purchaser later heard of the boundary disputes and claimed in the High Court for rescission of the contract and the return of his deposit. Dillon, J held that condition 17(1) did not satisfy the requirements of reasonableness as set out in s 3 of the Misrepresentation Act 1967 (as substituted by s 8(1) of the Unfair Contract Terms Act 1977). The claimant, therefore, succeeded.

Comment (i) The National Conditions of Sale have been revised and, as regards misrepresentation, the contract now only attempts a total exclusion of the purchaser's remedies if the misrepresentation is not material or substantial in terms of its effect and is not made recklessly or fraudulently.

(ii) The provisions relating to inducement liability were also applied in *South Western General Property Co Ltd* v *Marton, The Times*, 11 May 1982; the court *held* that conditions of sale in an auction catalogue which tried to exclude liability for any representations made, if these were incorrect, were not fair and reasonable. The defendant had relied upon a false statement that some building would be allowed on land which he bought at an auction, even though the facts were that the local authority would be most unlikely to allow any building on the land. The clauses excluding liability for misrepresentation did not apply and the contract could be rescinded.

Exclusion clauses and reasonableness

187 *Mitchell (George) (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* [1983] 1 All ER 108

This case is a landmark. It was the last case heard by Lord Denning, one of the foremost opponents of exclusion clauses that could operate unfairly, in the Court of Appeal. In it he gave a review of the development of the law relating to exclusion clauses in his usual clear and concise way. The report is well worth reading in full. Only a summary of the main points can be given here.

George Mitchell ordered 30 lb of cabbage seed and Finney supplied it. The seed was defective. The cabbages had no heart; their leaves turned in. The seed cost £192 but Mitchell's loss was some £61,000, i.e. a year's production from the 63 acres planted. Mitchell carried no insurance. When sued Finney defended the claim on the basis of an exclusion clause limiting their liability to the cost of the seed or its replacement. In the High Court Parker, J found for Mitchell. Finney appealed to the Court of Appeal. The major steps in Lord Denning's judgment appear below:

(*a*) *The issue of communication – was the clause part of the contract?* Lord Denning said that it was. The conditions were usual in the trade. They were in the back of Finney's catalogue. They were on the back of the invoice. 'The inference from the course of dealing would be that the farmers had accepted the conditions as printed – even though they had never read them and did not realize that they contained a limitation on liability . . .'.

(*b*) *The wording of the clause.* The relevant part of the clause read as follows: 'In the event of any seeds or plants sold or agreed to be sold by us not complying with the express terms of the contract of sale or with any representation made by us or by any duly authorized agent or representative on our behalf prior to, at the time of, or in any such contract, or any seeds, or plants proving defective in varietal purity we will, at our option, replace the defective seeds or plants, free of charge to the buyer or will refund all payments made to us by the buyer in respect of the defective seeds or plants and this shall be the limit of our obligation. We hereby exclude all liability for any loss or damage arising from the use of any seeds or plants supplied by us and for any consequential loss or damage arising out of such use or any failure in the performance of or any defect in any seeds or plants supplied by us for any other loss or damage whatsoever save for, at our option, liability for any such replacement or refund as aforesaid.'

Lord Denning said that the words of the clause did effectively limit Finney's liability. Since the Securicor cases (see *Photo Production* and *Ailsa Craig*), words were to be given their natural meaning and not strained. A judge must not proceed in a hostile way towards the wording of exclusion clauses as was, for example, the case with the word 'mis-delivery' in *Alexander* v *Railway Executive* (1951).

(*c*) *The test of reasonableness.* Lord Denning then turned to the new test of reasonableness which could be used to strike down an exclusion clause, even though it had been communicated, and in spite of the fact that its wording was appropriate to cover the circumstances. On this he said: 'What is the result of all this? To my mind it heralds a revolution in our approach to exemption clauses; not only where they exclude liability altogether and also where they limit liability; not only in the specific categories in the Unfair Contract Terms Act 1977, but in other contracts too. . . . We should do away with the multitude of cases on exemption clauses. We should no longer have to harass our students with the study of them. We should set about meeting a new challenge. It is presented by the test of reasonableness.'

(*d*) *Was the particular clause fair and reasonable?* On this Lord Denning said: 'Our present case is very

much on the borderline. There is this to be said in favour of the seed merchant. The price of this cabbage seed was small: £192. The damages claimed are high: £61,000. But there is this to be said on the other side. The clause was not negotiated between persons of equal bargaining power. It was inserted by the seed merchants in their invoices without any negotiation with the farmers. To this I would add that the seed merchants rarely, if ever, invoked the clause. . . . Next, I would point out that the buyers had no opportunity at all of knowing or discovering that the seed was not cabbage seed: whereas the sellers could and should have known that it was the wrong seed altogether. The buyers were not covered by insurance against the risk. Nor could they insure. But as to the seed merchants the judge said [Lord Denning here refers to Parker, J at first instance]: "I am entirely satisfied that it is possible for seedsmen to insure against this risk . . .". To that I would add this further point. Such a mistake as this could not have happened without serious negligence on the part of the seed merchants themselves or their Dutch suppliers. So serious that it would not be fair to enable them to escape responsibility for it. In all the circumstances I am of the opinion that it would not be fair or reasonable to allow the seed merchants to rely on the clause to limit their liability.'

Oliver and Kerr, LJJ also dismissed the appeal.

The suppliers asked for leave to appeal to the House of Lords but the Court of Appeal refused. However, the House of Lords granted leave and affirmed the decision of the Court of Appeal in 1983 (see [1983] 2 All ER 737).

Comment This is in effect an application of s 6(3) of the Unfair Contract Terms Act 1977. It was actually brought under the Sale of Goods Act 1979 which contained transitional provisions and s 55(3) of the 1979 Act plus para 11 of Sch 1 applied to this contract. For contracts made after 31 January 1978 the Unfair Contract Terms Act 1977, s 6(3) would apply.

ILLEGALITY AND PUBLIC POLICY

Public policy: judiciary: illegal contracts

188 *Dann* v *Curzon* (1911) 104 LT 66

An agreement was made for advertising a play by means of collusive criminal proceedings brought as a result of a prearranged disturbance at the theatre. The claimants, who agreed to create the disturbance and did in fact do so, sued for the remuneration due to them under the agreement.

Held – the action failed because it was an agreement to commit a criminal offence and was, therefore, against public policy.

189 *Pearce* v *Brooks* (1866) LR I Exch 213

The claimants hired a carriage to the defendant for a period of 12 months during which time the defendant was to pay the purchase price by instalments. The defendant was a prostitute and the carriage, which was of attractive design, was intended to assist her in obtaining clients. One of the claimants knew that the defendant was a prostitute but he said that he did not know that she intended to use the carriage for purposes of prostitution. The evidence showed to the contrary. The jury found that the claimant knew the purpose for which the carriage was to be used and thereupon the court *held* that the claimant's action for the sum due under the contract failed for illegality.

Comment (i) The contract would, of course, have been valid if the claimants had not *known* of the intended use of the carriage.

(ii) It was decided by the Court of Appeal in *Armhouse Lee Ltd* v *Chappell* [1996] 1 CLY 1208, that contracts to advertise telephone sex lines for pre-recorded erotic one-to-one conversations did not amount to prostitution and were not unenforceable as a matter of public policy. The whole matter of these advertisements was the subject of regulation by the Independent Committee for the Supervision of Standards of Telephone Information, and judges sitting as part of the civil jurisdiction should not restrict the freedom of contract on the grounds of their own moral attitudes (*Fender* v *St John Mildmay* [1937] 3 All ER 402 followed).

190 *Regazzoni* v *KC Sethia Ltd* [1958] AC 301

The defendants agreed to sell and deliver jute bags to the claimant, both parties knowing and intending that the goods would be shipped from India to Genoa so that the claimant might then send them to South Africa. Both parties knew that the law of India prohibited the direct or indirect export of goods from India to South Africa, this law being directed at the policy of apartheid adopted at the time by South Africa. The defendants did not deliver the jute bags as agreed and the claimant brought this action in an English court, the contract being governed by English law.

Held – although the contract was not illegal in English law, it could not be enforced because it had as its object the violation of the law of a foreign and friendly country in which part of the contract was to be carried out.

Comment In an earlier case, *Foster* v *Driscoll* [1929] 1 KB 470, decided on this ground, the court held that a contract to smuggle whisky to the USA during the period of prohibition was illegal and void. Again, in *Soleimany* v *Soleimany* [1999] 3 All ER 847 the Court of Appeal refused to deal with a dispute between father and son, who were Iranians, in regard to the shares of the proceeds of a business under which the son, in contravention of Iranian revenue and export laws, arranged for the export from Iran of carpets that were subsequently sold by his father in England and other countries.

191 *John* v *Mendoza* [1939] 1 KB 141

The defendant owed the claimant some £852. The defendant was made bankrupt and the claimant was intending to prove for his debt in the bankruptcy. The defendant asked him not to do so, but to say that the £852 was a gift whereupon the defendant would pay the claimant in full regardless of the sum received by other creditors. In view of the defendant's promise the claimant withdrew his proof, but in the event all the other creditors were paid in full and the bankruptcy was annulled. The claimant now sued for the debt.

Held – there was no claim, for the claimant abandoned all right to recover on failure to prove in the bankruptcy, and the defendant's promise to pay in full was unenforceable, being an agreement designed to defeat the bankruptcy laws.

192 *Parkinson* v *The College of Ambulance Ltd and Harrison* [1925] 2 KB 1

The first defendants were a charitable institution and the second defendant was the secretary, who fraudulently represented to the claimant, Colonel Parkinson, that the charity was in a position to obtain some honour (probably a knighthood) for him if he would make a suitable donation to the funds of the charity. The claimant paid over the sum of £3,000 and said he would pay more if the honour was granted. No honour of any kind was received by the claimant and he brought this action to recover the money he had donated to the College.

Held – the agreement was contrary to public policy and illegal. No relief could be granted to the claimant.

193 *Napier* v *National Business Agency Ltd* [1951] 2 All ER 264

The defendants engaged the claimant to act as their secretary and accountant at a salary of £13 per week plus £6 per week for expenses. Both parties were aware that the claimant's expenses could never amount to £6 a week and in fact they never exceeded £1 per week. Income tax was deducted on £13 per week, and £6 per week was paid without deduction of tax as reimbursement of expenses. The claimant, having been summarily dismissed, claimed payment of £13 as wages in lieu of notice.

Held – the agreement was contrary to public policy and illegal. The claimant's action failed.

Comment (i) In an earlier case on this point (*Alexander* v *Rayson* [1936] 1 KB 169), Mrs Rayson took a lease of a service flat. The rent was £1,200 per annum and she signed two forms: under one she agreed to pay £450 for the lease, under the other £750 for services provided by the claimant landlord. His purpose in splitting the transaction was to defraud the rating authorities who assessed the flat for rates on the basis of a rent of £450 pa which was all the claimant disclosed. This was unknown to the defendant. It was held that the contract was illegal. Mrs Rayson could not be sued for the rent. The service contract was also void.

(ii) In *Salvesen* v *Simons* [1994] 490 IRLB 3 the Employment Appeal Tribunal decided that an arrangement whereby part of an employee's pay was paid to a partnership that provided no services to the employer amounted to a fraud on the Inland Revenue and made the employment contract illegal and unenforceable so that the employee had no right to bring a complaint of unfair dismissal. The arrangement resulted at the least in a deferral of payment of tax and a potential evasion of tax lawfully due under Schedule E (PAYE) because the partnership could offset legitimate business expenses under Schedule D, whereas this was not possible under Schedule E.

(iii) The public policy rules do not prevent genuine tax planning. Thus, in *Lightfoot* v *D & J Sporting Ltd* [1996] IRLR 64 L was assisted in his duties as an employed gamekeeper by his wife who initially received no remuneration from L's employer, the defendant. Eventually L made an agreement with his employer under which over a third of his income was paid to his wife. The object of this arrangement was to reduce L's liability for income tax and national insurance. He was later dismissed and both he and his wife received P45s. He claimed unfair dismissal but his employer said that his claim must fail because his contract was illegal as a result of the agreement regarding his wife. The Employment Appeal Tribunal decided that the arrangement in regard to the wife was not illegal merely because its sole purpose was to reduce L's tax and national insurance liabilities. The scheme had been entered into in good faith and was a proper method of reducing tax which had been or would be disclosed to the Revenue. The claim for unfair dismissal could proceed.

Illegal contracts: consequences: is performance necessarily unlawful or not? The *in pari delicto* rule: the matter of repentance

194 *Bowmakers Ltd* v *Barnet Instruments Ltd* [1944] 2 All ER 579

Bowmakers bought machine tools from a person named Smith. This contract was illegal because it contravened an order made by the Minister of Supply under the Defence Regulations, Smith having no licence to sell machine tools. Bowmakers hired the machine tools to Barnet Instruments under hire-purchase agreements which were also illegal because Bowmaker did not have a licence to sell machine tools. Barnet Instruments failed to keep up the instalments, sold some of the machine tools and refused to give up the others. Bowmakers sued, not on the illegal hire-purchase contracts, but in conversion, and judgment was given for Bowmakers. The Court of Appeal declared the contracts illegal but, since Bowmakers were not suing under the contracts but as owner, their action succeeded. The wrongful sales by Barnet Instruments terminated the hire-purchase contracts.

Comment Although the contract between Smith and Bowmakers was illegal, ownership passed to Bowmakers by reason of delivery. When goods are delivered, the person receiving them has some evidence of title by reason of possession and need not necessarily plead a contract. Where, in an illegal situation, the goods have not been delivered, there may be difficulty in establishing ownership without relying on the illegal contract. Nevertheless, ownership was established without delivery in *Belvoir Finance Co Ltd* v *Stapleton* [1970] 3 WLR 530. In this case A (a dealer) sold certain cars to B (a finance company) which let them on hire-purchase to C (a car-hire company). C did not pay the minimum deposit required by regulation to B, thus the hire-purchase contract was illegal. Later, C's manager, S, sold the cars to innocent purchasers. C did not pay the hire-purchase instalments and B sued S in conversion, the company C having gone into liquidation. It was *held* by the Court of Appeal that B succeeded. It was the owner of the cars and S had converted its property. The decision is of interest since B (the finance company) had never taken delivery of the cars; they were sent direct from A to C, as is usual in these transactions. Nevertheless, B was accepted as owner, although the only means of proving ownership open to B seems to have been the illegal hire-purchase contract with C. This was the only document which showed how B came to acquire ownership of the cars. On the assumption that this case means what it says, the rule that there can be no enforcement of illegal contracts loses much of its practical value since the major remedy of claiming the goods back appears to be available equally against a hirer in default, whether the contract is legal or illegal.

195 *Edler* v *Auerbach* [1950] 1 KB 359

The defendant leased premises to the claimant for use as offices. The lease was contrary to the provisions of the Defence Regulations of 1939, since the premises had previously been used as residential accommodation and should have been let as such. The local authority discovered the illegal use and would not allow it to continue. The claimant now sued for rescission of the lease together with rent paid under it. The defendant counterclaimed for rent due and for damage done to the premises, including the removal of a bath.

Held – the landlord could not enforce the illegal lease but was entitled to damages for the claimant's failure to replace the bath.

196 *Hughes* v *Liverpool Victoria Legal Friendly Society* [1916] 2 KB 482

John Henry Thomas, a grocer, had orginally taken out five policies on customers who owed him money. It was agreed that Thomas had an insurable interest in the customers because they were his debtors. Thomas let the policies drop and an agent of the defendant company persuaded a Mrs Hughes to take them up, assuring her that she had an insurable interest which she had not. She now brought this action to recover the premiums paid.

Held – the contract was illegal but the claimant could recover the premiums. She had been induced to take up the policies by the fraud of the defendant's agent.

Comment In an earlier case on this point (*Atkinson* v *Denby* (1862) 7 H & N 934), the claimant was insolvent and wished to compromise with his creditors by paying 25p in the £1. One creditor would not agree unless the claimant paid him £50. This sum was paid and was later recovered by the claimant who had been forced to defraud his creditors. The money was then available for distribution to creditors generally.

197 *Bigos* v *Bousted* [1951] 1 All ER 92

The defendant was anxious to send his wife and daughter abroad for the sake of the daughter's health, but restrictions on currency were in force so that a long stay abroad was impossible. In August 1947, the defendant, in contravention of the Exchange Control Act 1947, made an agreement under which the claimant was to supply £150 of Italian money to be made available at Rapallo, the defendant undertaking to repay the claimant with English money in England. As security, the defendant deposited with

the claimant a share certificate for 140 shares in a company. The wife and daughter went to Italy but were not supplied with currency, and had to return sooner than they would have done. The defendant, thereupon, asked for the return of his share certificate but the claimant refused to give it up. This action was brought by the claimant to recover the sum of £150 which she insisted she had lent to the defendant. He denied the loan, and counterclaimed for the return of his certificate. In the course of the action the claimant abandoned her claim, but the defendant proceeded with his counterclaim saying that, although the contract was illegal, it was still executory so that he might repent and ask the court's assistance.

Held – the court would not assist him because the fact that the contract had not been carried out was due to frustration by the claimant and not the repentance of the defendant. In fact, his repentance was really want of power to sin.

198 ***Taylor* v *Bowers*** (1876) 1 QBD 291

The claimant was under pressure from his creditors and in order to place some of his property out of their reach, he assigned certain machinery to a person named Adcock. The claimant then called a meeting of his creditors and tried to get them to settle for less than the amount of their debts, representing his assets as not including the machinery. The creditors would not and did not agree to a settlement. The claimant now sued to recover his machinery from the defendants who had obtained it from Adcock.

Held – the claimant succeeded because the illegal fraud on the creditors had not been carried out.

199 ***Kearley* v *Thomson*** (1890) 24 QBD 742

The claimant had a friend who was bankrupt and wished to obtain his discharge. The defendant was likely to oppose the discharge and accordingly the claimant paid the defendant £40 in return for which the defendant promised to stay away from the public examination and not to oppose the discharge. The defendant did stay away from the public examination but before an application for discharge had been made the claimant brought his action claiming the £40.

Held – the claim failed because the illegal scheme had been partially effected.

Illegal contracts: consequences: lawful on the face of it

200 ***Fielding and Platt Ltd* v *Najjar*** [1969] 2 All ER 150

The claimants entered into an agreement with a Lebanese company to make and deliver an aluminium press. Payment was to be made by six promissory notes given at stated intervals by the defendant personally. The defendant, who was the managing director of the Lebanese company, told the claimants that they ought to invoice the goods as part of a rolling mill, his intention being to deceive the Lebanese import authorities into believing that the import of the press was authorised whereas in fact it was not. The first promissory note was dishonoured and the claimants stopped work on the press and cabled a message to the Lebanese company to that effect. The second promissory note was then dishonoured and the claimants sued upon the notes. The case eventually reached the Court of Appeal where it was *held* that:

(*a*) since the first note covered work in progress there was no defence based on failure of consideration;
(*b*) any illegality in connection with the importing of the press was not part of the contract or agreed to by the claimants;
(*c*) the claimants' claim was not, therefore, affected by illegality;
(*d*) since the claimants had repudiated the contract before the second note was dishonoured they had no claim for the amount of the note as such but could only sue for damages; the defendant was not liable on the second note.

Comment In an earlier case on this point (*Clay* v *Yates* (1856) 1 H & B 73) it was *held* that a printer who had, without knowledge, printed a book containing libels could recover his charges.

201 ***Cowan* v *Milbourn*** (1867) LR 2 Ex 230

A person hired a hall to deliver blasphemous lectures and then was refused possession of it. His action claiming possession was refused on the ground that no relief could be granted by the court where the purpose of the contract was illegal.

202 ***Berg* v *Sadler and Moore*** [1937] 1 All ER 637

The claimant was a hairdresser and sold tobacco and cigarettes. He was a member of the Tobacco Trade

Association, the Association having as its object the prevention of price cutting. Manufacturers would supply tobacco to traders who agreed not to sell at less than the fixed retail price. The claimant sold tobacco at cut prices and was put on the manufacturers' stop list which meant that he could not obtain supplies. The claimant made contact with a person named Reece who was a member of the Association and Reece agreed to obtain goods from manfacturers and hand them over to the claimant, in return for which Reece was to receive a commission from the claimant. One such transaction was carried out. On a later occasion the claimant's assistant and a representative of Reece went to the defendant's premises to obtain a supply of cigarettes. The claimant's assistant handed over some £72 to Moore, who had some doubt about the matter and said he would send the goods direct to Reece's shop. Thereupon the claimant's assistant demanded the return of the money. Moore refused to give it back, and this action was brought to recover it.

Held – this was an attempt by the claimant to obtain goods by false pretences and, since no action arises out of a base cause, the claimant's action failed.

Public policy: contracts to oust the jurisdiction of the courts; severance

203 *Goodinson* v *Goodinson* [1954] 2 All ER 255

A contract made between husband and wife, who had already separated, provided that the husband would pay his wife a weekly sum by way of maintenance in consideration that she would indemnify him against all debts incurred by her, would not pledge his credit, and would not take matrimonial proceedings against him in respect of maintenance. The wife now sued for arrears of maintenance under this agreement. The last promise was admittedly void since its object was to oust the jurisdiction of the courts, but it was *held* that this did not vitiate the rest of the contract; it was not the sole or even the main consideration, and the wife's action for arrears succeeded, this promise being severable.

Comment In a later case on this point (*Re Davstone Estates Ltd* [1969] 2 All ER 849) it was decided that a clause in a lease providing that, as regards certain payments to be made by tenants for services to common parts, e.g. staircases, in a block of flats, the certificate of the landlord's surveyor was to be final and conclusive, could be regarded as void.

Restraint of trade and the public interest

204 *Wyatt* v *Kreglinger and Fernau* [1933] 1 KB 793

In June 1923, the defendants wrote to the claimant, who had been in their service for many years, intimating that upon his retirement they proposed to give him an annual pension of £200, subject to the condition that he did not compete against them in the wool trade. The claimant's reply was lost and he did not appear ever to have agreed for his part not to engage in the wool trade, but he retired the following September and received the pension until June 1932 when the defendants refused to make any further payments. The claimant sued them for breach of contract. The defendants denied any contract existed and also pleaded that if a contract did exist, it was void as being in restraint of trade. The Court of Appeal gave a judgment for the defendants and although there was no unanimity with regard to the *ratio decidendi*, it appeared to two judges that the contract was injurious to the interests of the public, since to restrain the claimant from engaging in the wool trade was to deprive the community of services from which it might derive advantage.

Comment The basis of this decision seems to be that if a contract did exist it was supported only by an illegal consideration moving from Wyatt, i.e. an agreement not to engage in the wool trade. If he had been entitled to a pension as part of his original contract of service, then no doubt the pension arrangements would have been severed and enforced.

Restraints on employees: trade secrets

205 *Forster & Sons Ltd* v *Suggett* (1918) 35 TLR 87

The works manager of the claimants, who were mainly engaged in making glass and glass bottles, was instructed in certain confidential methods concerning, amongst other things, the correct mixture of gas and air in the furnaces. He agreed that during the five years following the termination of his employment he would not carry on in the United Kingdom, or be interested in, glass-bottle manufacture or any other business connected with glass-making as conducted by the claimants. It was *held* that the claimants were entitled to protection in this respect and that the restraint was reasonable.

Comment (i) The Court of Appeal decided in *PSM International and McKechnie* v *Whitehouse and Willenhall Automation* [1992] IRLR 279 that the court has power to prevent a contract made following an abuse of trade secrets from being carried out. Thus, if A is employed by B

and goes to work for C and, by using trade secrets obtained while working for B, helps C to obtain a contract with D, then the court can grant B an injunction to restrain C from fulfilling its contract with D where there is evidence that B has lost the contract with D because of the misuse of its trade secrets, even though the effect on D appears unfair. C is not liable to D for breach of contract because it is frustrated (see further Chapter 17) since it could not be carried out without C being in contempt of court.

(ii) A more recent example involving a famous name can be found in *Dyson Technology Ltd* v *Strutt* [2005] All ER (D) 355 (Nov). Mr Strutt is an engineer who had been employed by Dyson and possessed confidential knowledge of a technical nature belonging to Dyson and relating to vacuum cleaners. Because of this, he was contractually restrained from being involved in a competing business for 12 months from leaving his employment with Dyson. He left Dyson and joined Black & Decker, known mainly for power tools but having a small business in vacuum cleaners. The High Court granted Dyson an injunction which prevented Mr Strutt from working for any business that competed with Dyson for the 12-month period. The judge took the view that Black & Decker could realistically be regarded as a competitor, in spite of the small business presence, and the 12-month term was reasonable in the circumstances.

Restraints on employees: solicitation of customers and clients

206 *Home Counties Dairies* v *Skilton* [1970] 1 All ER 1227

Skilton, a milk roundsman employed by the claimants, agreed, amongst other things, not for one year after leaving his job 'to serve or sell milk or dairy produce' to persons who within six months before leaving his employment were customers of his employers. Skilton left his employment with the claimants in order to work as a roundsman for Westcott Dairies. He then took the same milk round as he had worked when he was with the claimants.

Held – by the Court of Appeal – this was a flagrant breach of agreement. The words 'dairy produce' were not too wide. On a proper construction they must be restricted to things normally dealt in by a milkman on his round. 'A further point was taken that the customer restriction would apply to anyone who had been a customer within the last six months of the employment and had during that period ceased so to be, and it was said that the employer could have no legitimate interest in such persons. I think this point is met in the judgment in *GW Plowman & Sons Ltd* v *Ash* [1964] 2 All ER 10 where it was said that a customer might have left temporarily and that his return was not beyond hope and was therefore a matter of legitimate interest to the employer'. (*Per* Harman LJ)

Comment (i) It was held by the Court of Appeal in *John Michael Design* v *Cooke* [1987] 2 All ER 332 after referring to *Plowman* v *Ash* that a restraint in a contract of employment preventing an employee (A) from competing with his former employer (B) could be enforced by an injunction even to prevent the former employee from doing business with a customer (C) of his former employer who had made it clear that he would not do business with (B) again. There was always the possibility that (C) would change his mind.

(ii) It is better in these customer/client restraints to restrict the restraint to not soliciting. If in addition the restraint prevents the employee from working in a given area, it may fail. Thus, in *Office Angels Ltd* v *Rainer-Thomas and O'Connor* [1991] IRLR 214 the defendants were employed by the claimants at their employment agency in Bow Lane in the City of London. Janette Rainer-Thomas and Elizabeth Ann O'Connor were employed as the manager of the branch and temporaries consultant respectively. The defendants' contracts of employment included a clause which provided that, in order to protect Office Angels' goodwill, for a six-month period following the termination of employment, office managers and temporaries consultants should not solicit custom from people or companies which had been a client of the company at any time during the period for which the employee was employed by the claimants. In addition, during those six months the relevant employees agreed not to engage in the trade or business of any employment agency within a radius of 3,000 metres of the branch or branches of the company at which they had been employed for a period of not less than four weeks during the six months prior to the date of termination of employment, or in the case of a branch or branches in the Greater London area, then within a radius of 1,000 metres.

The defendants gave notice and left the claimants' employment on 23 October 1990. On 1 November they became directors and shareholders of a company called Pertemps City Network (London) Ltd which operated an employment agency from Fenchurch Street.

Injunctions preventing the defendants from so operating were granted by the High Court. The defendants appealed to the Court of Appeal. The Court of Appeal allowed the appeal and discharged the injunctions, dismissing all the claimants' claims for relief in the action. While the court would have been prepared to accept the restraint on the poaching of clients for a period of six months, it was not prepared to accept the area restraint, and for this reason the whole of the clause setting out the restraints failed.

In the main judgment, Sir Christopher Slade said: 'Looking at the matter broadly, a restriction which precludes the defendants, albeit only for a period of six months, from opening an office of an employment agency anywhere in an area of about 1.2 square miles, including most of the City of London, is not an appropriate form of covenant for the protection of the [claimants'] connection with its clients and is, in any

event, wider than is necessary for such protection. The City of London, where there are some 400 employment agencies, is clearly a particularly fertile area for persons carrying on this class of business in view of the many thousands of potential clients and job-seekers who operate in that area. I fully understand the desire of the [claimants] to preclude the defendants from seeking unfair advantage of the contacts with the 100 or so of the [claimants'] clients which the defendants had made during their employment by the [claimants]. In my judgment, however, the restriction imposed by [the clause] placed a disproportionately severe restriction on the defendants' right to compete with the [claimants] after leaving [their] employment and went further than was reasonable in the interest of the parties.'

(iii) The case represents the modern approach to restraints of trade on ex-employees in regard to the poaching of customers and clients. If the employees agree not to poach clients then it surely does not matter whether they set up in business next door or not. The area restraint does little to protect a customer/client connection and can lead to the unenforceability of the whole restraint clause, as in this case.

(iv) Other cases of interest in this area are *Morris Angel and Son Ltd* v *Hollande and Lee* [1993] IRLR 169 where the Court of Appeal *held* that a covenant restraining an employee from dealing with his employer's business contacts for a year after his employment could be enforced by the company to which the business was transferred, but only in regard to the contracts of the original employer who took the covenant and not to those of the transferee, who had no such covenant with the employee. *Briggs* v *Oates* [1991] 1 All ER 411 is also of interest in that it decided that if a contract containing an employee restraint is repudiated by the employer all contractual obligations are discharged with the contract and the restraint cannot be enforced. Thus if an employer were unilaterally to reduce the restrained employee's pay so that he left under a constructive dismissal (see further Chapter 19) the employer could not subsequently legally enforce the restraint in the former employee's contract.

(v) The decision in *Briggs* will not apply if the employee resigns and is not dismissed. In *Rock Refrigeration Ltd* v *Jones* [1997] 1 All ER 1 J was employed under a contract which imposed restrictions on future employment for 12 months following termination of the contract 'howsoever occasioned'. He resigned and went to work for a competitor and the restraint was held enforceable. The Court of Appeal said that if he had been dismissed, constructively or otherwise, the clause would not have applied though it seemed to cover such a situation. A dismissal by the employer would mean that he had repudiated the contract and the restraint would then be unenforceable under the rules of the House of Lords in *General Billposting* v *Atkinson* [1909] AC 118. But where there was a resignation, the restraint could be applied.

(vi) Many covenants are drafted to apply on termination of the contract 'for whatever reason'. It is clear from the decision in *Rock* that (*a*) such words do not prevent the application of the rule in *General Billposting*, but (*b*) they do not make the whole covenant unreasonable.

(vii) Of particular interest because it relates to a restraint placed upon an employee/partner of a professional firm is *Taylor Stuart* v *Croft* [1998] 606 IRLB 15. The High Court had to deal with a contractual restraint of trade on an accountant/salaried partner which placed a three-year restraint on him in terms of working for clients of the firm after his employment terminated. This restraint was regarded by the High Court as unreasonable and unenforceable. Other restraints, namely soliciting, canvassing and enticing away clients, were enforceable. A liquidated damages clause in the contract payable by the salaried partner for breach of the restraints was regarded as penal and unenforceable being two-and-a-half times the salaried partner's gross annual income. However, since the salaried partner had after leaving the firm taken some steps to canvass his former clients, e.g. by telephoning them, and some had taken their work to him, a claim for unliquidated damages would seemingly have succeeded. The claimants had, however, relied on enforcing the penal liquidated damages clause and, therefore, their action failed.

Restraints on employees: exceptionally for life

207 *Fitch* v *Dewes* [1921] 2 AC 158

A solicitor at Tamworth employed a person who was successively his articled clerk and managing clerk. In his contract of service, the clerk agreed, if he left the solicitor's employment, never to practise as a solicitor within seven miles of Tamworth Town Hall.

Held – the agreement was good because during his service the clerk had become acquainted with the details of his employer's clients, and could be restrained even for life from using that knowledge to the detriment of his employer.

Comment (i) Although the restraint was for life, it did cover a rather small area in which at the time there were comparatively few people. It is unlikely that such a restraint would be regarded as valid today, particularly in a more densely populated area.

(ii) The Privy Council stated quite clearly in *Deacons* v *Bridge* [1984] 2 All ER 19 that a restraint such as this would only be applied in unusual circumstances. The decision seems confined to its own facts, though the statements of principle in the case by the House of Lords are more enduring.

(iii) Ignoring *Fitch* v *Dewes* (1921) which is a one-off decision, restraints of trade have not always found favour with the smaller business, such as a small to medium firm

of accountants or lawyers, or with small traders such as the owners of hair-styling salons. The canvassing of clients after leaving service can be damaging and does go on. However, the advice generally received by such business organisations is that a six-month restraint is all that a court is likely to accept under the 'reasonableness' principles and since injunctive relief would be the best remedy to stop canvassing on pain of contempt of court and possible fine or imprisonment (the latter being rather unlikely) in this context, by the time the lawyers have got a case in motion and to the court, the acceptable period of six months is likely to be up anyway, though a claim for damages is available if clients and customers have been lost, the question being, of course, can the ex-employee pay them? The three-year period allowed in *Taylor Stuart* is, therefore, of value. It is longer than what has in general been allowed and would give time to seek injunctive relief for a large part of the time.

In large concerns, and in respect of higher management, restraint clauses may well be worthwhile to protect the business and retain skilled employees (see Restraint in the City at p 376).

Restraints on employees: taken in a contract between their employers

208 *Kores Manufacturing Co Ltd* v *Kolok Manufacturing Co Ltd* [1958] 2 All ER 65

The two companies occupied adjoining premises in Tottenham and both manufactured carbon papers, typewriter ribbons and the like. They made an agreement in which each company agreed that it would not, without the written consent of the other, 'at any time employ any person who during the past five years shall have been a servant of yours'. The claimant's chief chemist sought employment with the defendant, and the claimant was not prepared to consent to this and asked for an injunction to enforce the agreement.

Held – by the Court of Appeal:

(*a*) a contract in restraint of trade cannot be enforced unless:
  (i) it is reasonable as between the parties; and
  (ii) it is consistent with the interest of the public;
(*b*) the mere fact that the parties are dealing on equal terms does not prevent the court from holding that the restraint is unreasonable in the interests of those parties;
(*c*) the restraint in this case was grossly in excess of what was required to protect the parties and accordingly was unreasonable in the interests of the parties;
(*d*) the agreement therefore failed to satisfy the first of the two conditions set out in (*a*) above and was void and unenforceable.

Comment The restrictive agreement which was at the root of *Kores Manufacturing Co Ltd* v *Kolok Manufacturing Co Ltd* is not covered by the Competition Act 1998 which is not concerned with agreements between traders in regard to their employees and was decided on common-law principles. These principles are that the agreement must be reasonable between the parties and reasonable in the public interest. Both of these points arose in *Kores*, the Court of Appeal holding that the agreement was unreasonable as between the parties and also that it was contrary to the public interest, though the *ratio* is based on the fact that the agreement was unreasonable as between the parties.

Restraints on vendors of businesses

209 *British Reinforced Concrete Co* v *Schelff* [1921] 2 Ch 563

The claimant carried on a large business for the manufacture and sale of BRC Road Reinforcements. The defendant carried on a small business for the sale of 'Loop Road Reinforcements'. The defendant sold his business to the claimant and agreed not to compete with the defendant in the manufacture or sale of road reinforcements in any part of the UK. It was *held* that the covenant was void. All that the defendant transferred was the business of selling the reinforcements called 'Loop'. It was, therefore, only with regard to that particular variety that it was justifiable to curb his future activities.

Comment It would have been possible to sever the restraint by deleting the part relating to manufacture, but the court said that even if this were done it would still be too wide. Not to 'sell any road reinforcement in any part of the UK' was much too wide for what was a very small business.

210 *Nordenfelt* v *Maxim Nordenfelt Guns and Ammunition Co* [1894] AC 535

Nordenfelt was a manufacturer of machine guns and other military weapons. He sold the business to a company, giving certain undertakings which restricted his business activities. This company was amalgamated with another company and Nordenfelt was employed by the new concern as managing director. In his contract Nordenfelt agreed that for 25 years he would not manufacture guns or ammunition in any part of the world, and would not compete with the company in any way.

Held – the covenant regarding the business sold was valid and enforceable, even though it was worldwide, because the business connection was worldwide and it was possible in the circumstances to sever this undertaking from the rest of the agreement (see further p 365). However, the further undertaking not to compete in any way with the company was unreasonable and void.

Restraints on employee/shareholders: what is the test?

211 ***Systems Reliability Holdings plc* v *Smith*** [1990] IRLR 377

In 1986 Mr Smith commenced work with a company called Enterprise Computer Systems (ECS). He was a computer engineer engaged upon the reconfiguration of IBM mainframe computers. He became highly skilled in the modification and rebuilding of the latest generation of IBM's 3090 computer. His skill was instrumental in making ECS a leading company providing computer services. He was dismissed on 1 February 1990.

While he was employed by ECS Mr Smith had purchased shares totalling 1.6 per cent of the holding in the company. After his dismissal Systems Reliability Holdings plc acquired all the shares in ECS and Mr Smith received £247,000 for his 1.6 per cent holding. The share sale agreement had a restrictive covenant. Mr Smith had seen and initialled the agreement in final draft form. The covenant said: 'None of the specifically restricted vendors will during the restricted period directly or indirectly carry on or be engaged or interested . . . in any business which competes with any business carried on at the date of this agreement . . . by the company or any of its subsidiaries.'

Mr Smith was one of the specifically restricted vendors and the restricted period was in effect one of 17 months from the date of the sale. There was a further covenant which provided that: 'None of the vendors will at any time after the date of this agreement disclose or use for his own benefit or that of any other person any confidential information which he now possesses concerning the business or affairs or products of or services supplied by the company or any of the subsidiaries or of any person having dealings with the company or any of its subsidiaries.'

Soon after his dismissal and the share sale, Mr Smith set up in business supplying computer services. Systems Reliability asked for an injunction to enforce the restrictive covenant in the share sale agreement.

The High Court *held* that a restrictive covenant imposed upon the defendant as part of the claimant's acquisition of the shares in the company in which he was formerly employed was entirely reasonable and would be enforced against him notwithstanding that his shareholding in the company had amounted to only 1.6 per cent of the total. The present case was a true vendor and purchaser situation in which the defendant had received £247,000 for his 1.6 per cent shareholding. There was no public policy to prevent the defendant taking himself out of competition for what was a comparatively short period of 17 months as required under the agreement which on the evidence was entirely reasonable, or to prevent the imposition of a worldwide restriction which was also reasonable given that the business was completely international. The covenant would, therefore, be enforced.

Comment As we have seen, the courts have traditionally allowed wider restraints on competition to be placed on the vendors of businesses than on employees. In Mr Smith we have a mix of the two and the court applied the wider vendor/purchaser approach.

It must, of course, be significant that Mr Smith got £247,000 for a comparatively small shareholding and it must remain doubtful whether the court would apply the vendor/purchaser test to an employee whose shareholding was merely nominal. Presumably, here the tighter employer/employee test of reasonableness would apply.

The matter is one of some importance because the number of employee/shareholders has increased rapidly over the past few years.

Restraints on distributors or merchandise

212 ***Esso Petroleum Co Ltd* v *Harper's Garage (Stourport) Ltd*** [1967] 1 All ER 699

The defendant company owned two garages with attached filling stations, the Mustow Green Garage, Mustow Green, near Kidderminster, and the Corner Garage at Stourport-on-Severn. Each garage was tied to the claimant oil company, the one at Mustow Green by a solus supply agreement only with a tie clause binding the dealer to take the products of the claimant company at its scheduled prices from time to time. There was also a price-maintenance clause which was no longer enforceable and a 'continuity clause' under which the defendant, if it sold the garage, had to persuade the buyer to enter into another solus agreement with Esso. The defendant also agreed to keep the garage open at all reasonable hours and to give preference to the claimant company's oils. The agreement was to remain in force for four years and five months from 1 July 1963, being the unexpired residue of the 10-year tie of a previous owner. At the Corner Garage there was a similar solus agreement for 21 years and a mortgage under which the claimant lent Harper's £7,000 to assist it in buying the garage and improving it. The mortgage contained a tie covenant and forbade redemption for 21 years. In August 1964, Harper's offered to pay off the loan but Esso refused to accept it. Harper's then turned over all four pumps at the Corner Garage to VIP, and later sold VIP at Mustow Green. The claimant company now asked for an injunction to restrain the defendant from buying or selling fuels other than Esso at the two garages during the subsistence of the agreements.

Held – by the House of Lords – the rule of public policy against unreasonable restraints of trade applied to the solus agreements and the mortgage. The shorter

period of four years and five months was reasonable so that the tie was valid but the other tie for 21 years in the solus agreement and the mortgage was invalid, so that the injunction asked for by the claimant could not be granted.

Comment The House of Lords appears to have been influenced by the report of the Monopolies Commission on the Supply of Petrol to Retailers in the United Kingdom (Cmnd 1965, No 264) which recommended the period of five years.

213 *Cleveland Petroleum Co Ltd* v *Dartstone Ltd* [1969] 1 All ER 201

The owner of a garage and filling station at Crawley in Sussex leased the property to Cleveland and it in turn granted an underlease to the County Oak Service Station Ltd. The underlease contained a covenant under which all motor fuels sold were to be those of Cleveland. There was power to assign in the underlease and a number of assignments took place so that eventually Dartstone Ltd became the lessee, having agreed to observe the covenants in the underlease, but then challenged the covenant regarding motor fuels, and Cleveland asked for an injunction to enforce it. The injunction was granted. Dealing in the Court of Appeal with *Harper*'s case Lord Denning, MR said:

> It seems plain to me that in three at least of the speeches of their Lordships a distinction is taken between a man who is already in possession of the land before he ties himself to an oil company and a man who is out of possession and is let into it by an oil company. If an owner in possession ties himself for more than five years to take all his supplies from one company, that is an unreasonable restraint of trade and is invalid. But if a man, who is out of possession, is let into possession by the oil company on the terms that he is to tie himself to that company, such a tie is good.

Comment (i) The essential distinction is, as we have seen, that where the restraint on the use of the land is contained in a conveyance or lease the common-law rules of restraint of trade do not apply. The person who takes over the property under a conveyance or lease has given nothing up. In fact, he has acquired rights which he never had before even though subject to some limitations.

(ii) In *Alec Lobb (Garages) Ltd* v *Total Oil GB Ltd* [1985] 1 All ER 303 the claimant company borrowed from the defendant to develop a site. As part of the loan arrangements, the claimant agreed to buy the defendant's petrol for 21 years. Since the company was already in occupation of the garage and filling station when the agreement was made, it was subject to the doctrine of restraint of trade, being a *contract* and not a *lease*. The High Court said that 21 years was too long and that the restraint was unenforceable. The Court of Appeal rejected that view and with it the opinion of the Monopolies Commission that it was not in the public interest that a petrol company should tie a petrol filling station for more than five years in the circumstances of this case.

Therefore, the *Lobb* case seems to show that the courts may not be prepared to help the so-called weaker party, i.e. the garage owner, as they were in the past. In the *Lobb* case the Court of Appeal said that each case must depend on its own facts. In fact, the longer restriction in this case seems to have been justified. The loan by Total was a rescue operation greatly benefiting Lobb and enabling it to continue in business. There were also break clauses in the arrangement at the end of seven and 14 years if Lobb wished to use them. In view of the ample consideration offered by Total, the restraint of 21 years was not, according to the Court of Appeal, unreasonable and was, therefore, valid and enforceable.

(iii) These agreements would in any case appear to be contrary to the prohibition contained in the Competition Act 1998. Section 2(2)(e) of the Act prohibits agreements which require the acceptance of supplementary trading conditions which have no connection with the subject matter of the contract. This would cover cases in which a manufacturer or a supplier insisted that a retailer did not stock the products of a rival manufacturer. This is at the root of solus agreements and yet has nothing essentially to do with the supply and sale of petrol and other products such as oil normally sold by a garage.

Involuntary restraints on members of trade associations and the professions

214 *Pharmaceutical Society of Great Britain* v *Dickson* [1968] 2 All ER 686

The Society passed a resolution to the effect that the opening of new pharmacies should be restricted and be limited to certain specified services, and that the range of services in existing pharmacies should not be extended except as approved by the Society's council. The purpose of the resolution was clearly to stop the development of new fields of trading in conjunction with pharmacy. Mr Dickson, who was a member of the Society and retail director of Boots Pure Drug Company Ltd, brought this action on the ground that the proposed new rule was *ultra vires* as an unreasonable restraint of trade. A declaration that the resolution was *ultra vires* was made and the Society appealed to the House of Lords where the appeal was dismissed, the following points emerging from the judgment.

(*a*) Where a professional association passes a resolution regarding the conduct of its members the validity of the resolution is a matter for the courts even if binding in honour only, since failure to observe it is likely to be construed as misconduct and thus become a ground for disciplinary action.