensive scope. The problem may now be how best to confine it to those situations where it is most clearly needed.

Obviously, there are innumerable ways in which a buyer's possession could be disturbed subsequently to his acquiring property in goods: many of them the result of his own conduct, such as repairers' liens, confiscation by customs, seizure under bills of sale, collision, theft and even, in some circumstances, detention by the police. Section 12 (2) is clearly not intended to constitute a perpetual guarantee to the buyer against all incursions on his possession or enjoyment. Both Roskill L.J. and Sir John Pennycuick stressed the importance in this regard of the prefatory words to s. 12, which created an exception where 'the circumstances of the contract are such as to show a different intention'.[10] This proviso would, it is submitted, almost infallibly exclude from the ambit of s. 12 (2) those situations where the disturbance is due solely to the fault of the buyer or results from a phenomenon not inherent in the goods, or relative to them, at the time of the sale. Thus, for instance, if a buyer later modifies a machine so that it infringes a patent not otherwise infringed, no action should lie unless the seller had contemplated or encouraged such modification at the time of the sale.

Even thus confined, s. 12 (2) seems surprisingly wide. Suppose that a defective car is sold which is later involved in an accident and is out of action for several months; or that a car-sticker is marketed which

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5 *Ibid.*, at pp. 532, 533 (Lord Denning, M.R.); 535-536 (Roskill, L.J.); 537 (Sir John Pennycuick).

6 *Monforts* v. *Marsden* (1895) 12 R.P.C. 266.

7 *Niblett, Ltd.* v. *Confectioners' Materials, Ltd.* [1921] 3 K.B. 387, disapproving *Monforts* v. *Marsden* (*supra*); *Mason* v. *Burningham* [1949] 2 K.B. 545, at p. 563, per Lord Greene, M.R.

8 [1975] 1 All E.R. 529, at pp. 532, 534-537.

9 Benjamin on Sale (8th Edn.), 682 (cf. Benjamin's Sale of Goods (1st Edn.) para. 277); Atiyah, *Sale of Goods* (4th Edn.), 49.

10 [1975] 1 All E.R. 529, at p. 537.

supervening circumstances render defamatory and which involves the buyer in an action for damages or an injunction; or that the buyer instals a defective air-conditioning system which creates excessive noise and is the subject of an injunction for nuisance on the part of his neighbours.[11] In neither case could the buyer's possession be said to be quiet, or his enjoyment undisturbed. It is not difficult to envisage an interpretation of s. 12 (2) which would overlap and even envelop the functions of s. 14 (1).

Section 69 of the Trade Practices Act 1974 contains no prefatory equivalent to s. 12 of the unrevised English Act. At first sight, this would appear to suggest that the sort of disturbances which can place a seller in breach of s. 69 (1) (b) are unlimited in shape, origins or time. But this conclusion cannot be supported for a number of reasons. First, a court might imply such a qualification in any event, although it is not easy to see the justification for doing so in the absence of explicit wording to that effect. Secondly, since s. 69 (1) (b) applies except so far as the buyer's quiet possession 'may lawfully be disturbed by the supplier or another person who is entitled to the benefit of any charge or encumbrance disclosed or known to the consumer before the contract is made', an Australian court might feel at liberty to construe s. 69 (1) (b) as confined in any event to disturbances arising from a charge or encumbrance over the goods. Thirdly, it may be that the ambit of s. 69 (1) (b) is regulated by the statutory context in which it appears and that it is no more than a post-active dimension of s. 69 (1) (a). A seller would not, therefore, be held to be in breach of the warranty as to quiet possession unless the circumstances alleged to constitute the breach would, if existing, at the time of the sale, have deprived him of his right to sell the goods and thus involved an infringement of s. 69 (1) (a). Such an interpretation would accommodate the principle in *Microbeads A.C.* v. *Vinhurst Road Markings Ltd.* within the federal legislation without exposing s. 69 (1) (b) to a wide spectrum of actions beyond the apparent intendment of that subsection. It would also be consistent with the approach taken by the Court of Appeal in the present case, which at no point specifically countenances the application of s. 12 (2) to disruptions which would not, if arising from circumstances extant at the time of sale, have affected the seller's right to dispose of the goods.

N. E. Palmer

11 Cf. *Wathes (Western) Ltd.* v. *Austin's (Menswear) Ltd.* (1975) 119 Sol. Jo. 527.

12 No. 51 of 1975 (Federal). Both this section and s. 12 (2) of the revised English Act contain elaborate provision for the exclusion of the condition as to title, and the warranties as to quiet possession and freedom from encumbrance, in circumstances where the defect in question was disclosed or known to the buyer at the time of sale.

LEFT TURN AT MAIN JUNCTION LEADS TO DEAD END:

Tasmanian Television v. *Rolph*; *Nettlefolds Ltd. & Others* v. *Rolph and the Tasmanian Branch of the Transport Workers Union of Australia*[1]

Only a matter of four or five years ago, the Australian student researching the structure and operation of the economic or industrial torts was faced with a dearth of home-grown examples. Apart from a sprinkling of state cases and two important High Court decisions on conspiracy,[2] the law was to be found in a plethora of highly technical and complicated English cases culminating in a series of mind-bending decisions during the 1960s.

The torts of conspiracy, intimidation and inducing a breach of contract have been honed by the English courts into effective industrial weapons for employers, by constant use, by the ingenuity of counsel and by the receptive attitude of a largely anti-union judiciary. That these common law developments have not occurred in Australia can be explained by the existence of state and federal conciliation and arbitration systems for the settlement of industrial disputes and the willingness of employers and unions to act within them. But since 1970, when an efficient though unfair procedure in the Federal Act for penalising unions was abolished, there have been indications that employers are dissatisfied with the operation of this, the most important, system and, faced with strike action by certain unions which also prefer to work outside it, have resorted instead to actions in tort in the ordinary civil courts.

In Tasmania, with its system of wages boards constituted by equal numbers of employers and employees under an independent chairman, it would be expected that the direct involvement of employees and union representatives (up to half the number of employee members on any board) in the settlement of industrial disputes would assist in maintaining the viability of the system. The state does have a very low incidence of industrial disputes but this has been ascribed not so much to the inherent qualities of the wages boards system as to the small size of the state and its work force and to the strength of the personalities of the few who dominate the Tasmanian industrial scene. One such right-wing labour figure is Brian Harradine, Secretary of the Tasmanian Trades and Labour Council, who has been concerned to work within the wages boards system. Recently, however, a number of left-wing unions have disagreed with Harradine and have seceded from the Council, forming a group which is more prepared to attain its objects by direct action.

Against this briefly sketched back-drop it is easier to understand why the state recently saw its first industrial torts cases for many years, certainly the first to draw on principles expounded in the important

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1 Unreported. Typewritten copies of the judgments are available.

2 *McKernan* v. *Fraser* (1931) 46 C.L.R. 343; Williams v. Hursey (1959) 103 C.L.R. 30.

English decisions in the 1960s. They were: *Tasmanian Television* v. *Rolph*; *Nettlefolds Ltd. & Others* v. *Rolph and the Tasmanian Branch of the Transport Workers Union of Australia.* Both cases arose out of the same dispute.

The T.W.U. (Tasmanian Branch) is one of the disaffiliated unions of the left; John Rolph is its secretary. In July 1975, some of the drivers of Yellow Cabs (Tas.) Pty. Ltd. were admitted as members to the union and Rolph demanded that the company negotiate with the T.W.U. for the payment to them of rates and benefits under the provisions of the Transport Workers Federal award. Yellow Cabs refused, claiming that it could not afford to do so and that in any case the drivers were not employees but independent contractors and the company would not negotiate with the T.W.U. Pressure tactics of the type well illustrated in the English case of *Stratford* v. *Lindley*[3] were then adopted by Rolph, aimed at Tasmanian Television Ltd., Nettlefold Car & Truck Pty. Ltd. and Motors Pty. Ltd.,[4] which had common directors with Yellow Cabs.

Tasmanian Television v. *Rolph*

Tasmanian Television had contracts with three mainland distributing companies whereby films were sent to them for showing on Channel 6 on the understanding that they would be sent on to other mainland television companies by a certain date. Films were carried to and from the state by T.A.A. and Ansett Airlines. Some airline employees, as members of the T.W.U., acting on Rolph's directions refused to handle any of the films addressed to, or sent by, Tasmanian Television. The plaintiff accordingly sought an interim injunction to prevent the continuance of the 'black ban' on the grounds that the defendant had thereby caused, procured or induced a breach of its contracts with the distributors.

The tort of inducing a breach of contract had its origins in *Lumley* v. *Gye*[5] and has since proved to be something of a headache for union officials who call on their members to strike or to place a black ban on certain work. In England protection was given by Section 3 of the *Trade Disputes Act* 1906 providing there was no other independently unlawful act and only where the contract broken was a contract of employment in the context of a trade dispute. Apart from Queensland, similar legislation has not been enacted in the Australian States, but even so, Section 3 would not be relevant where the contract alleged to have been broken was a commercial one, as in the Tasmanian Television case.

The main principles underlying the tort have been worked out by the English courts. Knowledge of the contract on the part of the inducer is

3 [1965] A.C. 269.

4 Nettlefold Car and Truck and Motors are subsidiaries owned wholly by Nettlefolds Ltd.

5 (1853) 2 El. & Bl. 216; 118 E.R. 749.

essential, as is the requirement that the interference be intentional. Moreover, where the interference is indirect in the sense that the inducement is directed towards a third party who is contractually bound to one of the parties to the head contract, unlawful means must have been used, although this is not necessary for a direct inducement of one of the contracting parties.[6] Until fairly recently it was safe to say that the interference must have caused a breach of contract but, since 1969[7] it would be more accurate to state that a mere preventing or hindering the performance of a contract without causing a breach is sufficient.

In Australia these pre-requisites have been clearly stated in the form of propositions of law by Wells J. of the South Australian Supreme Court in *Woolley* v. *Dunford*[8] and again more recently in *Davies* v. *Nyland*.[9] In the latter case, a majority of the Full Court affirmed the principles on appeal and it is significant that Chambers J. in Tasmanian Television referred to *Davies* and was satisfied that the law was accurately stated therein.

The facts of *Davies*, like most cases in this area, are as complicated as the law. The firm of H. & A. Davies was in dispute with the T.W.U. about the compulsory unionism of their employees and were placed under a 'black ban' on the instructions of Nyland, the Secretary of the South Australian Branch of the T.W.U. Davies had contracted with Truran Earthmovers to cart clay to the premises of P.G.H. Industries Ltd. Truran were contractually bound to P.G.H. to perform the work themselves or to employ others to do it, hence the contract with Davies. At a meeting with representatives of P.G.H. and Truran, O'Neil, a union representative, acting on Nyland's instructions, said that certain owner-drivers who were members of the union working for P.G.H. would not work as long as Davies' drivers were working for P.G.H. P.G.H. responded by telling Truran not to use Davies as a sub-contractor if they wished to reap the benefit from its contract with P.G.H. Truran informed Davies accordingly. Davies sought an interim injunction and it was granted by Wells J. who accepted that Nyland and O'Neil knew of the contract between P.G.H. and Truran and of the sub-contract between Truran and Davies, that there had been breaches of both the principal contract and the sub-contract, and that these consequences were the likely results of their actions and were intended by them.

The terms of the order made was identical to the one made by Chambers J. in *Tasmanian Television* and in both cases would seem to be wider than was required. The tort established on the facts was that of inducing a breach of contract and that part of the order forbidding interference with the mere performance of a contract was unnecessary

6 *D. C. Thomson & Co. Ltd.* v. *Deakin* [1952] Ch. 646.
7 *Torquay Hotel* v. *Cousins* [1969] 2 Ch. 106.
8 (1972) 3 S.A.S.R. 243 at pp. 266-268.
9 (1974) 10 S.A.S.R. 76.

where there was no evidence to show that something less than a breach had been induced. If it is argued that procuring a breach of contract is *a fortiori* an interference with the performance of a contract then that part of the injunction dealing with inducing a breach of contract becomes superfluous.

The main reason for the excessive restrictions of the injunctions in *Davies* and *Tasmanian Television* is to be found in the uncertainty surrounding the existence and extent of the tort of interference with contractual relations. In its modern form it is almost entirely the creature of Lord Denning's imagination in *Torquay Hotel Co.* v. *Cousins*[10] and contrary to the House of Lords decision in *Allen* v. *Flood*.[11] The obstacle that persuaded Lord Denning to seek a new path was a *force majeure* clause in the main commercial contract exempting one party from liability for failure to deliver due to, *inter alia*, labour disputes. Could a breach of such a contract ever be induced by action which brought into operation the *force majeure* clause? This difficulty was avoided by holding, as Lord Denning did, that liability was established on the grounds of an interference with contractual relations, although Winn L.J. and Russell L.J. were not prepared to go that far and thought that, despite the exemption clause, a breach of contract had been induced because the clause affected only liability for breach and not the breach itself.

The extent of the tort is also doubtful. According to Lord Denning the interference must be direct (although indirect interference by unlawful means was affirmed as tortious by the House of Lords in *Rookes* v. *Barnard*[12]) and intended. Surprisingly, it may be an interference not only with the execution of existing contracts but also with the performance of future contracts. A mere intention to interfere with contracts not yet made will be sufficient. The width of the tort and its potency as an industrial weapon are enormous unless the view is taken that Lord Denning's formulation of it should be restricted to the facts of *Torquay Hotel* where something less than a breach of contract was induced. However, as we have seen, the majority opinion in the Court of Appeal was that breaches of contract did occur and in any case Lord Denning was quite certain that he was laying down a general principle. Only a clear House of Lords decision in another case will settle the issue in England and in view of the doubtful protection given in Section 13 (2) of the new *Trade Union and Labour Relations Act* 1974, we may not have to wait very long for it to appear.[13]

The appeal in *Davies* v. *Nyland* raised some interesting legal points. In the straightforward situation a trade union official who calls a strike

10 [1969] 2 Ch. 106.
11 [1898] A.C. 1.
12 [1964] A.C. 1129.
13 See Wedderburn, 'The Trade Union and Labour Relations Act 1974', 37 *M.L.R.* 525 at p. 539 n. 86.

or black ban aimed at an employer's customer is directly inducing a breach of the members' contracts of employment and this will provide the unlawful means for indirectly inducing a breach of the main contract between their employer and his customer. Normally there is also some communication between union official and employer which may be seen as a direct inducement of a breach of the main contract. In *Davies* however, at first glance it looked as though the threat by Nyland and O'Neil to bring out the owner-drivers would amount to unlawful means for the indirect inducement of a breach of the contract between P.G.H. and Truran (P - T contract) but this could not be stretched further to provide the unlawful means for indirectly inducing a breach of the sub-contract between Truran and Davies (T - D contract). Indeed, counsel for the appellants argued strenuously on this tack, pointing to the fact that the owner-drivers were not under permanent contracts with P.G.H. and could not therefore be in breach of their contracts in refusing to work, with the result that there were no unlawful means for indirectly inducing a breach of the P - T contract. And if T could not sue why should D, who was even more indirectly affected, be able to?

The argument was dismissed by Bray C.J. who was of the opinion that when P.G.H. were told at the meeting with O'Neil, what would happen if Davies continued working, this constituted a direct inducement of a breach of the P - T contract which amounted to unlawful means for the indirect inducement of a breach of the T - D contract actionable at the suit of Davies. The fact that the owner-drivers could not be induced to break their contracts was thus irrelevant because the unlawful means came from the direct inducement of a breach of the P - T contract. Sangster J. agreed with this.

Alternatively, the Chief Justice thought that since Truran representatives had also been present at the meeting with O'Neil, there was a simple direct inducement of a breach of the T - D contract.

With the greatest respect it is submitted that these principles were completely misunderstood by Chambers J. in the *Tasmanian Television and Nettlefolds* cases.

In *Tasmanian Television* the relevant contracts were: contracts of employment between T.A.A. and Ansett and their employees who were members of the T.W.U., contracts of carriage between T.A.A. and Ansett and Tasmanian Television (T.A.A. and A - T.T.V. contracts), and the main commercial contracts between Tasmanian Television and three mainland distributors (T.T.V. - Dis. contracts). In his judgment Chambers J. was satisfied that the 'interference has been the procuring of a breach of legally binding contracts, not yet fully performed, between the plaintiff company and the film distributing companies and the interference has prevented and is continuing to prevent, the performance of such contracts'. But, unfortunately, he does not explain whether the inducement was direct or indirect.

A number of possibilities are suggested by the facts. There is little doubt that Rolph directly induced breaches of T.A.A. and Ansett employees' contracts of employment, actionable at the suit of T.A.A. and Ansett. Furthermore, this unlawful act would provide the unlawful means for the indirect inducement of breaches of the T.A.A. & A. - T.T.V. contracts, actionable at the suit of T.T.V. It is clear so far that no injunction could reasonably be granted to prevent the inducement of a breach of the T.T.V. - Dis. contracts. Do the additional facts that Rolph 'informed' T.A.A. and Ansett of the 'black ban' and that a meeting took place, with T.T.V. executives make any difference?

Providing the communication to T.A.A. and Ansett is regarded as an inducement[14] rather than merely informational[15] it is possible to regard Rolph as having directly procured a breach of the T.A.A. & A - T.T.V. contracts. However, this analysis still does not justify the granting of an injunction to T.T.V. to prevent a breach of the T.T.V. - Dis. contracts because if the interference is direct, only T.A.A. & A. - T.T.V. contracts are broken and, if it is indirect, inducing a breach of the T.T.V. - Dis contracts is actionable not at the suit of T.T.V. but at the suit of the distributing companies.

If the meeting between T.T.V. and Rolph is regarded as evidence of a direct inducement of a breach of the T.T.V. - Dis. contracts it is again vital to appreciate that this is only tortious as regards the distributors and not at the instance of T.T.V. The tort consists in knowingly inducing *a third party* to break his contract causing damage to *the other contracting party* and it is a pity that Chambers J. dealt with 'interference' in such general terms, without any apparent understanding of the nature and finer points of the tort. Even if the tort is regarded as 'interference with contractual relations' rather than 'inducing a breach of contract', the distinction between direct and indirect action is crucial where there are no unlawful means. Moreover, no English or Australian court has yet held that in the absence of unlawful means the person who is induced to break his contract has an action against the inducer.[16]

Nettlefolds Ltd. and Others v. *Rolph and the Tasmanian Branch of the Transport Workers Union of Australia*

As already mentioned this action arose out of the same dispute over the conditions of employment of Yellow Cabs drivers, Nettlefolds and its subsidiaries (hereafter referred to as the plaintiff company) having

14 As in *Stratford* v. *Lindley* [1965] A.C. 269.

15 As in *D. C. Thomson & Co. Ltd.* v. *Deakin* [1952] Ch. 646.

16 To be fair to Chambers J. the defendant, Rolph, who represented himself did not raise any arguments to rebut the plaintiff's contention that the tort had been committed. He preferred instead to concentrate on establishing that he was the servant or agent of the Federal organisation and could not therefore personally be restrained by an injunction, a mistaken argument in view of the general principle that a tortfeasor is liable for his own actions and it is no defence to claim that he was the servant or agent of another.

common directors with Yellow Cabs Pty. Ltd. The plaintiff company, motor car and spare parts dealer, had contracted with a Victorian company (General Motors Spare Parts and Accessories Pty. Ltd., a subsidiary of General Motors Holden Pty. Ltd.), for the supply of spare parts and accessories which were delivered by the carrier Frank Hammond Pty. Ltd. When the 'black ban' was placed on delivery by members of the T.W.U. who were employees of Frank Hammond Pty. Ltd., the company sought an injunction against both Rolph and the Tasmanian Branch of the T.W.U.[17]

Chambers J. accepted that there had been an intentional interference by Rolph with the plaintiff company's contractual rights in that the defendant had procured a breach of legally binding contracts not yet fully performed between (a) the company and General Motors in Victoria, (b) the company and Frank Hammond Pty. Ltd. and (c) the company and its customers in Tasmania. An order was accordingly made against Rolph personally to prevent the direct or indirect inducement of breaches of the plaintiff company's contracts with G.M.H., G.M.H. Spare Parts and Accessories, Frank Hammond Pty. Ltd. and I.P.E.C. Transport Group,[18] or any interference with the performance of those contracts.

As with *Tasmanian Television* the principles discussed in *Davies* v. *Nyland* were supposedly applied, but in fact the application of these principles to the facts does not lead to the conclusion that Rolph had induced breaches of either the customer contracts or those with G.M.H. and G.M.H. Spare Parts and Accessories. The analysis is exactly the same as in the *Tasmanian Television Case.* The fact that Rolph, through Godsell, another T.W.U. official, 'informed' both the plaintiff company and Frank Hammond Pty. Ltd. of the black ban, does not support the injunction insofar as it applied to the G.M.H. contracts. However, the tort of inducing a breach of the contract between the plaintiff company and Frank Hammond Pty. Ltd. does appear to have been committed either directly (if the 'information' given to Frank Hammond is regarded as an inducement) or indirectly (where the unlawful means are provided

17 The injunction sought against the T.W.U. (Tasmanian Branch) was not granted on the grounds that the High Court in *Williams* v. *Hursey* 33 A.L.J.R. 269, particularly Fullager J., had held that the state branch of a federally registered organisation has no separate legal personality. It is doubtful however, whether *Williams* v. *Hursey* really decided this. In the light of The Industrial Court decision in *Moore* v. *Doyle* (1969) 15 F.L.R. 59, which held that registered state branch did have a separate legal existence, it is probable that *Williams* v. *Hursey* only decided that, on the facts, the conduct of the Hobart members complained of was really the conduct of agents or servants of the federal executive of the union. In any case, none of this is relevant now in view of Section 7 of the Federal Conciliation and Arbitration (Organisations) Act, 1974 (amending Section 136 of The Principal Act) which prevents a state branch of a federally registered organisation from acquiring a separate legal personality. The absence of any reference by Chambers J. to this Act or to the decision in *Moore* v. *Doyle* which led to its enactment is difficult to explain.

18 A 'black ban' had also been placed on delivery by the carrier I.P.E.C. of emergency spare parts needed for the repair of customers' vehicles.

by the direct inducement of breaches of Frank Hammond's employees' contracts of employment).

It should be noted that, although Chambers J. thought there had been a wrongful interference with the bailment contracts between the plaintiff company and their customers, the injunction did not refer specifically to such contracts. Instead, Rolph was prevented from interfering or inducing a breach of the contract between the plaintiff company and I.P.E.C. Transport, the carrier responsible for delivering the emergency repair parts. Since there was no evidence that Rolph had been in contact with I.P.E.C. (who knew of the ban through the news media) the injunction could not be justified on the basis that the defendant had directly induced a breach of the I.P.E.C. contract actionable at the suit of the plaintiff. But it would appear that an indirect inducement by unlawful means existed because there was a direct inducement of breaches of the I.P.E.C. employees' contracts of employment.

One final point must be made. It has long been recognised by English law that justification may be used as a defence to an action for inducing a breach of contract. This was appreciated by Chambers J. who, following Wells J. and the majority of the Full Court in *Davies* v. *Nyland* saw the tort of inducing a breach of contract as part of the wider tort of knowingly and intentionally interfering with contractual rights without justification. But, having stated this, neither Chambers J., nor Wills J., nor the majority of the Full Court saw fit to look at the question of justification. Only Zelling J. in *Davies* was prepared to consider it and, on the facts, to allow it. Quoting *Salmond on the Law of Torts*,[19] he pointed out that what amounts to justification is a question to which no precise answer can be given and that it must be left to the good sense of the tribunal to analyse the circumstances of the particular case. Factors to be borne in mind might be: the nature of the contract broken, the position of the parties to the contract, the grounds for the breach, the relation of the person procuring the breach to the person who breaks the contract, and the object of the person in procuring the breach.

A consideration of these aspects would not necessarily involve a judge in what might appear to him as the distasteful business of having to make a decision on the merits and demerits of an industrial dispute since the promotion of the defendant's own trade union interests with no desire malevolently to injure the plaintiff would be sufficient to constitute justification[20] without passing judgment on the merits of the dispute. Consideration of merits may not be avoided however, where the plaintiff is seeking an injunction, for his own conduct may be a reason

19 16th ed. (1973) at p. 379.

20 *Mogul Steamship Co.* v. *McGregor, Gow & Co.* [1892] A.C. 25. *Jasperson* v. *Dominion Tobacco Company* [1923] A.C. 709.

for refusing the injunction in the court's discretion.[21] Moreover, where it appears that an injunction has been granted without the legal defence of justification having been discussed it is arguable that the matter should be considered *de novo.*

In *Davies* v. *Nyland* the dispute was concerned with compulsory unionism, yet Zelling J. thought that the pursuit of a 'closed shop' was a part of trades union policy and therefore legally justifiable whatever one's views of the policy. The dispute in *Tasmanian Television* and *Nettlefolds* centred around the refusal of an employer to negotiate with the union on conditions of work of members of that union who were entitled to membership. Surely this too was legally justifiable in the same way and, if one considers the merits, morally defensible given general acceptance of the existence of trade unions as bargaining 'agents' for their members. It might, of course, be argued that there was no dispute at all between Rolph and the plaintiff companies so that his action assumes a vindictive aspect which cannot be justified. Press reports of the 'unusual course' in industrial disputes where there was 'no direct grievance' with either Tasmanian Television or Nettlefolds were echoed by the Tasmanian Chief Secretary and Minister for Labour, Mr. D. Lowe who, in condemning the move, declared it to be 'unique, to say the least, in my experience'.[22] Chambers J. also stated emphatically in both cases that no dispute of any kind existed between them, a rather naive view of the situation and one which makes it difficult to explain the presence of the parties before him. Whether or not it was an 'industrial dispute' under the State Wages Boards Act or the *Federal Conciliation and Arbitration Act,* there can be little doubt that a dispute existed. What was extraordinary about the cases was the form of the pressure exerted and not the non-existence of any dispute. But in terms of the defence of justification the question is still whether the defendant was pursuing accepted (not acceptable) trade union objectives, regardless of his political views.

In conclusion it is worth stating that the injunctions in the Tasmanian cases did not settle the industrial dispute itself. As it happened the court orders took effect after 5 p.m. on 3rd September and on the 4th September the management of Yellow Cabs agreed to negotiate with the T.W.U. Only then were the black bans removed. In the face of the defendant's determination to maintain the bans after the injunctions were granted it is likely that he would have been imprisoned for contempt.[23] But none

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21 In *Davies* the reaction of the male plaintiff when asked by a union official if he were a member of the union was, in the first place, to ignore him. When told he could not work on the site if he were not a union member he replied, 'Get out of the way. If you stand in front of the truck I will run over you or I'll bend a bar around your head. You're nothing but a communist scabby bastard and are ruining the country.'

22 *Mercury* 27:8:75.

23 For a fairly recent example see: *Adriatic Terrazzo & Foundations Pty. Ltd.* v. *Robinson and Others,* (1972) 4 S.A.S.R. 294.

of this would have helped settle the real dispute with Yellow Cabs, Tasmanian Television, Nettlefolds and its subsidiaries. As Zelling J. said in *Davies* v. *Nyland*, '[t]he difficulty is, that so frequently a plaintiff who obtains an interlocutory injunction has in fact won the action even though the merits, in terms of industrial dispute may, as in this particular case, be a very debatable issue'.[24]

A. P. Davidson

INEQUALITY OF BARGAINING POWER

In *Lloyds Bank Ltd.* v. *Bundy*,[1] 'poor old Mr. Bundy', the defendant, charged his farm to the plaintiffs. The farm was all he had. The charge was to secure an overdraft account of a company formed by his son. 'Michael was his only son and... he was 100 per cent behind him.' But the company was in a bad way. The defendant was an old customer of the plaintiffs. He trusted them as his counsellors. There was a confidential relationship between the plaintiffs and the defendant. The plaintiffs' assistant branch manager brought the charge for the defendant to sign. He should have given the defendant a full explanation of the trouble of the company. He did not. He should have asked the defendant to get independent advice. He did not. Five months later a receiving order was made against the son. The plaintiffs stopped all overdraft facilities. They then sold the farm. The defendant refused to leave. The plaintiffs brought an action to recover possession. The defendant counterclaimed for an order setting aside the charge. The Court of Appeal, consisting of Lord Denning M.R., Cairns L.J. and Sir Eric Sachs, set aside the charge. Sir Eric Sachs and Cairns L.J. decided the case on the ground of undue influence. Lord Denning decided the case on a broader ground.

Seven years before Lord Denning had reviewed Goff and Jones' *Law of Restitution*.[2] He praised it highly. He said: 'It is one of our necessary tools of trade'.[3] In the course of the review Lord Denning said:

> Throughout, too, the authors have drawn both from law and equity. Their account cuts across traditional boundaries. For centuries the two systems had their differing ways of preventing unjust enrichment. The common lawyers had their money counts or implied contracts. The equity practitioners had their constructive trusts or fiduciary relationships. Even after the Judicature Act 1873 they went their separate ways. In truth, the two systems sometimes overlap, and sometimes are complementary one to the other. This book draws them together as one coherent whole in the field

24 (1975) 10 S.A.S.R. 96 at p. 113.

1 [1974] 3 W.L.R. 501.

2 (1967) 83 L.Q.R. 277.

3 *Ibid.* at p. 278.

> of Restitution. At last the fusion of law and equity is seen to work.[4]

Restitution is just another name for quasi-contract.[5] But a wider concept of restitution has been suggested by Goff and Jones' *Law of Restitution.* It says:

> ... there are claims in equity analogous to quasi-contractual claims to recover money paid under a mistake; and equitable relief from undue influence is a rational extension of the limited relief which the common law provides in cases of duress ... Other restitutionary claims, notably general average and salvage, were developed by the Court of Admiralty. But the substantive link between these and quasi-contractual claims was hidden by the artificial barriers erected by the forms of action.[6] It is now almost a century since the forms of action were abolished, and there is no reason why they should be allowed any longer to obstruct a unified treatment of all claims founded on the principle of unjust enrichment. The law of restitution is the law relating to all claims, quasi-contractual or otherwise, which are founded upon that principle.[7]

In *Lloyds Bank Ltd.* v. *Bundy*[8] Lord Denning laid down a new doctrine. It was called the doctrine of 'inequality of bargaining power'.

The Sources of the Doctrine

Lord Denning derived the doctrine from three sources. The first source was the common law on quasi-contract. Lord Denning said:

> The first category is that of 'duress of goods'. A typical case is when a man is in a strong bargaining position by being in possession of the goods of another by virtue of a legal right, such as by way of pawn or pledge or taken in distress. The owner is in a weak position because he is in urgent need of the goods. The stronger demands of the weaker more than is justly due: and he pays it in order to get the goods ... He can recover the excess: ... To which may be added the cases of 'colore officii', where a man is in a strong bargaining position by virtue of his official position or public profession. He relies upon it so as to gain from the weaker — who is urgently in need — more than is justly due: ... In such cases the stronger may make his claim in good faith honestly believing that he is entitled to make his demand. He may not be guilty of any fraud or misrepresentation. The inequality of bargaining power — the strength of the one versus the urgent need of the other — renders ... the money paid to be recovered back: ...[9]

The second source was equity. Lord Denning said:

> The second category is that of the 'unconscionable transaction'. A man is so placed as to be in need of special care and protection and yet his weakness is exploited by another far stronger than

4 *Ibid.* at p. 278.

5 *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32 at p. 61.

6 The separate jurisdictions of the courts?

7 At pp. 4-5.

8 [1974] 3 W.L.R. 501.

9 *Ibid.* at p. 507.

himself so as to get his property at a gross undervalue. The typical case is that of the 'expectant heir'. But it applies to all cases where a man comes into property, or is expected to come into it — and then being in urgent need — another gives him ready cash for it, greatly below its true worth, and so gets the property transferred to him: ... Even though there be no evidence of fraud or misrepresentation, nevertheless the transaction will be set aside: ...[10]

The third category is that of 'undue influence' usually so called. These are divided into two classes as stated by Cotton L.J. in *Allcard* v. *Skinner*. The first are those where the stronger has been guilty of some fraud or wrongful act — expressly so as to gain some gift or advantage from the weaker. The second are those where the stronger has not been guilty of any wrongful act, but has, through the relationship which existed between him and the weaker, gained some gift or advantage for himself.[11]

The fourth category is that of 'undue pressure'. The most apposite of that is *Williams* v. *Bayley*, where a son forged his father's name to a promissory note, and by means of it, raised money from the bank of which they were both customers. The bank said to the father, in effect: 'Take your choice — give us security for your son's debt. If you do take that on yourself, then it will all go smoothly: If you do not, we shall be bound to exercise pressure.' Thereupon the father charged his property to the bank with payment of the note. The House of Lords held that the charge was invalid because of undue pressure exerted by the bank.[12]

The third source was maritime law. Lord Denning said:

The fifth category is that of salvage agreements. When a vessel is in danger of sinking and seeks help, the rescuer is in a strong bargaining position. The vessel in distress is in urgent need. The parties cannot be truly said to be on equal terms. The Court of Admiralty have always recognised that fact. The 'fundamental rule' is

> 'if the parties have made an agreement, the court will enforce it, unless it be manifestly unfair and unjust; but if it be manifestly unfair and unjust, the court will disregard it and decree what is fair and just.'

See *Akerblom* v. *Price per* Brett L.J., applied in a striking case *The Port Caledonia and The Anna*, when the rescuer refused to help with a rope unless he was paid £1,000.[13]

To simplify the discussion, let us ignore the source derived from maritime law. This will leave us with common law and equity. Lord Denning said:

Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them.[14]

Be it observed: 'To unite law and equity.'

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10 *Ibid.* at p. 507.
11 *Ibid.* at p. 507.
12 *Ibid.* at p. 508.
13 *Ibid.* at p. 508.
14 *Ibid.* at p. 506.

The Fusion of Law and Equity

In *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[15] Denning J. (as he then was) based promissory estoppel on the fusion of law and equity. He said:

> The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel. The decisions are a natural result of the fusion of law and equity: for the cases of *Hughes* v. *Metropolitan Ry. Co.*, *Birmingham and District Land Co.* v. *London & North Western Ry. Co.* and *Salisbury (Marquess)* v. *Gilmore*, afford a sufficient basis for saying that a party would not be allowed in equity to go back on such a promise. In my opinion, the time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt ([,] is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better. That aspect was not considered in *Foakes* v. *Beer*. At this time of day however, when law and equity have been joined together for over seventy years, principles must be reconsidered in the light of their combined effect.[16]

But there the fusion was effected by statute. Section 41 of the *Supreme Court of Judicature (Consolidation) Act*, 1925 provides:

> No cause or proceeding at any time pending in the High Court or the Court of Appeal shall be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might formerly have been obtained, whether unconditionally or on any terms or conditions, may be relied on by way of defence thereto: . . .

A fusion effected by s. 41 provides a shield, not a sword.

That is fusion by statute. But is fusion by the court possible? It is. Before the *Judicature Act*, 1873, law and equity were administered by different courts. Today they are administered by the same court. The court is in a position to fuse them, if it thinks fit. A new principle can be created by fusing law and equity. The new principle is not a *tertium quid*. It is a principle of both law and equity.

Granting that fusion by the court is possible, can the court forge a sword by fusing law and equity? It can. One must distinguish between the substantive law and the remedies. Fusion of law and equity affects the substantive law only. The distinction between common law remedies and equitable remedies remains.

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15 [1956] 1 All E.R. 256 n. (original version of Denning J.'s judgment); [1947] K.B. 130 (revised version of Denning J.'s judgment).

16 [1947] K.B. 130, pp. 134-135.

The Doctrine

In *Lloyds Bank Ltd.* v. *Bundy*[17] Lord Denning said:

> Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, [1] without independent advice, [2] enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, [3] when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, [4] coupled with undue influences or pressures brought to bear on him by or for the benefit of the other... I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal.[18]

The 'relief' is not limited to restitutionary relief. Suppose the weaker party breaks the contract. The stronger party claims damages. The court will give the weaker party 'relief' by denying the stronger party damages. The contract is unenforceable.

The doctrine expresses sound policy. The court can no longer ignore the plight of the small man. In *Schroeder Music Publishing Co. Ltd.* v. *Macaulay*[19] Lord Diplock said:

> It is, in my view, salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning power, the public policy which the court is implementing is not some 19th-century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable.[20]

Here we find in restraint of trade a general regard for the weaker party; previously the court's regard for the weaker party was limited to a restrictive covenant entered into by an employee.[21] The doctrine of inequality of bargaining power, as its name suggests, is the court's response to the needs of the times.

The Application of the Doctrine

In *Lloyds Bank Ltd.* v. *Bundy*[22] Lord Denning found the following requirements of the doctrine were satisfied. (i) '... the English law gives relief to one who, without independent advice, ...' 'There was a conflict of interest between the bank and the father. Yet the bank did not realise it. Nor did it suggest that the father should get independent advice.'[23]

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17 [1974] 3 W.L.R. 501.
18 *Ibid.* at pp. 508-509.
19 [1974] 1 W.L.R. 1308.
20 *Ibid.* at p. 1315.
21 *Attwood* v. *Lamont* [1920] 3 K.B. 571, at pp. 581-582.
22 [1974] 3 W.L.R. 501.
23 *Ibid.* at p. 509.

(ii) '... transfers property for a consideration which is grossly inadequate, ...' 'The bank did not promise to continue the overdraft or to increase it. On the contrary, it required the overdraft to be reduced. All that the company gained was a short respite from impending doom.'[24] (iii) 'when his bargaining power is grievously impaired by reason of his ... desires, ...' 'The relationship between the father and the son was one where the father's natural affection had much influence on him. He would naturally desire to accede to his son's request.'[25] (iv) 'coupled with undue influences ... brought to bear on him by ... the other'. 'The relationship between the bank and the father was one of trust and confidence. The bank knew that the father relied on it implicitly to advise him about the transaction. This gave the bank much influence on the father.'[26]

Lord Denning also decided the case on another ground. He said:

> But, in case that principle [the doctrine of inequality of bargaining power] is wrong, I would also say that the case falls within the category of undue influence of the second class stated by Cotton L.J. in *Allcard* v. *Skinner*.[27]

This was merely said out of caution. Lord Denning applied the doctrine of inequality of bargaining power in another case.

In *Clifford Davis Management Ltd.* v. *W.E.A. Records Ltd.*[28] the plaintiffs, music publishers, were the managers of a 'pop' group. Two members of the group were composers. They entered into agreements with the plaintiffs. Each agreement gave the plaintiffs a stranglehold over the composer. In every work which the composer produced over a period of ten years, the copyright was vested in the plaintiffs. The plaintiffs were not bound to publish any of the works. Before the ten years expired the group and the plaintiffs fell out. The composers had a number of songs recorded. The defendants were going to release for sale a record album of the songs. The case arose out of a claim by the plaintiffs for an injunction to restrain the defendants from infringing the plaintiffs' copyright in the songs. An interlocutory injunction was granted and continued. But the Court of Appeal, consisting of Lord Denning and Browne L.J., discharged the interlocutory injunction.

Lord Denning said:

> In the present case I would not presume to come to any final opinion. It is only interlocutory. But there are ingredients which may be said to go to make up a case of inequality of bargaining power.[29]

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24 *Ibid.* at p. 509.
25 *Ibid.* at p. 509.
26 *Ibid.* at p. 509.
27 *Ibid.* at p. 509.
28 [1975] 1 W.L.R. 61.
29 *Ibid.* at p. 65.

(i) '... the English law gives relief to one who, without independent advice, ...' 'The manager did not condescend to say how the agreements came to be signed. But from the internal evidence much can be inferred ... It may be inferred that the manager took a stock form, got the blanks filled in and asked the composer to sign it without reading it through or explaining it... The composer had no lawyer and no legal advisers. It seems to me that, if the publisher wished to exact such onerous terms or to drive so unconscionable a bargain, he ought to have seen that the composer had independent advice.'[30] (ii) 'enters into a contract upon terms which are very unfair...' 'Each composer was tied for 10 years without any retaining fee and with no promise to do anything in return save for a promise by the publisher to use his best endeavours.'[31] Further, 'or transfers property for a consideration which is grossly inadequate, ...' 'It is true that if the publisher chose to exploit a work, he was to pay royalties; but if he did not do so, he got the copyright for 1s.'[32] (iii) 'when his bargaining power is grievously impaired by reason of his own needs or desires, ...' 'They [the composers] wanted to get their songs published. It was their ladder to success. In order to get the songs performed — and to get them published — they were dependent on the manager. Their needs and desires were dependent on his will.'[33] (iv) 'coupled with undue influences or pressures brought to bear on him by or for the benefit of the other'. On this requirement, Lord Denning said nothing. 'It is only interlocutory.' Lord Denning ended by saying:

> For these reasons it may well be said that there was such inequality of bargaining power that the agreement should not be enforced and that the assignment of copyright was invalid and should be set aside.[34]

Browne L.J. said:

> For the reasons given by Lord Denning M.R., I am satisfied, as he is, that there is such a prima facie case [that these agreements may be unenforceable].[35]

Thus, the doctrine of inequality of bargaining power was adopted by Browne L.J.

Lord Denning's judgment in *Lloyds Bank Ltd.* v. *Bundy* has far-reaching implications. It shows what can be achieved by the fusion of law and equity. Eyebrows have been raised at Lord Denning's idea of fusing law and equity. Let us hope they will now be lowered.

E. K. Teh

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30 *Ibid.* at p. 65.
31 *Ibid.* at p. 65.
32 *Ibid.* at p. 65.
33 *Ibid.* at p. 65.
34 *Ibid.* at p. 65.
35 *Ibid.* at p. 66.