Sport, Restraint of Trade and the Australian Courts: *Adamson v New South Wales Rugby League Ltd*

"The history of professional sport, both in Australia and overseas, reveals a tendency to regulation in ways which interfere with the freedom of players to contract."[1] Sports organisations attempting such regulation may find themselves in court; their rules challenged as being in unreasonable restraint of trade. *Adamson v New South Wales Rugby League Ltd*[2] provides a recent example.

The modern common law doctrine of restraint of trade is premised upon the principles laid down by Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd.*[3] Yet the application of these rules remains an area of difficulty for all types of trade. The judgments of the Full Federal Court in *Adamson* demonstrate the potential for different approaches. This note suggests that despite the differences in the judgments of Wilcox and Gummow JJ, they are both consistent with and referable to the fundamental and historical rationales of the restraint of trade doctrine.[4]

The Facts

The case was an appeal by 154 professional rugby league players concerning the adoption of an internal draft in the rules of the New South Wales Rugby League Ltd. The respondents were the League and its 16 member clubs.

The rules provided that a player whose contract of service with a club had expired and wished to change clubs could only do so through the internal draft. Lodging an application constituted an offer to any club; a contract was formed when the club drafted the player, accepting the offer and its terms. Priority in drafting was given in the reverse order to which the clubs were ranked at the finish of the previous year's competition. It is a condition of entry to the competition that a club agrees to be bound by the rules of the League. Contracts between players and clubs must also be made subject to these rules.

The players claimed the rules contravened s45 of the *Trade Practices Act* 1974 (Cth) and s88F of the *Industrial Arbitration Act* 1940 (NSW) and were invalid at common law as an unreasonable restraint of trade. All the claims failed at first instance. On appeal the statutory claims failed on construction of the Acts,[5] but the appeal was unanimously allowed on the common law claim. Relief was granted by way of declaration that the rules were void.[6]

1 Hill J at first instance in *Adamson v New South Wales Rugby League Ltd* (1991) 27 FCR 535 at 541.
2 (1991) 103 ALR 319.
3 [1894] AC 535.
4 In a brief judgment, Sheppard J agreed with their conclusions but added observations of his own. Noting the differences between the judgments of Wilcox and Gummow JJ he nevertheless stated his general agreement with the *substance* of both (at 322).
5 Above n2 at 332-9 per Wilcox J, Gummow and Sheppard JJ concurring.
6 The parties agreed that an injunction was unnecessary.

The restraint of trade doctrine and the sports league cases[7]

All restraints of trade are prima facie void as contrary to public policy but a restraint may be justified if, and only if, the restriction is "reasonable", that is:

> ... reasonable in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.[8]

There are two questions. First, is there a restraint of trade? This was not in issue in the appeal.[9] Second, is the restraint reasonable? Whether the restraint was reasonable *as between the parties* was the only question in issue.[10]

A series of cases have dealt with the different forms of regulation and discipline imposed upon players within sports leagues.[11] Regardless of their form, these rules have a common effect: restricting the players' right to negotiate and contract with the team of their choice; and in some cases, preventing players from exercising their trade altogether.

The central function of any sports administration is to maintain a marketable sporting competition. This is fundamentally dependent upon the existence of competitors.[12] The survival of individual clubs is essential to the survival of a league.[13] Rules like the internal draft system aim to ensure this survival.[14]

The courts have recognised these aims as legitimate interests of sports leagues. In *Buckley v Tutty* the High Court, dealing with the earlier retention

---

7 For a discussion of related problems see Kelly, *Sport and the Law* (1987); Grayson, D, *Sport and the Law* (1988); Lindgren, "Sport and the Law, The Player's Contract" (1991) 4 *JCL* 135. Specifically, see Bieker and von Nessen, "Sports and Restraint of Trade: Playing the Game the Court's Way" (1985) 13 *ABLR* 180; Owen-Conway, S and L, "Sport and Restraint of Trade" (1989) 5 *Aust Bar Rev* 208.

8 Above n3 at 565, per Lord Macnaghten. The House of Lords established this as the definitive statement in *Mason v Provident Clothing & Supply Co Ltd* [1913] AC 724. The High Court has frequently endorsed the statement: see eg *Butt v Long* (1953) 88 CLR 476 at 486 per Dixon CJ; *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288 at 306-7.

9 The parties did not dispute Hill J's finding that "it might be thought that short of restraining a player from playing altogether there could seldom be a greater restraint upon trade than restricting an employee's freedom in choosing his employer", above n1at 498-9. Wilcox J and Gummow J approved this statement, above n2 at 342 and 359 respectively.

10 Having decided this in the negative, it was unnecessary to decide if the restraint was reasonable in the interests of the public.

11 *Greig v Insole* [1978] 1 WLR 302 and *Hughes v Western Australian Cricket Association (Inc)* (1986) 69 ALR 660 deal with disciplinary rules (retrospective bans on cricketers who play in "disapproved matches"). These cases deal with different regulatory rules: *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413 (transfer and retain); *Blackler v New Zealand Rugby Football League* [1968] NZLR 547 (clearance); *Buckley v Tutty* (1971) 125 CLR 353 (transfer and retain); *Adamson v West Perth Football Club* (1979) 27 ALR 475 (zoning and clearance); *Hall v Victorian Football League* [1982] VR 64 (zoning); *Foschini v Victorian Football League and South Melbourne Club Ltd*, unreported judgment of the Victorian Supreme Court 15 March 1983 No 9868 of 1982 (clearance).

12 Bieker and von Nessen, above n7 at 185.

13 Ibid.

14 See the statement of objectives which prefaces the competition rules of the New South Wales Rugby League set out in the Wilcox J's judgment in *Adamson*, above n2 at 325-6,

and transfer system of the New South Wales Rugby League, found that it was a legitimate object of the League and the clubs to ensure that the teams were as strong and well matched as possible, for it is this which attracts the support of the public.[15] It was therefore legitimate to aim to provide a system that would ensure sufficient stability of membership and would prevent the stronger clubs obtaining all the best players.[16]

Nevertheless the High Court held the rules invalid as an unreasonable restraint of trade.[17] The plaintiff player was granted relief by way of declaration and injunction. The absence of a contract between the player and the League (as in *Adamson*) did not prevent the application of the restraint of trade doctrine or the granting of relief. Under these rules, at the expiration of a playing contract a club could elect to retain a player without renewing his contract or providing remuneration of any kind for an unlimited period of time. The player would only be free to play for another club with the consent of the retaining club or (if placed on the "transfer list") upon the payment of a transfer fee to the old club, fixed at any price it chose to set. The High Court stated that some restrictions on player transfers may be reasonable but refused to advise in advance what restraints would be allowed.[18] This case is central to an understanding of *Adamson*; much reliance was placed on it both in argument and in the judgments.

In 1990 the League introduced the internal draft in conjunction with a salary cap system. The salary cap (which imposes limits on a club's total spending on players) had great significance for the outcome of the *Adamson* litigation.[19] Although its validity was not challenged, it was part of the context in which the reasonableness of the internal draft was to be decided.[20]

The central problem: deciding if the restraint is reasonable between the parties

Whether a restraint is reasonable is a question of law.[21] The onus of proving reasonableness as between the parties lies on the party seeking to uphold the restraint.[22]

Cases since *Nordenfelt* have asked whether a restraint goes no further than is reasonably necessary to protect the legitimate interests of those who have imposed it.[23] In the *Adamson* litigation, all the judges saw this as the proper question. Three "legitimate interests" of the League and the clubs were identified (based on *Buckley v Tutty)*, the protection of which the internal draft was said to be concerned: improving competitive equality between teams; maintaining the financial viability of individual clubs; and the retention of players by clubs (preventing "mid-season poaching").[24]

---

15 Above n11 at 377.
16 Ibid.
17 Above n11, following the earlier decision of Wilberforce J in *Eastham*, above n11.
18 Above n11 at 377-8.
19 Above n2 at 323 per Sheppard J.
20 Above n2 at 331 per Wilcox J.
21 *Buckley v Tutty*, above n11 at 377. See too Gummow J, above n2 at 361.
22 Ibid. See too *Bridge v Deacons* [1984] AC 705 at 714.
23 See, eg, Eastham v Newcastle United, above n11 at 439 and the discussion in *Buckley v Tutty*, above n11 at 376-7.

Two questions going to the reasonableness of the restraint were of great influence. Both address the issue of whether the internal draft rules were an effective means to secure the identified ends.

First, was there any evidence that the protectable interests of the League might be jeopardised if the restraint was not in place?[25] Gummow J pointed out that the adequacy of the protection must be assessed in the light of the degree of danger presented to the League's interests when the internal draft was adopted.[26] The evidence established that before the introduction of the draft the League was prospering financially and that the competition was strong and evenly matched.[27] There was little evidence that mid-season poaching was a problem.[28] Thus, any danger to the League's interests was not immediate or significant.[29]

Second, were there other means of protecting the legitimate interests of the League?[30] Wilcox J pointed to the many other means available to combat ill effects from player poaching, including the application of existing rules.[31] But the major interest at issue was that of maintaining the financial viability of clubs and it was here that the salary cap was of great importance. The players argued that the salary cap system *alone* ensured the financial viability of the clubs by preventing injurious competition for the services of players and "cheque book warfare". Wilcox and Gummow JJ clearly accepted that the evidence that the internal draft was needed to supplement the salary cap was weak.[32] Hill J at first instance indicated that his decision may have been different if the salary caps between the clubs had been equal.[33]

Placing the rules into their wider context may be important. Although I do not think the result on appeal would have differed if the salary cap system was not in place and the internal draft operated alone[34], this practice should be encouraged. In *Foschini* the plaintiff challenged the clearance rules of the Victorian Football League but Crockett J looked carefully at the zoning rules and other controls over players. He felt the rules were interlocking in operation; it was only by having regard to their combined effect that the operation of one segment of the rules could be fully understood.[35]

Could the players' interests be taken into account in deciding reasonableness?

Wilcox J held that although the primary question will always be the extent of the covenantee's need for protection, it is impossible to leave out of the

---

24 Wilcox J and Gummow J, above n2 at 346 and 369 respectively.
25 This question also concerned the High Court in *Buckley v Tutty*, above n11 at 378.
26 Above n2 at 370.
27 Ibid.
28 Wilcox J, above n2 at 349.
29 Gummow J, above n2 at 370.
30 See too *Eastham v Newcastle United,* above n11 and *Buckley v Tutty,* above n11.
31 Above n2 at 349-50.
32 Wilcox J and Gummow J, above n2 at 346-9 and 371 respectively.
33 Above n1. The League's objective is for equal salary caps. Differences between caps at trial were minimal.
34 Because of the nature of the restraint: see the final section of this note.
35 Above n11 at 33.

account the effect of the restraint upon the covenantor.[36] He maintained that the notion of "reasonableness" involves the balancing of competing considerations; the more onerous the constraint, the harder it will be to prove it was reasonable.[37] Further, in the sports league cases, "the courts have always considered the effect of the agreement upon the players".[38] Thus the restraint was only enforceable if it did "no more than reasonably protect the interests of the respondents, *having regard to the interests of the players*".[39] Because the rules did much to infringe the freedom and interests of the players and little to protect the League's interests, the restraint was unreasonable.

Sheppard J agreed that it was necessary to have regard to the likely or potential effects of the rules on the players, but does not make clear whether this is only relevant in "hard cases". In some cases a restraint may be "so obviously unreasonable" that no examination of its effects is required. However, where it can be shown that some aspects of the restraint are reasonably necessary to protect the interests of the person imposing it, it is necessary to consider the impact of the restraint upon those intended to be effected.[40] He found the case before him to be such a case.[41]

In contrast, Gummow J stressed that the question of reasonableness did not involve a balancing act. In disapproving the approach adopted by Hill J[42] (and by implication, that of Wilcox J) as involving an "impermissible lightening of the burden" carried by the League to prove that the restraint is reasonable,[43] Gummow J makes three points.

First, to discharge its burden, the League must prove that the restraint is reasonably related to its objects and affords no more than adequate protection to its interests; it is not a question of unreasonableness "in some broader sense".[44]

Second, it is inevitable that the court will have to consider the position of players when having regard to the special character of the area in which the restraint operates:

> But that is not to undertake a "balancing" exercise with a comparative evaluation of the weight of the interests of organisers and players. It is to *test the justification attempted* by those in adverse interest, in the litigation, to the players.[45]

Third, and most significantly, there is a distinction between cases of contractual restraint and those of involuntary restraint by a combination.[46]

---

36 Above n2 at 341. Wilcox J cited Gibbs J in *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co,* above n8 at 316.

37 Ibid.

38 Ibid.

39 Id at 356, emphasis supplied.

40 Id at 323.

41 Ibid.

42 Hill J concluded "on balance" that the restraint was not unreasonable, "having regard to the legitimate interests of the League and the clubs, on the one hand, and the players on the other"; above n1 at 568.

43 Above n2 at 365, 371.

44 Id at 364.

45 Ibid, emphasis supplied.

46 Above n2 at 363. Gummow J appears to be adopting the language of the *Sherman Act* 1890 (US) which forbids "Every Contract, combination ... or conspiracy in restraint of trade or commerce".

Different considerations of reasonableness apply. In contractual cases, the bargaining power of the parties and the adequacy of consideration may be taken into account. But here, the court cannot look at the position of each player as though he were a party to a contract; the result as to the reasonableness of the restraint could differ depending on the particular player.[47]

This distinction is important. In cases of contractual constraint there is an opportunity for the parties to negotiate, and if an agreement is reached through fair bargaining, a court will not readily hold the restraint unreasonable as between the parties.[48] Where the restraint is involuntary and imposed by a combination, there *should* be a heavy burden on the restraining party to prove that it should be enforceable.

Gummow J's approach rightly treats the restraint of trade doctrine as an independent body of law, and not merely as a branch of the law of contract. Moreover, it is consistent with the historic concern of the doctrine with abuses of power by legal monopolies.[49]

Nevertheless, I wish to suggest that inequality of bargaining power was relevant to the question of reasonableness in *Adamson*, even though it is not a case of contractual restraint: that is, that the internal draft rules were in unreasonable restraint of trade because they became binding on players as the direct result of an inequality of bargaining power between the League and the players. This relies on the view expressed by Lord Diplock in *A Schroeder Music Publishing Co Limited v Macaulay* that

> ... the public policy which the court is implementing [in restraint of trade cases] is not some 19th-century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable.[50]

Wilberforce J applied such an analysis in the sports league case of *Eastham*[51] and that reasoning can equally be applied to the facts in *Adamson*: unless a player signed a contract with a club (which the rules of the League required to be on a standard form), agreeing to submit to the rules of the League, he could not play in the New South Wales competition. There was then a real inequality of bargaining power between the League and its players.

Non-economic effects on players

If the effects on players could be taken into account in assessing the reasonableness of the restraint, did this extend to effects of a non-economic kind?

---

47 Id at 365. Note that all of the previous sports league cases involved challenges by one player alone, above n11.

48 *Esso Petroleum Co Ltd v Harper's Garage Ltd* [1968] AC 269; *Amoco Australia v Rocca Bros*, above n8 at 294 per Menzies J.

49 See Trebilcock, M J, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (1986), at 213-4. He points out that the earliest uses of the doctrine in the 16th century involved the invalidation of excessively restrictive guild by-laws.

50 [1974] 1 WLR 1308 at 1315. Supported in *Esso v Harpers Garage*, above n48; *Queensland Co-operative Milling Association Ltd v Pamag Pty Ltd* (1973) 133 CLR 260 at 268.

51 Above n11 at 428-9, 438.

Wilcox J held that "non-economic effects ought not to be disregarded".[52] They may be more difficult to evaluate, but just as significant as economic effects.[53] Although he felt that the cases usually deal exclusively with economic effects (non-economic considerations are simply not argued), he could find no authority for the proposition that non-economic effects must be disregarded where they arise. Effects on the ability to choose an employer are especially significant.[54]

Sheppard J chose to leave the matter open.[55] There was ample evidence of actual or potential adverse economic effects on players; thus it was unnecessary to reach a conclusion. He too noted the lack of authority but indicated a preference for confining considerations to economic effects: there was a real question as to whether it was appropriate to take into account effects which were *only* non-economic in character.[56]

Speaking of "economic" and "non-economic" effects (a distinction very difficult to maintain) is more than problematic; it seems to overlook the foundations of the restraint of trade doctrine. Sheppard J stated that, "[w]hether a party has engaged in unreasonable restraint of trade to my mind raises for consideration substantially, if not wholly, economic considerations."[57] However, this is misconceived. The restraint of trade doctrine is essentially centred on *individuals* and is aimed at interferences with an individual's *liberty of action*.[58] The doctrine is not, and has never been, based on any economic theory (a point made by Lord Diplock in *Schroeder*[59]); it contains only a vague picture of "free competition" in its background. In this sense, the doctrine is wholly concerned with non-economic effects.

The evidence used to reach the decision on reasonableness

At the trial, Hill J rejected the evidence of two academic economics experts (given on behalf of the players) as to the effect of labour market controls.[60] He held that the question of reasonableness was to be determined by reference to the practical operation of the rules, guided by the evidence of administrators and players.[61]

Gummow J rightly criticised this formulation. A restraint of trade is void *ab initio;* validity is tested as at the date of its imposition.[62] It follows that

---

52 Above n2 at 341.
53 Ibid.
54 Ibid. See too the final section of this note.
55 Above n2 at 323.
56 Ibid.
57 Id at 323.
58 See *Nordenfelt*, above n3 at 565 per Lord Macnaghten; *Petrofina (Gt Britain) Ltd v Martin* [1966] 1 Ch 146 at 180 per Diplock LJ.
59 Above n50. See also Trebilcock, above n49. His central thesis is that the restraint of trade doctrine has never reflected a coherent economic theory of when a restraint is or is not justified.
60 Above n1 at 563. This is consistent with *Texaco Ltd v Mulberry Filling Station Ltd* [1972] 1 All ER 513 at 526 per Ungoed-Thomas J: the restraint of trade doctrine is "part of the doctrine of the common law and not of economics".
61 Above n1 at 563.
62 Gummow J and Wilcox J, above n2 at 359 and 346 respectively.

reasonableness must be tested not by what the parties have done or intend to do, but by what the restraint entitles or requires them to do.[63] The actual practice of parties may shed light on this, but there was no such practice in this case. Wilcox J also focused on what the rules *permitted*.[64] Evidence from the administrators and players was irrelevant to this question. Evidence that the administrators were acting in good faith was also irrelevant.[65]

Further, Gummow J held that much of the evidence from administrators and players was inadmissible because it was directed to the ultimate question — the reasonableness or otherwise of the restraint — which is a question of law.[66]

Appeals provisions in the draft rules

Hill J had found that the rules relating to appeals provisions, which entitled any player to a hearing and required the Appeals Board to have regard to specified matters (including the effect on the player), "overcame the defect" the High Court found in the procedures in *Buckley v Tutty* , which placed a player "completely in the hands" of the appeals committee.[67] The High Court did seem to allow for the possibility that appeals rules could affect the outcome of a case.[68] Gummow J and Wilcox J did not disqualify this in principle. In light of their decisions however, it is unlikely that any modification to the appeal rules could have rendered the internal draft enforceable.

Gummow J held that the alleged amelioration provided by the rules did not go to the issue of reasonableness and could only be relevant to an argument that the internal draft rules as a whole did not constitute a restraint.[69]

Wilcox J stressed that the criteria for deciding an appeal were "open textured" (for example, "The best interests of the game, the player and the club").[70] As for judicial review of the appeal board's decisions, even if it were subject to this, a court could not go to the merits of a decision.[71]

The case-law is yet to reveal appeals provisions which would render otherwise invalid rules enforceable.[72] It seems impossible that any procedures could reach the standard set by the High Court: that is,

> ... that the decisions of the committee will always and necessarily ensure that the restraint imposed by the rules is no more than a court would consider reasonable.[73]

---

63 Above n2 at 360, citing *Watson v Prager* [1991] 3 All ER 487 at 507-8 per Scott J.

64 He found that, "The rules are too broad", above n2 at 355. See also his statement that, "Evidence of what is done today does not prove what will happen tomorrow" at 354.

65 Sheppard J and Wilcox J, above n2 at 323 and 356 respectively.

66 Above n2 at 361. He cites *Haynes v Doman* [1899] 2 Ch 13 at 24; *Stenhouse Australia Ltd v Phillips* [1974] AC 391 at 402. Evidence from persons associated with a trade is only admissible to show the nature and customs of the trade, special dangers requiring protection etc. See too *Leng & Co Ltd v Andrews* [1909] 1 Ch 763 at 722, 770; *Hawkesbury Bakery Pty Ltd v Moses* [1965] NSWR 1242 at 1246-7.

67 Above n11 at 379. The appeal rules are set out in Wilcox J's judgment, above n2 at 328.

68 Above n11 at 378-9.

69 Above n2 at 366.

70 Id at 353-4.

71 Ibid. See too Gummow J at 366-7 on the divided authorities.

72 Such arguments were rejected in *Adamson v West Perth Football Association*, above n11 at 506-7 per Northrop J and in *Foschini*, above n11 at 21.

73 *Buckley v Tutty*, above n11 at 371.

Guarding the "right to work" and the right to choose an employer

If Hill J's decision was upheld, *Adamson v New South Wales Rugby League Ltd* would have become an exception amongst the case-law.[74] Once a restraint on the "right to work" is established, a finding that the restraint is unreasonable will almost inevitably follow. Indeed, it is the "right to work" which may provide the legal or equitable right necessary to support the grant of an injunction at the suit of a third party restrained by a combination.[75]

Incidental to the right to work is the right to choose an employer. The effect of the internal draft was to prevent a player from negotiating with and contracting with a club of his choice. Wilcox J stressed that

> ... the internal draft is contrary to the common law principle that people are entitled to practise their trade as and where they wish...making their own decisions as to their employment and lifestyle.[76]

He saw the right to choose between employers as "a fundamental element of a free society"; if a rule infringing this right "can ever said to be reasonable, the case in justification must be *extraordinarily compelling*".[77]

It is doubtful if any justification would have been sufficient. It remains true that, no matter what the test of its reasonableness, the courts' decisions will depend on the nature of the restraint. In this respect then, the focus of the inquiry is on the effect of the restraint in the market place. Where the market is for employees it will be difficult for a defendant to prove that a restraint should be allowed. When the employee has not chosen, in conditions of free and equal bargaining, to submit to that restraint this burden of proof is doubly difficult to discharge. If disgruntled players continue to litigate sports administrators will have to be content with measures of restraint such as salary caps which do not directly interfere with a player's right to work.

ANDREW HUMPHREYS*

---

74 The plaintiffs were successful in all of the sports league cases cited above n11.

75 See the case note on *Buckley v Tutty* by Atiyah, (1972) 46 *ALJ* 235 which argues that the High Court there recognised a "quasi-tort" remediable by injunction only. See too Denning LJ in *Nagle v Feilden* [1966] 2 QB 633 at 646: "The true ground of jurisdiction in all these cases is a man's right to work ... Just as the courts will intervene to protect his rights of property, they will also intervene to protect his right to work".

76 Above n2 at 355.

77 Above n2 at 342-3.

* Final year student, Faculty of Law, University of Sydney, 1992.