

# **The Political Economy of Anton Piller Orders**

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This article examines the social and historical conditions in the UK that gave birth to the Anton Piller order. It seeks to probe below the surface of society and locate the origins of the Anton Piller order in the changing social relations of production shaped by the capital accumulation process. The Anton Piller order is a product of the era of monopoly capitalism. Just as the rise of monopolies are inextricably linked with overaccumulation crises, the Anton Piller order is a response to the pattern of the overproduction of capital. The Anton Piller order emerged as a product of the fallout from the end of the long wave of post-war monopoly capitalist development. The economic crash in the early 1970's sparked an internecine struggle for survival within the ranks of the UK capitalist class. As overproduction skyrocketed and profits plummeted, the credo of social Darwinism triumphed in business circles. The Anton Piller order was the response of UK jurists to the savage competition unleashed by the economic crisis. This judicial innovation emerged at a time when the unrestrained egotism of the various strata of the UK capitalist class was threatening to destabilize the economic structure.

The Anton Piller order is a remedy available to a party in a civil case. Application to the court may be made *ex parte* and may be heard *in camera*. The order is in the form of an interlocutory injunction that authorizes search, seizure and disclosure. A defendant served with an Anton Piller order must allow their premises to be searched or may be in contempt of court. Moreover, the defendant must acquiesce in the removal of material which is considered to be of an incriminating nature. The bulk of Piller cases concern large firms claiming that their intellectual property rights are being infringed by small enterprises.

## The Rise of Monopoly Capitalism

The economic backdrop to the genesis of the Anton Piller order is the development in the latter part of the nineteenth century of giant monopolies. These began to supplant small scale concerns that had experienced their heyday in the period of free competition. As capital became centralized and concentrated, small producers were swallowed up. Dominant sectors of the economy came under the sway of monopoly banks and industries. From the ashes of laissez-faire capitalism arose a financial oligarchy. Through their ownership of transnational corporations this financial oligarchy embodied the merging of bank and industrial capital and they strove to dominate all production in the world capitalist economy.

For Lenin the role of economic crises was an important factor in the rise of monopolies in advanced capitalist countries. As recurrent economic crises engulfed laissez-faire capitalism the result was to "increase very considerably the tendency towards concentration and towards monopoly."<sup>1</sup> The creation of monopolies paved the way for them to "play a decisive role in economic life".<sup>2</sup> The monopolies grew out of the soil of free competition. A poignant result of the economic crises was the fatal blow delivered to countless small enterprises that had been the agents of free competition. The concentration of production and capital embodied in monopolies was the hallmark of a fresh stage of capitalist development. In human terms this new epoch was erected upon the bones of numerous small entrepreneurs liquidated in the course of a competitive struggle.

The Great Depression which began in 1873 and concluded in 1896 was a watershed in the history of monopoly capitalism. The prelude to the slump was an expansion of production in the advanced capitalist countries fuelled by a boom in capital investment in a range of manufacturing industries. Dobb notes the "1860's were a period of abnormally rapid capital investment and of very great expansion of the productive equipment of industry."<sup>3</sup> Beaud's data on the empirical conditions within the advanced capitalist countries confirms the view that the scale of accumulation in the years

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<sup>1</sup> V I Lenin, *Imperialism, The Highest Stage of Capitalism*, Foreign Language Press, Peking, 1975, p 29.

<sup>2</sup> Lenin, above, n 1, p 106.

<sup>3</sup> M Dobb, *Studies in the Development of Capitalism*, 2 ed, International Publishers, New York, 1975, p 302.

preceding the slump was very high.<sup>4</sup> In 1873 the accumulation process collapsed. Hobsbawm argues that "businessmen searched anxiously for a way out".<sup>5</sup> The overaccumulation of capital was reflected in excess productive capacity and thus overproduction and declining prices and profits. Marx observed that the tap root of an economic depression was the overproduction of capital that signified an overproduction of commodities.<sup>6</sup>

One measure adopted to transcend the 1873 crash was the establishment of monopolies as pillars of the economic structure. The intensified competitive struggle in the course of the crisis eliminated many small enterprises and destroyed their capital base. As regards the UK, Dobb avers that the crisis unleashed "cut-throat competition and cut-prices of the classic textbook type".<sup>7</sup> With the weaker competitors liquidated, the excess capital that had depressed profit levels and produced the slump was abolished. A new phase of capital accumulation became possible but it was predicated on monopolies as the foundation of economic life.<sup>8</sup> The monopolies first became a cardinal feature of economic life in Germany and the US whilst the UK and other capitalist powers followed suit.<sup>9</sup> Henceforth free competition was the province of the minnows of capitalism. Meanwhile the monopolies with a grip on the commanding sectors of the economy could restrict output and fix prices at levels that allowed superprofits.<sup>10</sup> Hilferding pointed out a vital aspect of the triumph of monopoly capitalism was that it strengthened the position of monopolies at the expense of the petty bourgeoisie during "the competitive struggle in periods of serious depression".<sup>11</sup> In brief, the locomotive for pulling a capitalist economy out of a slump is an increase in profitability. The squeezing of the petty bourgeoisie is one of a number of measures required to lift profit rates.<sup>12</sup> Following the 1873 Great Depression colonial conquests were part of the panacea.<sup>13</sup> This strategy went hand in glove with the rise of monopolies. The origins of monopolies are inextricably linked to the waging of economic warfare against the petty

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<sup>4</sup> M Beaud, *A History of Capitalism 1500-1980*, Macmillan, London, 1984, pp 117-118.

<sup>5</sup> E J Hobsbawm, *Industry and Empire*, Pelican, London, 1975, p 129.

<sup>6</sup> K Marx, *Capital Volume Three*, Penguin, London, 1981, p 367.

<sup>7</sup> Dobb, above, n 3, p 310.

<sup>8</sup> Lenin, above, n 1, p 20.

<sup>9</sup> Dobb, above, n 3, p 309.

<sup>10</sup> Lenin, above, n 1, p 15.

<sup>11</sup> Cited in Lenin, above, n 1, p 15.

<sup>12</sup> Marx, above, n 6, p 339.

<sup>13</sup> Hobsbawm, above, n 5, p 131.

bourgeoisie. The events of the first Great Depression signalled that in any future slump, the monopolies would again seek to swallow their smaller brethren. The logic of such a step was inscribed in the very soul of the accumulation process.

Of crucial importance in the rise of monopolies is the way this historical phenomenon transforms social relations of production. As Lenin stressed, monopoly capitalism created "a new social order".<sup>14</sup> He depicted the economic essence of this new epoch as a process occurring.

before our eyes, creating large-scale industry and forcing out small industry, replacing large-scale by still larger-scale industry, and carrying concentration of production and capital to the point where out of it has grown and is growing monopoly: cartels, syndicates and trusts, and merging with them, the capital of a dozen or so banks, which manipulate thousands of millions.<sup>15</sup>

Yet Lenin astutely realized monopoly capitalism did not result in the total eclipse of the petty bourgeoisie and free competition. He grasped the fact the laws of motion of monopoly capitalism were developing "in the direction of a single world trust that will swallow up all enterprises and all states without exception".<sup>16</sup> Lenin eschewed mechanical materialism and averred the tempo of the social development of monopoly capitalism would be punctuated with "contradictions, conflicts and convulsions - not only economical, but also political, national, etc".<sup>17</sup> As the unfolding of the internal contradictions of monopoly capitalism guided the social order, it ensured the business climate was dominated by a dialectical relationship between the monopolists and small-scale capital fraught with conflict. The petty bourgeoisie are fierce individualists and cherish their freedom from the chains of wage slavery. They do not passively accept extinction. As Lenin put it,

monopolies, which have grown out of free competition, do not eliminate the latter, but exist over it and alongside of it, and thereby

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<sup>14</sup> Lenin, above, n 1, p 25.

<sup>15</sup> Lenin, above, n 1, p 105.

<sup>16</sup> N Bukharin, *Imperialism and World Economy*, Merlin Press, London, 1976, p 14. Lenin wrote the introduction for this book.

<sup>17</sup> Bukharin, above, n 16, p 14.

give rise to a number of very acute, intense antagonisms, frictions and conflicts.<sup>18</sup>

The Anton Piller order provides an object lesson in how the social relations of monopoly capitalism structure the internecine struggle between the monopolists and petty bourgeoisie. It highlights how a particular legal form was developed to cope with the convulsions engendered by the expansion of capital in an epoch dominated by monopolies. The accumulation of capital under monopoly capitalism entails the reinvestment of profits in plant and equipment in order to expand the scale of production. Failure to undertake capital investment at a sufficient level will result in a decline in the productivity of labour and fatal exposure to competitors. In the modern era large scale corporations reinforce the trend towards the concentration of production and capital. As a result, the share of production flowing from the petty bourgeoisie shrinks.<sup>19</sup> As the centralization of capital gathers pace, the power structure becomes centralized to a degree alien to classic liberalism.

During the period of competitive capitalism the role of the state was minimal. This was in keeping with the precepts of laissez-faire liberalism which was underpinned by free competition. C Wright Mills observed that before the triumph of US monopolies, the wide distribution of property elicited a flourishing form of bourgeois democracy.<sup>20</sup> He also noted "The legal framework guaranteed and encouraged the order of small property, but the government was the guardian, not the manager, of this order".<sup>21</sup> The hegemony of a financial oligarchy in advanced capitalist countries controlling transnational empires ensures the state operates as a "supporter of the great monopolies".<sup>22</sup> Kautsky wrote that "the capitalist class rules but does not govern, it contents itself with ruling the government".<sup>23</sup> In the age of monopoly capitalism the financial oligarchy rules the government and policies are implemented that guarantee the expanded reproduction of the social relations of monopolies. Luxemburg sketches the dialectical unity between monopoly capitalism and its expression in the form of political domination. Her analysis concludes with the observation that under

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<sup>18</sup> Lenin, above, n 1, p 105.

<sup>19</sup> K Marx, *Capital Volume One*, Penguin, London, 1979, p 929.

<sup>20</sup> C Wright Mills, *White Collar : The American Middle Classes*, Oxford University Press, New York, 1971, p 9.

<sup>21</sup> Wright Mills, above, n 20, p 10.

<sup>22</sup> E Mandel, *The Second Slump*, New Left Book, London, 1978, p 127.

<sup>23</sup> R Miliband, *The State in Capitalist Society*, Quartet, London, 1976, p 51.

monopoly capitalism "political power is nothing but a vehicle for the economic process."<sup>24</sup> As the state becomes the domain of the financial oligarchy parliament becomes "a decorative institution".<sup>25</sup> Monopolies create organizations enabling close collaboration between politicians and captains of banking and industry. This lobbying is transmitted into policies favouring the monopolists.<sup>26</sup>

In the ideological superstructure the ruling ideas of the financial oligarchy are, as Hilferding pointed out, posited upon the striving for domination.<sup>27</sup> Existing in a climate of turbulence, the legal and political superstructure are geared towards the containment of dissent that springs from the social antagonisms generated by monopoly capitalism. In practice this boils down to securing a social order facilitating the reproduction of the pattern of accumulation of capital required by monopolies. As Poulantzas cogently argued, legal ideology plays a cardinal role in preventing the changing balance of power within the bourgeois class from provoking crises that imperil the state.<sup>28</sup> In the contemporary world the legal order must exercise this power to preclude the petty bourgeoisie from rupturing the social fabric. The accumulation process of monopoly capitalism destroys the power base of the petty bourgeoisie. Legal fetters must be placed upon the petty bourgeoisie to stymie any attempt by this moribund group to disrupt the accumulation pattern that is slowly eliminating them as members of a stratum of the bourgeois class.

The Anton Piller order was a legal device engineered to accelerate the disintegration of the UK petty bourgeoisie and prevent them provoking social upheaval. Of course, small business in the UK has not passively accepted the development of legal doctrine aimed at fettering their role. The history of the Piller order is one of resistance. In response to this resistance a section of jurists have expressed disquiet at the implications for the social structure of the arbitrary power inherent in Piller orders. Given this situation it is apposite to undertake an examination of the empirical reality of small shopkeepers in the UK. Not only are small shopkeepers archetypal members of the UK petty bourgeoisie but they also bore the brunt of the Anton Piller order.

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<sup>24</sup> R Luxemburg, *The Accumulation of Capital*, Routledge & Kegan Paul, London, 1971, p 452.

<sup>25</sup> Bukharin, above, n 16, p 128.

<sup>26</sup> Bukharin, above, n 16, p 128.

<sup>27</sup> R Hilferding, *Finance Capital*, Routledge & Kegan Paul, London, 1981, p 334.

<sup>28</sup> N Poulantzas, *State, Power, Socialism*, New Left Book, London, 1978, p 91.

## Shopkeepers and Class Power

By the middle of the nineteenth century the political power of the UK petty bourgeoisie had reached its zenith. The descent to political marginalization was to be a feature of social development in the following decades. As the structure of UK industry was transformed, the balance of power within the bourgeois class was altered to the detriment of the petty bourgeoisie. Yet in 1832 the future appeared rosy for the petty bourgeoisie. They played a prominent role in securing the 1832 Reform Bill.<sup>29</sup> Under the umbrella of the Whig party, a coalition embracing a section of the landed aristocracy, industrial capitalists and the petty bourgeoisie achieved parliamentary reforms that proved a decisive step in the march to political power. Henceforth whilst the landed aristocracy and industrial capitalists were at the apex of the class structure, the petty bourgeoisie was a junior partner within the domain of state power. In the course of time this alliance expressed its political aims within the ranks of the Liberal party. During the struggle for the Reform Bill shopkeepers had been in the vanguard of the petty bourgeoisie.<sup>30</sup> Along with their peers, shopkeepers were determined to cling to the political influence gained in the fight for parliamentary reform. As Nossiter highlights, shopkeepers were not reluctant to mobilize in the years following the 1832 victory if their class allies were felt to be attempting to restrict their political power.<sup>31</sup> Ultimately the triumph of 1832 proved to be a pyrrhic victory. With the quickening pace of the tempo of industrialization and the corresponding transformation of social relationships, the anachronistic nature of the petty bourgeoisie became visible. The history of shopkeepers in the aftermath of the 1832 Reform Bill symbolizes the decline of a class.

The dominant feature of retail trade in the UK for most of the nineteenth century was its scale and complexity. It contained a bewildering array of small scale entrepreneurs reaping the benefit of their labour. Only in the latter part of the nineteenth century was the triumph of the fixed shop in the retail trade obvious to contemporaries. Writing in the late 1880's Thorold Rogers said: "The epoch of shops is comparatively recent ... we are now further removed from the experiences of my youth in these matters than our fathers were from the age of Elizabeth and the Stuarts".<sup>32</sup> For most of the

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<sup>29</sup> A L Morton, *A People's History of England*, Seven Seas, Berlin, 1977, p 387.

<sup>30</sup> T J Nossiter, *Influence, Opinion and Political Idioms in Reformed England*, Harvester Press, Brighton, 1975, p 147.

<sup>31</sup> Nossiter, above, n 30, p 146.

<sup>32</sup> J B Jefferys, *Retail Trading in Britain 1850-1950*, Cambridge UP, Cambridge, 1954, p 6.

century fixed shops struggled to eclipse market stallholders, itinerant dealers and craftsmen producing and selling their own wares.<sup>33</sup> Davis opines that whilst industrial development was transforming the UK production process in the early nineteenth century "retail trade was allowed to jog along in its traditional grooves".<sup>34</sup> This is a misshapen view of economic development in the early decades of the nineteenth century. It fails to take account of the fact that the triumph of industrial capitalism was not achieved until the last quarter of the nineteenth century when the mechanization of the labour process sped forward.<sup>35</sup>

In short, the pace of industrial development was slow and this explains the gradual changes in the retail trade. Whilst vestiges of the handicraft phase of capitalism exerted an influence on production relations the pace of social development was hampered.<sup>36</sup> Antiquarian retail forms allowed all sorts of fraudulent activity to flourish as imperilled sections fought to boost flagging profit margins. In the middle of the nineteenth century the medical journal *Lancet* campaigned against the widespread practice of adulteration.<sup>37</sup> Benson details ingenious methods employed by street sellers to doctor a range of goods. Thus one street seller boasted of finding gullible Irish customers for his boiled oranges that "makes 'em look finer ones, but it spoils them, for it takes out the juice. People can't find that out though until it's too late".<sup>38</sup> Apart from adulteration another method for ensuring financial survival was the slick use of faulty weights and measures. It seems that nut-sellers were particularly adept at fleecing customers by this method.<sup>39</sup>

As the production process was transformed by mechanization, a corollary was a rise in the productivity of labour. This enabled the most efficient firms to garner bigger profits at the expense of weaker competitors. This trend culminated in the rise of monopolies.<sup>40</sup> It was not only large scale industrial capitalists which undertook a programme of swallowing weaker competitors. In the distribution process the higher profits to be gained from

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<sup>33</sup> Jefferys, above, n 32, p 2.

<sup>34</sup> D Davis, *A History of Shopping*, Routledge & Kegan Paul, London, 1966, p 252.

<sup>35</sup> Jefferys, above, n 32, p 7.

<sup>36</sup> Dobb, above, n 3, p 265.

<sup>37</sup> Jefferys, above, n 32, p 5.

<sup>38</sup> J Benson, *The Penny Capitalists*, Gill and Macmillan, Dublin, 1983, p 106.

<sup>39</sup> Benson, above, n 38, p 107.

<sup>40</sup> Hilferding, above, n 27, p 183.

economies of scale by lowering unit labour costs, prices and streamlining management practices paved the way for the emergence of the department store and chain shops. Crossick dates the genesis of problems for small retailers in the 1860s. He stresses that it was at this period of time that structural changes began that revamped the retail trade.<sup>41</sup> On a personal note it was in the 1860s that H G Wells located the decline of his father's shop in Bromley. Wells was keenly aware of the growth of department stores and the economic despair they entailed for small shopkeepers. In relation to his own father Wells stated that those who moved to Bromley in the 1860s steered clear of his father's shop "and bought their stuff from the stores".<sup>42</sup> Jefferys, relying less on impressionistic evidence and more on solid empirical data, traces the rise of retail giants from the period 1875-1914.<sup>43</sup> Jefferys argues this period encompassed a parallel development of large scale business corporations in both the manufacturing and distribution spheres.<sup>44</sup>

Department stores took advantage of their lower cost structure to wage price wars on embittered small shopkeepers.<sup>45</sup> As competitors fell by the wayside during the course of the 1873 Great Depression, the High Streets of the UK became dominated by retail giants. By the early part of the twentieth century the structure of the UK retail trade was clearly dividing into a two-tier system. At the pinnacle stood enterprises that were becoming household names such as Selfridges, Marks and Spencer, W H Smith and Harrods.<sup>46</sup> At the bottom of the pile was the remnants of the petty bourgeois section of shopkeepers that had found a haven in the retail market where monopoly stores had yet to invade. Writing in 1907 Macrosty noted the centralization of capital in the retail trade and its expression in large stores. He realized that free competition had resulted in monopoly. As he put it:

Out of this strenuous competition the large business has developed just as it has in manufacture, economies attending on large-scale

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<sup>41</sup> G Crossick, "The Petite Bourgeoisie in Nineteenth-Century Britain: the Urban and Liberal Case" in *Shopkeepers and Master Artisans in Nineteenth-Century Europe*, G Crossick and H G Haupt (eds), Methuen, London, 1984, p 63.

<sup>42</sup> H J Dyos, *Victorian Suburb*, Leicester UP, Leicester, 1973, p 149.

<sup>43</sup> Jefferys, above, n 32, p 6.

<sup>44</sup> Jefferys, above, n 32, p 7.

<sup>45</sup> Jefferys, above, n 32, p 20.

<sup>46</sup> Jefferys, above, n 32, p 20.

distribution as well as on large-scale production. Every town has its notable businesses, great in proportion to the size of the town.<sup>47</sup>

Macrosty perceived that the halcyon days of small shopkeepers were over. They were engaged in a rearguard action against pitiless opponents relentlessly pursuing the aim of eliminating all weaker and undercapitalized competitors. Macrosty evokes the pathos of the situation when he says: "Against such large masses of capital the small trader struggles in vain".<sup>48</sup>

Small shopkeepers could gain no succour from their peers in the petty bourgeoisie. In every sector of the economy this stratum was under pressure as monopoly capitalism expanded its sphere of accumulation. A wave of mergers as the twentieth century dawned entrenched the position of the large firm.<sup>49</sup> By 1914 key sectors of the economy were under monopoly control and the list included cement, tobacco, sewing cotton, textile dyeing and glass.<sup>50</sup> Giants such as Imperial Tobacco, Watney, Dunlop, GKN, Vickers and Levers claimed to have secured market shares of between 60 per cent and 90 per cent in their respective industries.<sup>51</sup> In his account of the mergers that altered the structure of UK industry in this era, Hannah describes how the large firms in the brewing industry swallowed "several hundred smaller breweries".<sup>52</sup> With the rise to economic power of the monopolies there was a change in the political establishment that resulted in the petty bourgeoisie being squeezed out of the domain of state power. For the Liberal party steadily became an organ expressing petty bourgeois interests and the upshot was it began to lose political authority.<sup>53</sup> The financial oligarchy, emerging from the fusion of banking and industrial capital that expresses a critical element of the growth of monopoly capitalism, began to drift towards the Tory party.<sup>54</sup> As the financial oligarchy became the dominant force within the state apparatus, the landed

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<sup>47</sup> H W Macrosty, *The Trust Movement in British Industry*, Agathon Press, New York, 1968, p 244. Macrosty's study was originally published in 1907.

<sup>48</sup> Macrosty, above, n 47, p 245.

<sup>49</sup> L Hannah, *The Rise of the Corporate Economy*, Methuen, London, 1976, p 23.

<sup>50</sup> Hannah, above, n 49, p 23. See also Hobsbawm, above, n 5, p 215.

<sup>51</sup> Hannah, above, n 49, p 23.

<sup>52</sup> Hannah, above, n 49, p 23.

<sup>53</sup> Morton, above, n 29, p 421.

<sup>54</sup> H Perkin, *The Origins of Modern English Society*, Routledge & Kegan Paul, London, 1971, p 380. See also Morton, above, n 29, p 422.

aristocracy and petty bourgeoisie were relegated to subordinate roles within the UK social structure.<sup>55</sup>

### **The Consolidation of Monopoly Power**

In the inter-war years the monopolization process expanded rapidly. For example, on the eve of the First World War there had been 130 railway companies whilst in 1921 there were four interlocked monopolies.<sup>56</sup> The banking industry was further rationalized. In 1914 there were 38 banks and this figure had been pruned to 12 by 1924 "of whom the 'Big Five' (Midland, National Provincial, Lloyds, Barclays, Westminster) completely dominated the field".<sup>57</sup> Of prime importance is the concentration of political power as monopolies formed groups to lobby governments to implement policies favourable to big business. By 1925 the Federation of British Industries acted as a peak organization for 250 trade associations. After the Second World War this figure had jumped to one thousand.<sup>58</sup> Structural change to the economy was so obvious by 1939 that it led one contemporary observer to note that "As a feature of industrial and commercial organization free competition has nearly disappeared from the British scene".<sup>59</sup>

Within the retail trade the inter-war years witnessed further developments in the trend towards a two-tier system. Developments within the retail trade in this period were played out against a backdrop dominated by the global capitalist crisis. A wave of mergers that increased the centralization of capital process in the retail trade was sparked by the economic collapse. Whilst many small and medium size firms amalgamated, it was the large firms that spearheaded the merger boom.<sup>60</sup> Larger firms in the retail trade rushed to amalgamate in order to further restrict competition and thus shore up their shrinking profit margins. Within the grocery trade the bulk of the large firms amalgamated between 1924 and 1931. The outcome was a trust that then focused upon small firms. After swallowing them the result was the birth of the Home and Colonial chain with over 3,000 branches spread throughout the UK.<sup>61</sup> In the meat trade the biggest firms amalgamated to

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<sup>55</sup> Morton, above, n 29, p 422.

<sup>56</sup> Hobsbawm, above, n 5, p 215.

<sup>57</sup> Hobsbawm, above, n 5, p 215.

<sup>58</sup> Hobsbawm, above, n 5, p 215.

<sup>59</sup> Hobsbawm, above, n 5, p 216.

<sup>60</sup> Jefferys, above, n 32, p 64.

<sup>61</sup> Jefferys, above, n 32, p 64.

form the Union Cold Storage trust which had over 2,000 branches in the UK.<sup>62</sup> This phenomenon of mergers creating horizontal trusts from enterprises engaged in the same line of retail business was evident with department stores. Out of a series of amalgamations executed in the inter-war years "four groups emerged, Debenhams Ltd, United Drapery Stores Ltd, Great Northern and Southern Stores Ltd, and the John Lewis Partnership, that in all controlled some 200 stores".<sup>63</sup>

For the small fry in the UK retail trade the inter-war years exacerbated their precarious position as profit margins were squeezed. Moreover, they had no recourse to a policy of mergers designed to prop up falling profit rates. Small shopkeepers were under intense pressure from every quarter. On the one hand they were engaged in a relentless struggle with large firms whilst the UK economy was in a state of decline throughout the inter-war years. In 1920-21 industrial output fell by more than a quarter and unemployment rose from 2 per cent to 18 per cent.<sup>64</sup> The heart of the British Empire was rotting. Unemployment throughout the 1920s, in Glyn and Sutcliffe's words, "never fell significantly below 10 per cent of the working population".<sup>65</sup> But a parlous economic situation dominated by falling purchasing power and the omnipresent threat posed by hostile competitors was not sufficient to deter those held captive by grand illusions of independence. In brief, it appears there was a growth in the numbers of small shopkeepers in the inter-war years.<sup>66</sup> However, this growth in numbers cannot conceal a slump in the capital base of this branch of the retail trade. Quite simply the small shopkeepers were left a declining share of the cake as large firms carved out an ever bigger slice. This was the liquidation of competitors as surely as if the small operators were physically forced to shut their doors. In 1920 the large firms accounted for 20 per cent of retail sales.<sup>67</sup> By 1939 this figure had grown to 35 per cent.<sup>68</sup>

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<sup>62</sup> Jefferys, above, n 32, p 64.

<sup>63</sup> Jefferys, above, n 32, p 60.

<sup>64</sup> A Glyn, B Sutcliffe, *Capitalism in Crisis*, Pantheon, New York, 1972, p 24.

<sup>65</sup> Glyn, above, n 64, p 25.

<sup>66</sup> F Bechhofer, B Elliott, M Rushforth, "The Market Situation of Small Shopkeepers" (1971) 18 *Scottish Journal of Political Economy* 163.

<sup>67</sup> Jefferys, above, n 32, p 74.

<sup>68</sup> Jefferys, above, n 32, p 74.

It seems that the new recruits to the ranks of the small shopkeepers came from those workers cast off by manufacturing industries.<sup>69</sup> Furthermore raw data about a rise in small shopkeeper numbers during the inter-war years has to be treated with caution. For as Wright Mills observed in relation to the same phenomenon occurring in the US:

There is a great flow of entrepreneurs and would-be entrepreneurs in and out of the small-business stratum, as each year hundreds of thousands fail and others, some new to the game, some previous failures, start out again on the brave venture.<sup>70</sup>

What also needs to be taken into account when portraying a rise in small shopkeeper numbers is the human suffering that was a corollary of this situation. For as larger numbers of minnows compete against monopolies that are continually expanding their share of the market, the level of exploitation within the family running the shop escalates. Parker, in his 1932 study of Merseyside small shopkeepers, writes of the family having to share the burden of the "long hours of labour".<sup>71</sup> Women were carrying a disproportionate load as the husband was often driven to seek outside work to supplement the meagre income from the shop.<sup>72</sup> Hall sums up the real cost for large numbers of small shopkeepers of their much vaunted freedom when she says that their liberty boiled down to "a substandard of living".<sup>73</sup> Finally, the cruellest blow for small shopkeepers was their reduction to the status of mere agents for monopolies. In 1900 only 3 per cent of the goods bought by consumers was subject to price fixing. By 1938 this figure had increased ten-fold to 30 per cent.<sup>74</sup> Such price fixing practices left only a shell of the free enterprise system. The small shopkeepers existed in an economic zone where they were allocated the role of realizing the surplus value contained in commodities produced by monopolies. In return for executing this function they received an insignificant portion of the surplus value generated within the labour process from the exploitation of workers. Petty bourgeois small shopkeepers were now only of value as handmaidens of the very forces that were destroying them root and branch.

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<sup>69</sup> Jefferys, above, n 32, p 46.

<sup>70</sup> Wright Mills, above, n 20, p 23.

<sup>71</sup> H Parker, "The Independent Worker and the Small Family Business: A Study of Their Importance on Merseyside" (1932) *Journal of the Royal Statistical Society* 535.

<sup>72</sup> Parker, above, n 71, p 535.

<sup>73</sup> Cited in Bechhofer, Elliott, Rushforth, above, n 66, p 174.

<sup>74</sup> Jefferys, above, n 32, p 54.

## The Post-War Period

In the post Second World War period the decline of small shopkeepers accelerated. The process of merger and capital concentration worked hand in glove to intensify the pressure on small retailers. Using 1966 Census figures Bechhofer estimates that between 1950 and 1966 approximately 9 per cent of small scale retailers disappeared.<sup>75</sup> Profit rates had been shaved to the point whereby hard data from the 1966 Census showed "small shopkeepers look to be little better off than a good many skilled and semi-skilled manual workers".<sup>76</sup> Davis surveyed the retail trade in 1966 and espoused the view that the large firms were still in an expansionary mood. As she put it:

Only about one in five of the actual shops in the country are owned by these big concerns, but they do over half the total trade (a bigger proportion than in any other country in the world) and, what is even more important, they are still expanding, they occupy the best sites in the main shopping streets, and they set the pace, the style, the standard for all the rest.<sup>77</sup>

Moreover, the hard work and drudgery involved in keeping a small shop afloat destroyed any hope of psychic security and a rich family life. Klingender's study emphasized that the life of UK small shopkeepers involved "long hours and constant grind".<sup>78</sup> Bechhofer's study of Edinburgh small shopkeepers pinpointed that twenty five per cent of the sample stayed open "for more than eleven and a half hours each day and were therefore actually working for more than twelve hours".<sup>79</sup> In order to distinguish themselves from the large firms and enhance the prospect of eking a profit a third of the sample opened on Sunday "for an average of seven hours".<sup>80</sup> Further evidence of the quiet desperation that ruled their lives was contained in the finding that "More than 50 per cent do not close for lunch, 28 per cent have no half-day, and a further 14 per cent shut up shop for an afternoon but

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<sup>75</sup> Bechhofer, Elliott, Rushforth, above, n 66, 163 at 164.

<sup>76</sup> F Bechhofer, B Elliott, M Rushforth, R Bland, "The Petits Bourgeois in the Class Structure : the Case of the Small Shopkeepers" in *The Social Analysis of Class Structure* F Parkin (ed), Tavistock, London, 1974, p 106.

<sup>77</sup> Davis, above, n 34, p 277.

<sup>78</sup> Cited in Bechhofer, Elliott, "An Approach to a Study of Small Shopkeepers and the Class Structure" (1968) 186 *European Journal of Sociology* 9.

<sup>79</sup> Bechhofer, Elliott, Rushforth, Bland, above, n 78, 9 at 111.

<sup>80</sup> Bechhofer, Elliott, Rushforth, Bland, above, n 78, 9 at 111.

spend their time on business matters".<sup>81</sup> As in the inter-war years many small shops remained viable only because the wife ran the business whilst the husband worked in the mainstream economy.<sup>82</sup> These shopowners were a hybrid group. They had one precarious foot in the petty bourgeois class and the other planted in the world of the proletariat. Here was the realization of Marx's prophecy that the petty bourgeoisie were a decaying class and doomed to "sink gradually into the proletariat".<sup>83</sup>

Ironically the gradual impoverishment of substantial numbers of small shopkeepers in the post Second World War period took place within a UK economy that "had never been so prosperous, nor had it ever expanded so fast".<sup>84</sup> UK economic expansion in the post-war period was part of the world capitalist economy experiencing a long boom. Uneven development was the hallmark of growth patterns in the course of the long boom. Thus as Parboni has illustrated viewed within the context of the international capitalist economy the relative decline of the UK was unchecked in this period.<sup>85</sup> Yet for the advanced capitalist countries it is incontrovertible that "The fifties and sixties were capitalism's golden age".<sup>86</sup> This long post-war boom resulted in a situation whereby in 1973 "output in the advanced capitalist countries was 180 per cent higher than in 1950 - almost three times as great. More was produced in that quarter century than in the previous three quarters, and many times more than in any comparable period in human history".<sup>87</sup> For many observers this golden age of world capitalism appeared to signal "that capitalism had undergone a qualitative transformation - that the bad old days of slumps and class antagonisms had been transcended for ever".<sup>88</sup> What was suppressed by this object lesson in historical amnesia was the social reality of past economic cycles that had passed through boom and bust phases. Those pontificating on the demise of periodic overproduction crises glossed over the harsh reality that the capitalist world

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<sup>81</sup> Bechhofer, Elliott, Rushforth, Bland, above, n 66, p 111.

<sup>82</sup> Bechhofer, Elliott, Rushforth, Bland, above, n 78, 9 at 110.

<sup>83</sup> K Marx, F Engels, *Manifesto of the Communist Party*, Foreign Languages Press, Peking, 1970, p 40.

<sup>84</sup> A Gamble, *Britain in Decline*, 2nd ed, Macmillan, London, 1985, p 6.

<sup>85</sup> R Parboni, *The Dollar and its Rivals*, Verso, London, 1981, p 98. See also P Kennedy, *The Rise and Fall of the Great Powers*, Fontana, London, 1990, p 548; M Mann, *States, War and Capitalism*, Blackwell, Oxford, 1988, p 213.

<sup>86</sup> P Armstrong, A Glyn, J Harrison, *Capitalism Since World War Two*, Fontana, London, 1984, p 168.

<sup>87</sup> Armstrong, Glyn, Harrison, above, n 86, p 167

<sup>88</sup> Armstrong, Glyn, Harrison, above, n 86, p 193.

economy had experienced "twenty such general crises of overproduction since 1825".<sup>89</sup>

In 1974 the golden age was brought to an abrupt halt as the world capitalist accumulation process collapsed. It was in Mandel's words a collapse sparked by "a classic overproduction crisis."<sup>90</sup> The economic crash was a harbinger of the intensification of capitalist contradictions. It provided the framework for a growth in intra-capitalist conflict. All the antagonisms between the different strata of UK capital were destined to be exacerbated as the squabble over shares from a declining economic cake, sharpened the contest over how the fall in profit rates would be distributed. Just like the 1860s, the 1960s was a decade of feverish investment and growth of fixed capital.<sup>91</sup> This fuelled the boom but it eventually created the conditions for the bust as overaccumulation combined with labour shortages to depress profit rates.<sup>92</sup> As the profit rates in advanced capitalist countries began to slip the capitalists reacted to a brewing overproduction crisis by slashing investment and triggering a great crash.<sup>93</sup> By 1975 the profit rate in the bulk of the advanced capitalist countries was "only 60 per cent of the 1968 level".<sup>94</sup> Underutilization of productive capacity was manifested in growing unemployment. By 1975 approximately 11 per cent of fixed capital was idle.<sup>95</sup> Unemployment in the advanced capitalist countries had skyrocketed to 17 million.<sup>96</sup> The slump racked the UK economy making the 1970s a decade memorable for economic despair. Mandel adduces data from *The Economist* that highlights the sharp fall in company profits that corresponded with the inception of the world crisis.<sup>97</sup> Unemployment in the UK in the late 1970s soared to the point where, according to some estimates, close to 20 per cent of the labour force was idle as manufacturing output slumped.<sup>98</sup>

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<sup>89</sup> Gamble, above, n 84, p 7.

<sup>90</sup> Mandel, above, n 22, p 22.

<sup>91</sup> Armstrong, Glyn, Harrison, above, n 86, p 235.

<sup>92</sup> Armstrong, Glyn, Harrison, above, n 86, p 246. See also Mandel, above, n 22, p 27.

<sup>93</sup> Armstrong, Glyn, Harrison, above, n 86, p 235.

<sup>94</sup> Armstrong, Glyn, Harrison, above, n 86, p 319.

<sup>95</sup> Armstrong, Glyn, Harrison, above, n 86, p 319.

<sup>96</sup> Mandel, above, n 22, p 15.

<sup>97</sup> Mandel, n 22, p 23.

<sup>98</sup> Gamble, above, n 84, p 13.

## Emergence of Anton Piller Order

Viewed within the context of the great slump of 1974 and the history of monopoly capitalism the birth of the Anton Piller order is no accident of history. It was in 1974 that this ex parte order first appeared. It was two multinational record companies that pioneered this unique order.

In May 1974 Foster J granted an order in *A & M Records Inc v Aram Darakdjian*<sup>99</sup> and he did likewise in July 1974 in *EMI v Khazan*.<sup>100</sup> Both these cases were unreported. The first reported consideration of this kind of order was in *EMI v Pandit*<sup>101</sup> in 1975. It was also in 1975 that the order met its first judicial obstacle. In *Anton Piller KG v Manufacturing Processes Ltd* Brightman J refused to grant an order. He bluntly noted that

an order on the lines sought might become an instrument of oppression, particularly in a case where a plaintiff of big standing and deep pocket is ranged against a small man who is alleged on the evidence of one side only to have infringed the plaintiffs' rights.<sup>102</sup>

The refusal by Brightman J to make an order was appealed to the Court of Appeal. Spearheaded by Lord Denning, the court made an order in the case which gave the remedy formal recognition in regard to its name and established the key features of this judicial innovation. Lord Denning stated that a Piller order was not a search warrant, as the defendant could refuse entry onto and search of their premises and the removal of material specified in the order.<sup>103</sup> However, Lord Denning qualified this proposition by noting the pressure placed upon the defendant to comply with the ex parte order and lack of consent would entail the risk of prison for contempt of court.<sup>104</sup> Ormrod LJ echoed Lord Denning's view but added the caveat that the order was at the extreme edge of the court's powers and would subsequently "rarely be made".<sup>105</sup> Despite this note of caution, it has been estimated that between 1975 and 1980 500 orders per year were granted.<sup>106</sup>

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<sup>99</sup> *A & M Records Inc v Aram Darakdjian*, unreported, 21 May 1974.

<sup>100</sup> *EMI v Khazan*, unreported, 3 July 1974.

<sup>101</sup> *EMI v Pandit* [1975] 1 WLR 302.

<sup>102</sup> *Anton Piller KG v Manufacturing Processes* [1976] Ch 55 at 60.

<sup>103</sup> *Anton Piller KG v Manufacturing Processes* [1976] Ch 55 at 60.

<sup>104</sup> *Anton Piller KG v Manufacturing Processes* [1976] Ch 55 at 60.

<sup>105</sup> *Anton Piller KG v Manufacturing Processes* [1976] Ch 55, 60 at 61.

<sup>106</sup> M Dockray, H Laddie, "Piller Problems" (1990) 106 *The Law Quarterly Review* 601.

Corporations in the leisure industries in the UK were in the vanguard of those queuing up for Piller orders. The slump had exacerbated a number of disturbing trends in this sector of the economy. To begin with cinema audiences in the UK have been in steep decline since the Second World War.<sup>107</sup> To compound the problem the record industry was suffering from the fading of the Merseybeat and the breakup of the Beatles. The golden era of British pop music had passed and the A and R specialists at EMI and other conglomerates were desperate to discover a new fad that would rejuvenate the business when the general economic crisis erupted. Now a lucrative slice of the record buying public was unemployed as youth unemployment skyrocketed. The UK shared with Italy and Australia the unenviable distinction of having the highest percentage of youth unemployment in the advanced capitalist countries in the late 1970s.<sup>108</sup>

EMI had dominated the record market in the UK for decades. From the early 1970s however it became clear that EMI would have to contend with the growing power of US giants CBS and WEA. By 1977 these three corporations were jostling for leadership of the UK singles market.<sup>109</sup> Yet the struggle for hegemony was taking place in an industry gripped by plummeting sales.<sup>110</sup> By 1976 the impact of the end of the post-war boom was showing up in the falling profitability of record shops.<sup>111</sup> The atmosphere of economic depression was intensified by the technological revolution experienced during the great boom providing the copying machines that made copyright infringement a simple task. There was also no sign of revival in the music industry. Indeed, the extent of the collapse was graphically highlighted with the news in 1979 that UK record sales had slumped 20 per cent in the previous year.<sup>112</sup> With the end of the golden years of British pop music corresponding with general economic despair, it is little wonder that EMI featured so prominently at the birth of the Piller order. It was a legal weapon whose time had come. The enemy was in the shape of the small fry of capitalism driven to extreme measures in the slump. Brightman J could sound a warning but the social reality was that the accumulation process of the music monopolies overruled such voices and

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<sup>107</sup> A Sampson, *Anatomy of Britain*, Hodder and Stoughton, London, 1962, p 574.

<sup>108</sup> K Windschuttle, *Unemployment*, Penguin, Melbourne, 1979, p 44.

<sup>109</sup> *Music Week*, 29 October, 1977.

<sup>110</sup> *Music Week*, 4 December 1976.

<sup>111</sup> *Music Week*, 20 November 1976.

<sup>112</sup> S Frith, *Sound Effects: Youth, Leisure, and the Politics of Rock*, Constable, London, 1983, p 151.

judicial figures such as Lord Denning were prepared to sanction legal forms that suited the compelling requirements of big business.

It is in Lord Denning's judgments that the legal relation embodied in the Piller order can be best seen as a reflection of the economic relations of monopoly capitalism. In the downturn of the economic cycle and the resultant profit squeeze, the monopolies attempt to shore up their shrinking profit margins by eliminating small enterprises. Yet the petty bourgeoisie resist the cannibalism of their larger class brethren and the spectre of open conflict is never far below the surface of bourgeois society. In the case of small shopkeepers they cannot be blamed if in a crisis when plunging sales disrupt the foundations of their economic life they reach for any port in a storm. The alternative is an obedient march into the ranks of the proletariat and rather than suffer this ignominy, many of these robust individualists will adopt desperate measures. Part of Hitler's political genius was his acute understanding of the anxiety experienced by the petty bourgeoisie in periods of economic crisis. Thus his skilful propaganda strategy embraced a call to embattled small shopkeepers to join the Nazis in order to abolish the department stores that were crushing the corner stores. Of course, Hitler targeted department stores as creatures of Jewish financiers.<sup>113</sup>

In the UK as the economic crisis of the 1970s unfolded, small shopkeepers fighting for survival became eager recipients of pirated films and records that they could sell at cut prices. They had found a panacea to ensure economic survival. The monopoly companies always ensure they obtain the lion's share of profits from the sale of commodities and the petty bourgeoisie get the crumbs. In a slump even the crumbs are a contested issue. Yet the reverse of what occurs in classical economic crises was occurring in the case of those UK small shopkeepers driven to extreme measures. For this group were supplementing their profits at the expense of the monopolies. The resultant contradictions generated by this turn of events was a potent brew that carried the risk of open conflict and destabilization of the economic structure. The legal superstructure through the medium of jurists such as Lord Denning utilized Piller orders to discipline those capitalists taking a short cut to profits in order to ensure social cohesion. At the structural level of the relations of production the upshot of such judicial intervention was the continuation of the economic hegemony of the monopolies.

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<sup>113</sup> D Guerin, *Fascism and Big Business* 2nd ed, Monad, New York, 1979, p 80; E Fromm, *Escape from Freedom*, Avon, New York, 1971, p 244.

## Development of Case Law

In the 1978 case *Island Records Ltd v Corkindale*,<sup>114</sup> Lord Denning infers that the Piller order was conceived specifically to deal with small shopkeepers. He begins by observing that pirated records can be sold "at a very low price".<sup>115</sup> Then he moves on to identify the pirates. He says that pirated records "are sold by small shopkeepers in poor surroundings".<sup>116</sup> He then waxes lyrical on the success rate of the Piller order by averring that:

These pirates used to do an enormous trade in infringing copies of recorded music. It was very difficult to catch them. As soon as one small shopkeeper was sued, he got rid of all infringing material. He passed his stock to a fellow pirate and then declared that he never had any records except the one which the plaintiffs had discovered. ... The effect of these ex parte orders has been dramatic. When served with them, the shopkeepers have acknowledged their wrongdoing and thrown their hand in. So useful are these orders that they are in daily use ...<sup>117</sup>

Lord Denning's exuberant championing of the Piller order was responsible for an extension of its power base in 1976. At first instance in *EMI v Sarwar and Haidar* Pain J had "refused to extend the search and seizure principle to disclosure by the defendant of information".<sup>118</sup> Quite simply EMI took the matter to the Court of Appeal because they wanted small shopkeepers to divulge the source of their pirated records. Rosen stresses that yet again the judgment of the Court of Appeal was handed down without benefit of hearing from the defendants.<sup>119</sup> Furthermore, the judgment of Lord Denning was one page in length and Lord Stevenson and Lord Shaw simply rubber stamped his decision. With breathtaking disregard for the legal rights of the defendant, Lord Denning held the disclosure principle "is a legitimate extension which we should grant".<sup>120</sup> In justifying extending the parameters of the Piller order Lord Denning again demonized small

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<sup>114</sup> *Island Records Ltd v Corkindale* [1978] FSR 505.

<sup>115</sup> *Island Records Ltd v Corkindale* [1978] FSR 505 at 511.

<sup>116</sup> *Island Records Ltd v Corkindale* [1978] FSR 505 at 511.

<sup>117</sup> *Island Records Ltd v Corkindale* [1978] FSR 505 at 511.

<sup>118</sup> A Rosen, "The Pirates Protection Act 1984 - Anton Piller - A Critical View" (1983) *The Law Society's Gazette* 467.

<sup>119</sup> Rosen, above, n 118, p 467.

<sup>120</sup> *EMI v Sarwar and Haidar* [1977] FSR 146 at 147.

shopkeepers. He stated, "If the retailer is innocent he has nothing to fear ... If the retailer is guilty, there is all the more reason for the order".<sup>121</sup> Gaze examined Lord Denning's judgment in this case and concluded in a stinging remark that "there was no analysis of jurisdiction or authority to grant this extension of the order".<sup>122</sup>

Monopolists in other common law jurisdictions showed in a concrete fashion how they viewed the Piller order. It became a feature of judicial life in places such as Australia, New Zealand, Hong Kong, Singapore and Canada.<sup>123</sup>

### Anton Piller Challenged

Not all of Lord Denning's peers were prepared to cleave blindly to the viewpoint of those with deep pockets when considering the Piller order. Thus, for example, Lord Donaldson in a cogent dissenting judgment in the 1980 case *Yousif v Salama*<sup>124</sup> expressed views that would have cheered the hearts of the small fry that almost universally were at the receiving end of Piller orders. He highlighted that an order should never be granted unless there was a strong prima facie case and there was an imminent threat of the destruction of "essential evidence".<sup>125</sup> He added that the Piller order was a "Draconian power which should be used in only exceptional cases. ... The people of this country are entitled not to have their privacy and their property invaded by a court order except in very exceptional circumstances".<sup>126</sup> In the final analysis Lord Donaldson's words fell far short of an excoriating critique of the premises that underpinned the Piller order. However, there was scope in his views for believing that the heyday of the Piller order was over insofar as a less partisan way of mediating struggles in the business world would prevail. For his part Lord Denning for the majority in *Yousif v Salama* appeared blind to the fundamental issues at stake and simply rehashed the view that had become his trademark in such cases when he said: "It can do no harm to the defendant at all. If he is honest, he will produce

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<sup>121</sup> *EMI v Sarwar and Haidar* [1977] FSR 146 at 147.

<sup>122</sup> E Gaze, "The Anton Piller Order - A Review of its Development and Scope" (1985) 13, 6 *Australian Business Law Review* p 372.

<sup>123</sup> S Gee, *Mareva Injunctions and Anton Piller Relief*, 2nd ed, Longman, London, 1990, p 3.

<sup>124</sup> *Yousif v Salama* [1980] FSR 444.

<sup>125</sup> *Yousif v Salama* [1980] FSR 444 at 446.

<sup>126</sup> *Yousif v Salama* [1980] FSR 444 at 447.

the documents in any case. If he is dishonest, that is all the more reason why the order should be made".<sup>127</sup>

In 1981 the supporters of the Piller order were dealt a blow when the scope of the order was reduced by a House of Lords decision in *Rank Film v Video Information Centre*.<sup>128</sup> Following the Court of Appeal decision in *EMI v Sarwar and Haidar*<sup>129</sup> the principle of disclosure by the defendant became a critical element in Piller orders but the process was brought to a grinding halt by the 1981 House of Lords decision. This case was a clear example of a small shopkeeper fighting back against one of the giants of the UK leisure industry. The shopowner objected to a Piller order compelling disclosure of the suppliers of video cassettes and the names and addresses of their customers on the grounds that the order prevented them claiming the privilege against self-incrimination.<sup>130</sup> The House of Lords gave its imprimatur to the shopowner's claimed privilege against self-incrimination. This decision was obviously unpopular in the boardrooms of the monopoly companies and a lobbying campaign of politicians began. Tettenborn in the journal *The Company Lawyer* expressed the viewpoint of the monopolies by calling for the result in the *Rank* case to be reversed by legislation.<sup>131</sup> In a lightning move Parliament abolished the privilege against self-incrimination in intellectual property litigation just three months after the *Rank* decision.<sup>132</sup> As Staines points out the Piller order had been restored to full effect.<sup>133</sup> In other words the Thatcher government that came into office in 1979 gave its big business backers the law they wanted. So where one branch of the state apparatus fails to provide the financial oligarchy with the coercive laws that are increasingly required to protect its economic hegemony, the breach is filled one way or another. Henceforth the monopolists could relax insofar as the Anton Piller order could once again be used to extract such information as the identity of the driver of a car seen at a specific address five months previously.<sup>134</sup>

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<sup>127</sup> *Yousif v Salama* [1980] FSR 444 at 446.

<sup>128</sup> *Rank Film v Video Information Centre* [1981] 2 All ER 76.

<sup>129</sup> Gaze, above, n 122, p 146.

<sup>130</sup> Gaze, above, n 122, p 130.

<sup>131</sup> A Tettenborn, "Effectiveness of Anton Piller Orders Reduced" (1982) 3, 1 *The Company Lawyer* 35.

<sup>132</sup> A Staines, "Protection of Intellectual Property Rights: Anton Piller Orders" (1983) 46, 3 *The Modern Law Review* 274.

<sup>133</sup> Staines, above, n 132, p 274.

<sup>134</sup> Rosen, above, n 129, p 467.

## The Mareva Injunction

Following state intervention by way of legislative provision the judicial enforcement of the Piller order proceeded without challenge for a prolonged period. Working hand in glove with the Piller order was an equally oppressive form of injunction that operated as a valuable weapon in any contest between capitalists. Again Lord Denning was a key player. He proudly boasts that it was in his court in 1975 that the Mareva injunction "started on its way".<sup>135</sup> In brief, the Mareva injunction is an *ex parte* procedure empowering the freezing of the assets of the defendant. Lord Donaldson in *Bank Mellat v Nikpour*<sup>136</sup> in a vivid phrase stated that the Piller order and Mareva injunction were "the law's two nuclear weapons".<sup>137</sup> The draconian power embodied in these two procedures is given an extra dimension when they are utilized together by a plaintiff. For the Piller order is frequently accompanied by a Mareva injunction.<sup>138</sup> Thus not only will a small shopkeeper be subject to the authority of search, seizure and disclosure, but an injunction that will freeze bank accounts and restrain any disposition of assets. Furthermore, it was also in 1981 that the Thatcher government provided legislative endorsement of the Mareva injunction again pinpointing the role of the Tory party as the political vehicle of the monopoly capitalists.<sup>139</sup>

It was in fact in a 1984 case dealing with the application for a Mareva injunction that petty bourgeois resistance to this form of judicial relief resurfaced. Mustill J in *Ninemia v Trave*<sup>140</sup> expressed his concern at the growing discord that such applications for relief engendered. He stated that increasingly defendants were coming to court armed with evidence to challenge the imposition of a Mareva injunction. These defendants, according to Mustill J, were becoming bolder and complaining of the impact on their enterprises of the freezing of funds. Moreover, they were all seeking the lifting of the injunction.<sup>141</sup>

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<sup>135</sup> Gee, above, n 123, p xviii

<sup>136</sup> *Bank Mellat v Nikpour* [1985] FSR 87.

<sup>137</sup> *Bank Mellat v Nikpour* [1985] FSR 87 at 92.

<sup>138</sup> *Columbia Picture Industries Inc. v Robinson* [1987] Ch 38 at 71.

<sup>139</sup> Gee, above, n 123, p xix.

<sup>140</sup> *Ninemia v Trave* [1984] 1 All ER 398.

<sup>141</sup> *Ninemia v Trave* [1984] 1 All ER 398 at 401.

## Judicial Hand-wringing

Following the signs of rumblings amongst small enterprises about the abuses inherent in Mareva injunctions it was only a question of time before the Piller order became the focal point of dissent. *Columbia Picture Industries Inc. v Robinson*<sup>142</sup> occupied a number of court days in 1985. What transpired during the full trial of this matter was a judicial reappraisal of the merit of the Piller order and Mareva injunction that had been granted in 1982 to the film company. This was a case of a US multinational claiming a small UK video business was counterfeiting and selling videos of films that infringed its copyright. Scott J undertook an exhaustive analysis that canvassed a raft of abuses. What fuelled his concern was his obvious belief that Columbia had in collusion with their solicitors used the Piller order as a stalking horse to destroy the video shopowner. For following the execution of the order the video business collapsed. Scott J surveyed a litany of lies proffered in 1982 to obtain the order. He listed how the court was duped by the concealment of crucial facts. Scott J was adamant that this perfidious behaviour was premeditated for he stressed that the partner in charge of formulating the order "knew, of course that a duty of full disclosure to the court lay on those responsible for an ex parte application".<sup>143</sup> The plaintiff had suppressed the fact that well before seeking an order the shopowner had fully cooperated with a search of his premises. This had resulted in the removal of video cassettes which were returned to the shopkeeper later.<sup>144</sup> Moreover, the fact that following the initial search of his premises the shopkeeper had acted as an informant was not revealed to the court. In short, the defendant had been providing the names of video pirates in his local area prior to the plaintiff gaining an order.<sup>145</sup> Scott J averred that the legal representatives of the plaintiff had executed about 300 Piller orders since 1974.<sup>146</sup> For Scott J this obviously made their moral turpitude even more inexcusable. It drove him to comment that the plaintiff's solicitor "does not, and cannot be expected to present the available evidence from the respondent's point of view".<sup>147</sup> Scott J was also caustic about the manner of the execution of the order. It appears the order was used to support a fishing expedition at the defendant's premises. For not only were video

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<sup>142</sup> *Columbia Picture Industries Inc v Robinson* [1987] Ch 38.

<sup>143</sup> *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 54.

<sup>144</sup> *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 46.

<sup>145</sup> *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 54.

<sup>146</sup> *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 52.

<sup>147</sup> *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 75.

cassettes and boxes seized but according to the defendant personal papers unrelated to business transactions were confiscated. Included in the haul was divorce papers.<sup>148</sup> Scott J observed that the order "was sought in unnecessarily wide terms".<sup>149</sup> It had led to the order being executed "onerously and in flagrant disregard of the defendants' rights, with the intention of preventing them from trading lawfully or at all".<sup>150</sup> Implicit in the biting critique of Scott J is his belief that judges are being too easily hoodwinked by unscrupulous plaintiffs with ulterior motives when Piller orders are granted.

In the case of the Mareva injunction Scott J noted that in the usual way a copy was served on the video shopkeeper's bank. Scott J pointed out that Barclays Bank acted in the customary fashion by immediately cutting off credit.<sup>151</sup> Left without stock and with credit lines snapped, the plaintiff achieved its objective as the video business collapsed.<sup>152</sup> Material was also seized in the raid that was not covered by the terms of the order and was never returned "in breach of the plaintiffs' obligation and undertaking for safe custody".<sup>153</sup> In a cogent passage notable for its exasperated tone, Scott J summed up his disdain for an order that was trampling on key principles of civil jurisprudence. He stated:

What is to be said of the Anton Piller procedure which, on a regular and institutionalised basis, is depriving citizens of their property and closing down their businesses by orders made *ex parte* on applications of which they know nothing and at which they cannot be heard, by orders which they are forced, on pain of committal, to obey, even if wrongly made? ... [Even] villains ought not to be deprived of their property by proceedings at which they cannot be heard.<sup>154</sup>

Andrews has enumerated the proposals put forward by Scott J to avoid abuse of the Piller order. Andrews notes that the remedies boiled down to a request to fellow judges to be more circumspect in granting orders and ensure that

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<sup>148</sup> *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 62.

<sup>149</sup> *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 48.

<sup>150</sup> *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 48.

<sup>151</sup> *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 73.

<sup>152</sup> *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 46, 58, 67.

<sup>153</sup> *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 48.

<sup>154</sup> *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 74.

they are drawn as narrowly as possible.<sup>155</sup> Also a detailed list should be drawn up of all items seized and a receipt given.<sup>156</sup> With respect this was merely a cosmetic change. It certainly was not a clarion call to remove the Piller order root and branch. Whether it would suffice to stifle the agitation of the petty bourgeoisie was a moot point. Certainly the legal representatives of the plaintiff in the *Columbia* case received the kid glove treatment for their nefarious conduct. For whilst Scott J argued that "there have been breaches of the duties that solicitors owe the court" he concluded with the pious wish that "the defects espoused by the present case will not recur in other cases".<sup>157</sup>

If Scott J had believed that following the *Columbia* decision defects in the Piller order would be cured, he was doomed to be disappointed. For the realpolitik of intra-capitalist competition is that the struggle will continue until the system is vanquished or the petty bourgeoisie are liquidated as a fraction of a class. All the judiciary can do is erect legal scaffolding upon the power struggle. Such a containment policy is ultimately premised upon the need to quarantine the struggle and preclude such disputes acting as a catalyst for a general revolt against wage labour. Just two years after the *Columbia* decision Scott J was again taking up the cudgels against aspects of the Piller order. Furthermore, the defects he highlighted had a familiar ring. This time the order had been obtained by a North England electronics firm claiming former employees had established their own firm utilizing confidential information of technical secrets gained in the course of employment with the plaintiff company.<sup>158</sup> Scott J examined the merit of the order granted and revealed a number of defects. For example, the parlous economic position of the plaintiff company had been suppressed when making the ex parte application. The upshot of this failure of disclosure was that if it was found that the order was wrongly granted any claim for damages would be a hollow exercise as the plaintiff was probably insolvent.<sup>159</sup> Scott J was also obviously disturbed at the revelation that the plaintiff's solicitor was the daughter of the chief executive of the company seeking the order.<sup>160</sup>

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<sup>155</sup> N H Andrews, "Abuse of Anton Piller Orders" (1987) 46 *The Cambridge Law Journal* 51.

<sup>156</sup> Andrews, above, n 155 at 51.

<sup>157</sup> *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 89.

<sup>158</sup> *Manor Electronics Ltd v Dickson* [1988] RPC 618.

<sup>159</sup> *Manor Electronics Ltd v Dickson* [1988] RPC 618 at 623.

<sup>160</sup> *Manor Electronics Ltd v Dickson* [1988] RPC 618 at 622.

Scott J grasped the inequitable role played by the police in the execution of the Piller order. As was customary they had been at the scene when the order in this case was executed. Scott J stated that the rationale for a police officer to attend at the execution of the Piller order was to "prevent a breach of the peace that might result from the outraged reaction of the defendant to the threatened invasion of his home".<sup>161</sup> Searching for a deeper cause for the role of the police Scott J argued that it provided legitimacy to the plaintiff's attitude that the defendant could not bar entry.<sup>162</sup> With the police in tow, any difference between a search warrant and Piller order evaporates for all practical purposes. If the defendant is not caught napping by the order being flourished and the verbal magic of the plaintiff's solicitor putting a one-sided view there is always the symbolic significance of a police uniform that is guaranteed to open doors. Scott J offers only an impressionistic analysis of the role of the police in executing Piller orders. He obscures the central fact that by placing themselves on the side of the plaintiff, a repressive agent of state power is unmasked as taking sides in what is often a sordid squabble between business figures. Moreover, natural justice has been denied one of the parties and the police are in no position to judge the merits of the respective parties. That it should be big business that is the main beneficiary of this show of police power is unsurprising given their role in the history of the Piller order. After all, the monopoly capitalists are at the apex of the social pyramid and the state is fundamentally geared towards maintaining their economic hegemony.

As proper disclosure had not been made in this electronics case Scott J discharged the Piller order.<sup>163</sup> Whether the defendant's infant business survived its legal mauling is unknown. Certainly Hoffman J in *Lock Plc v Beswick*<sup>164</sup> opined that Piller orders were in high demand by firms determined to destroy the infant enterprises of former employees. Such firms obviously eschew the canons of free competition. As Hoffman J put it:

I have learned to approach such applications with a certain initial scepticism. There is a strong incentive for employers to launch a pre-emptive strike to crush the unhatched competition in the egg by

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<sup>161</sup> *Manor Electronics Ltd v Dickson* [1988] RPC 618 at 622.

<sup>162</sup> *Manor Electronics Ltd v Dickson* [1988] RPC 618 at 622.

<sup>163</sup> *Manor Electronics Ltd v Dickson* [1988] RPC 618 at 624.

<sup>164</sup> *Lock Plc v Beswick* [1989] 1 WLR 1268.

causing severe strains on the financial and management resources of the defendants or even a withdrawal of their financial support.<sup>165</sup>

Hoffman J shared the grave disquiet of Scott J regarding the danger to civil liberties posed by Piller orders. He concisely summed up the nature of the threat to hallowed principles when he listed these as comprising "the presumption of innocence, the right not to be condemned unheard, protection against arbitrary searches and seizures, the sanctity of the home".<sup>166</sup> Yet like so many high sounding principles in bourgeois society, the gap between theory and practice rendered them hollow rhetoric if the sovereign rights of monopoly capitalists were at stake. For no concrete measures to ameliorate the plight of those caught in the draconian net of the Piller order appeared to follow from these bouts of judicial hand-wringing.

### Petty Bourgeoisie Fightback

As the UK judiciary appeared deadlocked over how to mitigate the impact of the Piller order a shopkeeper appealed over their heads. In *Chappell v United Kingdom* a video shopkeeper approached the European Court of Human Rights in order to complain that the Piller order granted against him in a British court "was in breach of his rights under the Human Rights Convention".<sup>167</sup> The shopkeeper had been served with a Piller order by film companies claiming he was a video pirate. What particularly outraged the shopkeeper was the role of the police in the raid and the oppressive manner of the execution of the order.<sup>168</sup> His business premises doubled as his home and the shopkeeper asserted that Article 8 of the Human Rights Convention had been breached by the raid. Article 8 covers the sanctity of the home.<sup>169</sup> This was a bold move by a disgruntled shopkeeper. It speaks volumes about the depth of the bitterness felt by the UK petty bourgeoisie victimized by the Piller order. It forced the European Court of Human Rights to scrutinize the jurisdiction of the Piller order.<sup>170</sup> Predictably given the statute and case law, it was held that the Piller order was settled law.<sup>171</sup> But it was a propaganda coup for the petty bourgeoisie. It had lifted the lid

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<sup>165</sup> *Lock Plc v Beswick* [1989] 1 WLR 1268 at 1280.

<sup>166</sup> *Lock Plc v Beswick* [1989] 1 WLR 1268 at 1279.

<sup>167</sup> L Collins, "Anton Piller Orders and Fundamental Rights" (1990) 106 *The Law Quarterly Review* 175.

<sup>168</sup> Collins, above, n 167 at 175.

<sup>169</sup> Collins, above n 167 at 175.

<sup>170</sup> Collins, above n 167 at 173.

<sup>171</sup> Collins, above n 167 at 175.

on the despotism inherent within Piller orders. It was only a pyrrhic victory for the forces of monopoly capitalism. Now the petty bourgeoisie could wait for the ramifications of the agonising of the European Court of Human Rights over the violation of Mr Chappell's human rights to percolate through the ranks of the UK judiciary. This case was a milestone. It took place in a forum that has been considered as "probably the most influential Court in the world".<sup>172</sup> It would strengthen the resolve of the section of the judiciary critical of aspects of the Piller order. If viewed from the logic of intra-capitalist class relations these judges grasped that the pendulum had swung too far in favour of big business. Social peace dictated a revamping of the order.

In 1992 in the Chancery Division in *Universal Thermosensors Ltd v Hibben*<sup>173</sup> a step towards curbing the scope of the Piller order was taken. Yet again a sledgehammer had been used to crack a nut for in this case a Piller order had been granted to a firm claiming former employees had taken away confidential information that had subsequently been put to use in the establishment of a rival business. Following the execution of the Piller order the infant business collapsed. Thus dreams of petty bourgeois independence had been shattered by legal fiat in a procedure that as Vice Chancellor Nicholls stated "lends itself all too readily to abuse".<sup>174</sup> What formed the mainspring for a review of the Piller order was the disturbing way it was executed in this case. In brief, the plaintiff's solicitor arrived at the front door of Mrs Hibben's house at 7.15am. She came to the door in a night dress. She was the only adult in the house. Her children were still in bed. She was informed that the order permitted entry whilst any legal advice must be sought immediately. Not surprisingly at this early hour Mrs Hibben rang her solicitor's office but to no avail.<sup>175</sup> Following entry a dispute arose about the documents being seized. This has been a perennial problem crying out for a solution.

It must be stated that the Vice Chancellor was no iconoclastic figure. He is not advocating the abolition of the order. Indeed he was at pains to argue that he supported the Piller order. As he expressed it his aim was quite

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<sup>172</sup> V Berger, *Case Law of the European Court of Human Rights* Vol 1:1960-1987 Round Hall Press, Dublin, 1989, p xi.

<sup>173</sup> *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840.

<sup>174</sup> *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 at 859.

<sup>175</sup> *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 at 860.

simply "that these orders should not be allowed to fall into disrepute".<sup>176</sup> Here is a sane voice prepared to try to pull big business into line when its reckless behaviour towards its smaller brethren contains the potential for rupturing the social fabric. It is axiomatic that the reforms suggested by the Vice Chancellor are mild but perhaps they are a harbinger of a tougher judicial approach that could begin the process of defusing the anxieties of the petty bourgeoisie. For a start the Vice Chancellor suggested that the order should be executed during normal business hours thus providing a real opportunity for the defendant to contact a solicitor.<sup>177</sup> Also a full list of items being seized should be drawn up on the spot with the defendant given the right to check the list.<sup>178</sup> In a nutshell the most important reform was encapsulated in the Vice Chancellor calling for the order to be served and executed by a solicitor not in the employment of the solicitors acting for the plaintiff.<sup>179</sup> Moreover, this solicitor would write a report on the execution of the order that would be served on the defendant and form a basis for an early court hearing where both parties would be present.<sup>180</sup> That the upshot of this procedure would impose extra costs on the plaintiff did not ruffle the Vice Chancellor.<sup>181</sup> He realized that it offered a degree of protection warranted by those confronting the Piller order. As he put it:

If plaintiffs wish to take advantage of this truly draconian type of order, they must be prepared to pay for the safeguards experience has shown are necessary if the interests of defendants are fairly to be protected.<sup>182</sup>

It can be argued that the novel step suggested by the Vice Chancellor to in effect palliate the fears of shopkeepers and their ilk was placed in jeopardy by allocating the task of choosing the solicitor designated to serve and execute the order to the plaintiff's solicitor. A shopkeeper could well argue that in a tightly knit conservative profession such as law this was a sleight of hand trick. For in reality did it matter whether Tweedledum or Tweedledee served and executed the order if this legal instrument aimed at the heart of small enterprises remained on foot? Only time will tell whether

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<sup>176</sup> *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 at 861.

<sup>177</sup> *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 at 860.

<sup>178</sup> *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 at 860.

<sup>179</sup> *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 at 861.

<sup>180</sup> *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 at 861.

<sup>181</sup> *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 at 861.

<sup>182</sup> *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 at 861.

mild reforms will pacify the petty bourgeoisie. Certainly the judicial angst and vacillation over the Piller order is indicative of troubled spirits. Those on the bench may prove even more willing to dilute the order if dissent continued to be tangibly expressed. At this stage the process of calling upon a plaintiff's solicitor to choose a solicitor to serve and execute the order is showing signs of gaining judicial support. In an Australian case *Blain v Jamison*<sup>183</sup> held in March 1993 Burchett J whilst granting the order sought certain undertakings. Following in Vice Chancellor Nicholl's steps he proposed that a receipt for all the listed property seized be issued. More importantly Burchett J came into the court with a copy of the Vice Chancellor's judgment and handed it to the plaintiff's solicitors. He asked them to read the case and return with the name of solicitors with experience in intellectual property litigation ready to serve and execute the order. The plaintiff's solicitors were a large Sydney legal firm. Hardly surprisingly they returned to court with the names of solicitors belonging to one of Sydney's premier establishment firms.<sup>184</sup> This procedure obviously satisfied Burchett J for in his judgment he said:

I have, accordingly, required the applicants to give an undertaking designed to ensure that independent legal advice will be available on the spot, to persons required by the terms of the order to deliver up what may be, at least in some sense, their own property.<sup>185</sup>

The "independent" solicitors were also required "to provide a written report to the Court concerning the manner and circumstances of the service and execution of the orders."<sup>186</sup>

## Conclusion

The appearance of the Anton Piller order illuminates how capitalist law is rooted in the relations of production. Legal ideology is concentrated economics. The social relations of monopoly capitalism gave birth to the Piller order. The history of monopolies, particularly at a juncture of crisis when profits slumped and sacred egotism exacerbated intra-capitalist contradictions, comprises the economic content of the Piller order. The legal form expresses this reality through a glass darkly or in a distorted and

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<sup>183</sup> *Blain v Jamison* (Unreported, Federal Court, Burchett J, 26 March 1993).

<sup>184</sup> Tress Cocks & Maddox chose Phillips Fox to serve and execute the order.

<sup>185</sup> *Blain v Jamison* note 183 at p 6.

<sup>186</sup> *Blain v Jamison* note 185 at 6.

mystified way. The judiciary are purveyors of an ideology whereby reality is perceived in terms of form. This, as Marx would note, reifies the social relations of monopolies. Legal ideology exists at the level of the phenomenal forms of capitalism and this results in a fetishised ensemble of relations that obscures the real relations of production that are the locus of laws. In other words, legal reasoning inverts social reality and creates an imaginary social order where surface appearance predominates.

In this topsy-turvy universe the hidden abode of production is lost sight of as the foundation upon which rises legal ideology.<sup>187</sup> An imaginary social order is created at the ideological level that screens over the structuring of legal relations by economic relations. This is not to deny legal ideology a proactive role. The legal form is dialectically related to the economic content and can, as Engels noted, modify the production relations within certain limits.<sup>188</sup> Thus Poulantzas was right when he argued that legal ideology plays a fundamental role in defusing the potential for open conflict, as economic development alters the balance of power within the capitalist class.<sup>189</sup> In sanctioning the Piller order Lord Denning and his confreres were intervening to preclude the petty bourgeoisie from destabilizing the hegemony of monopolists at the level of the real relations of capitalist society. At the juridical level the Piller order was aiding the laws of motion that are slowly liquidating the petty bourgeoisie as an independent stratum of the UK capitalist class.

That there has been a countervailing trend against the more oppressive aspects of the Piller order amongst a section of the UK judiciary is not surprising. The UK petty bourgeoisie are a declining force but they still represent a significant portion of the UK capitalist class. This comment applies equally to the petty bourgeoisie in former UK colonies. Thus their material role in the productive process ensures their voices will be heard at the ideological level of judicial reasoning. By giving vent to the fears of the petty bourgeoisie apropos the Piller order these jurists are in effect masking the fact that the petty bourgeoisie are dying away but their slow death will not be accompanied by convulsions that could rupture the social fabric. As the concentration of production and capital continues to develop, the Piller order or variants of this procedure may increasingly become one of the forms of struggle that expresses the fight for survival waged by a shrinking number

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<sup>187</sup> Marx, above, n 6, p 927.

<sup>188</sup> K Marx, F Engels, *Selected Correspondence* 3rd ed Progress Publishers, Moscow, 1975, p 400.

<sup>189</sup> Poulantzas, above, n 28, p 91.

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of monopolies. Certainly the shape of legal orders of the Piller type will over time adapt to whatever new stages of development the relations of production hold in store for those living in common law jurisdictions.

