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WHAT IS A RESTRAINT OF TRADE?

Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd (Northern Ireland); Quantum Actuarial LLP v Quantum Advisory Ltd

Sandra **Booysen**[*]

The appropriate test for identifying a restraint of trade has long troubled the courts. In *Peninsula Securities Ltd v Dunnes Stores*, the United Kingdom ("UK") Supreme Court overruled a decision of the House of Lords that had stood for more than fifty years and adopted the 'trading society' test which had been put forward in a minority judgment of the House of Lords decision. Not long after this notable development, in *Quantum Actuarial v Quantum Advisory*, the English Court of Appeal found that the trading society test was not comprehensive as it could not apply to novel or unique provisions. The trading society test is also open to criticism for being vague and unhelpful. It is, however, supported here for its broad perspective, flexibility and synergy with the competing policies at stake: freedom to contract and freedom to trade.

I. Introduction

It is only in limited circumstances that the courts have jurisdiction to assess the reasonableness of contract terms.[1] One of these circumstances is when the agreement constitutes a restraint of trade, and so, courts must be able to distinguish a trade restraint from other agreements. Yet, a satisfactory definition or test has proved elusive. Fortunately, there are well-established examples of trade restraints, and most cases going before the courts fall into one of these, namely agreements that restrict a person's right to work after an employment relationship ends, and agreements that restrict the seller of a business from competing with the purchaser after the sale.[2] In such cases, the preliminary question of what constitutes a restraint of trade does not arise. Every now and then, however, a provision outside of the typical mould raises the elementary question: what is a restraint of trade, or when is the doctrine of restraint of trade engaged? *Peninsula Securities Ltd v Dunnes Stores*

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[*] Associate Professor, Faculty of Law, National University of Singapore. I am grateful to Helena Whalen-Bridge and the anonymous reviewer for their constructive comments.

1 A similar power exists pursuant to the *Unfair Contract Terms Act* (Cap 396, 1994 Rev Ed Sing) which controls exemption clauses.

2 The common law doctrine of restraint of trade overlaps with anti-competition legislation, such as the *Competition Act* (Cap 50B, 2006 Rev Ed Sing).

(Bangor) Ltd (Northern Ireland)[3] and *Quantum Actuarial LLP v Quantum Advisory Ltd*[4] were such cases. In *Peninsula,* the UK Supreme Court unanimously overruled the previous answer given to that question by the House of Lords. Shortly after the judgment was handed down, it was considered in *Quantum* by the English Court of Appeal, which concluded that the test favoured by the Supreme Court could not apply to novel or 'bespoke' provisions,[5] and that in such cases the answer lay in balancing the competing policy considerations involved. These policy considerations are, first, that agreements freely entered into should be honoured and, second, that every person should be free to lawfully apply their labour and talent to achieve well-being for themselves and their families, thereby contributing to a better society.[6] The Supreme Court's preferred test, the trading society test, does not offer a simple formula for identifying a restraint of trade. Nevertheless, it is defended here for its broad perspective, flexibility, and synergy with the policy considerations at stake. It is further contended that the approach adopted in *Quantum* is a logical extension of the trading society test.

Importantly, classification as a restraint of trade is not in itself fatal to a provision.[7] The consequences were famously articulated in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*,[8] where the House of Lords held that trade restraints were void unless reasonable in the interests of both the parties and the public. Since then, it has been established that the beneficiary of the restraint must have a legitimate interest that warrants reasonable protection.[9] In other words, once a restraint of trade has been identified, a second enquiry ensues. The focus here is on the first enquiry concerning the test for identifying a restraint of trade. It may be that the concept of reasonableness feeds into the first enquiry as well. The Court of Appeal in *Quantum* stated, for example, that a determination of the restraint status of a term and its reasonableness were overlapping, rather than discrete, questions.[10] This point will not be addressed further here, but it is suggested that the detailed reasonableness analysis at the second stage of the enquiry, which has regard to the parties' specific circumstances and the precise extent of the restraint,[11] is qualitatively different from any reasonableness element in the first stage of the enquiry.

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3 [2020] 3 WLR 521 (UKSC) [*Peninsula*]. See also Kelvin Hiu Fai Kwok, "Land-Related Restrictive Covenants in Restraint of Trade" (2021) 137 Law Q Rev 193.

4 [2021] EWCA Civ 227 [*Quantum*].

5 *Ibid* at para 1.

6 See, for example, *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 716 (HL); *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] 1 AC 269 at 295, 305 (HL).

7 See *Credico Marketing Ltd v Lambert* [2021] EWHC 1504 [*Credico*] where certain provisions were considered to be trade restraints but were nevertheless considered to be reasonable.

8 [1894] AC 535 (HL) [*Nordenfelt*].

9 See *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 710 (HL); *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] 1 AC 269 at 297, 301, 303, 312 (HL). In *Lek Gwee Noi* [2014] 3 SLR 27 at para 57 (HC), the Singapore High Court considered that the legitimate interest need not be proprietary.

10 *Quantum*, *supra* note 4 at paras 66, 67.

11 For the factors that have been identified as pertinent to the reasonableness enquiry, see *ibid* at para 65; *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 at paras 50-61(CA).

II. Background

Prior to *Peninsula*, the leading case attempting a definition of restraints of trade was the House of Lords decision in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*,[12] from which different views emerged. The first view came from Lord Reid, with whom Lord Morris and Lord Hodson agreed: "Restraint of trade appears to me to imply that a man contracts to give up some freedom which otherwise he would have had."[13] Lord Pearce showed some support for this 'pre-existing freedom' test,[14] but seemed to advocate a different touchstone of whether the provision had the effect of absorbing a person's services or sterilising them.[15] A third view came from Lord Wilberforce, subject to the preface that "probably no precise non-exhaustive test" can be stated: contracts that "have passed into the accepted and normal currency of commercial or contractual or conveyancing relations" do not fall to be assessed for reasonableness.[16] His Lordship spoke of "recognisably normal contracts",[17] and agreements "moulded under the pressures of negotiation, competition and public opinion" so as to "have assumed a form which satisfies the test of public policy."[18] Lord Wilberforce's test has come to be known as the 'trading society test'.[19]

The facts of *Esso* involved two versions of a petrol-tie or solus agreement, in which a garage proprietor agreed to sell only Esso's brand of petrol, in addition to other controls in the conduct of the business. Notwithstanding the different tests propounded, the House of Lords was unanimous that the agreements were trade restraints. The judgments in *Esso* recognised that the dividing line between trade restraints and other provisions is hard to draw.[20] They rejected a simplistic rule that restraints on the use of land were beyond the reach of the doctrine. Lord Hodson summed up on this point by saying: "All dealings with land are not in the same category".[21] While Lord Reid did not consider that common negative covenants restricting the use of land were restraints of trade, in this case the garage owner had given up a pre-existing right to sell other brands of petrol and agreed to certain operating hours, and these restrictions constituted restraints of trade. Nor did the provisions pass Lord Wilberforce's trading society test: "the solus system is both too recent and too variable".[22] Hence, the provisions were restraints of trade.

The pre-existing freedom test subsequently attracted much criticism for making arbitrary distinctions and ignoring the policy considerations at stake, as discussed

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12 [1968] 1 AC 269 (HL) [*Esso*].

13 *Ibid* at 298; also 309 (Lord Morris), 316, 317 (Lord Hodson). See also *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146 at 180 (EWCA).

14 *Esso*, *supra* note 12 at 325.

15 *Ibid* at 328, 336.

16 *Ibid* at 332, 333.

17 *Ibid* at 337.

18 *Ibid* at 333.

19 *Peninsula*, *supra* note 3 at para 26.

20 *Esso*, *supra* note 12 at 298, 299, 324, 332.

21 *Ibid* at 316; see also 310.

22 *Ibid* at 337.

further below.[23] It did not find favour, for example, in Australia,[24] yet it went unchallenged in the UK's highest court until *Peninsula*.[25] Some months before *Peninsula*, the Supreme Court ruled on the validity of a number of restraining provisions in *Tillman v Egon Zehnder Ltd*,[26] including a provision which prohibited an employee from owning shares in a competing business for a period after the employment ceased. Without entering the debate about the test for identifying a restraint of trade, the Supreme Court found that the doctrine was engaged.[27] Since *Peninsula*, the Supreme Court has had yet another opportunity to consider the restraint of trade doctrine, in *Harcus Sinclair LLP v Your Lawyers Ltd.*[28] The case involved a non-compete agreement between two law firms in the context of group litigation over diesel emissions. Despite falling outside of the paradigm restraint of trade categories, it was not in dispute that the agreement was a restraint of trade.[29] Of the three recent UK Supreme Court decisions dealing with trade restraints, therefore, *Peninsula* is the only case that deals with the preliminary question of what constitutes a restraint of trade.

III. The Decisions in *Peninsula* and *Quantum*

Peninsula came before the Supreme Court as an appeal from the Northern Ireland Court of Appeal. A property developer leased a space in a shopping centre to a well-known retailer, Dunnes Stores, and covenanted that no competing business would be allowed to operate in the centre. Peninsula Securities, a company owned by the developer, subsequently took an assignment of the developer's rights in the centre. After a period of prosperity, the shopping centre declined in popularity and, in the hope of reviving its fortunes, Peninsula Securities sought a declaration that the covenant was an unreasonable restraint of trade.

In the trial court, McBride J applied the majority's test in *Esso* of whether the covenantor had relinquished a pre-existing freedom.[30] She concluded that while the developer had given up a prior freedom, its successor (Peninsula Securities) had not, since they simply acquired the post-covenant rights as then existed in the shopping centre. The Northern Ireland Court of Appeal agreed that a literal application of the pre-existing freedom test meant that the restraint doctrine was not engaged when the developer's rights were assigned to Peninsula Securities, but it overrode that conclusion in light of the trade freedom policy that motivates the doctrine.[31] Dunnes Stores

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23 See, in particular, J D Heydon "The Frontiers of The Restraint of Trade Doctrine" (1969) 85 Law Q Rev 229.

24 See *Peninsula*, *supra* note 3 at paras 34-42.

25 *Ibid* at para 32.

26 [2019] 3 WLR 245 (UKSC) [*Tillman*]. See also William Day "Freedom of Contract and Restraint of Trade" (2020) 79:1 Cambridge LJ 11; Desmond Ryan "Restating Restraint of Trade: The Implications of the Supreme Court's Judgment in *Tillman v Egon Zehnder Ltd*" (2020) 49:4 Indus LJ 595.

27 *Tillman*, *ibid* at paras 33, 34.

28 [2021] 3 WLR 598 (UKSC) [*Harcus Sinclair*].

29 *Ibid* at para 47.

30 [2017] NIQB 59.

31 [2018] NICA 7.

appealed to the Supreme Court, which gave the Supreme Court the opportunity to ask more holistically when the restraint of trade doctrine should be engaged.[32]

While conscious that their previous decisions should not lightly be overruled,[33] the Supreme Court unanimously rejected the pre-existing freedom test and embraced Lord Wilberforce's trading society test. The main reason for rejecting the former test was its capacity to treat the same provision differently depending on who was bound by it, as illustrated by the trial court's decision. Lord Carnwath agreed with the accusation of counsel in *Esso* that the pre-existing freedom test produced "capricious results".[34] The court unanimously endorsed Lord Wilberforce's trading society test as being better equipped to determine when provisions should be scrutinised for reasonableness since, by its very nature, this test is attuned to the norms in commerce and is able to respond appropriately to changes.[35] In reaching their decision, the Supreme Court rejected an argument that the restraint of trade doctrine did not apply to property developers and property holding companies since they are not 'traders'. The doctrine, it said, was not confined to trade in the narrow sense.[36]

Applying their preferred trading society test to the facts, the Supreme Court found that the covenant "at no time engaged the doctrine".[37] Lord Wilson, who gave the leading judgment, referred to evidence showing that "it has long been accepted and normal for the grant of a long lease in part of a shopping centre to include a restrictive covenant on the part of the lessor in relation to the use of other parts of the centre."[38] Such covenants offer comfort to anchor tenants given their upfront investment and risk concerning the future success of the development. Lord Carnwath, who gave the only other judgment, pointed out that the interests of property developers would be undermined if the assurances given to anchor tenants were not binding.[39] His Lordship concluded that the decision whether to offer these assurances or lose an anchor tenant was intrinsic to the free pursuit of the property development business, not a restraint of trade.[40]

Hot on the heels of *Peninsula*, was the Court of Appeal's decision in *Quantum*.[41] The agreement in question was a services agreement entered into between commercial entities pursuant to a corporate restructuring. The restrained party, a new entity formed for the purposes of the restructuring, agreed for 99 years not to solicit the clients of another party (called the legacy party) but agreed to provide services to those clients in return for a fee that covered their costs. The profit of providing the services went to the legacy party. The new entity benefitted from the arrangement by taking over a functioning business, including staff, use of premises, and access to a client base from which it could build its own. Some years later, when the personnel and interests of the two sides diverged, the new entity challenged the agreement

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32 *Peninsula*, *supra* note 3 at para 16.
33 *Ibid* at paras 49, 50.
34 *Ibid* at para 59.
35 *Ibid* at paras 45-47.
36 *Ibid* at paras 17, 64.
37 *Ibid* at para 51.
38 *Ibid* at para 51. See also *ibid* at para 65.
39 *Ibid* at para 65.
40 *Ibid*.
41 *Quantum*, *supra* note 4.

as an unreasonable restraint of trade. Faced with a bespoke agreement designed to respond to a particular situation, and with no history, the Court of Appeal found that it could by definition not pass the trading society test, thereby suggesting that it was a restraint of trade. The Court of Appeal rejected that inference,[42] and concluded that the trading society test was inapt for novel agreements, *ie* it was not of "universal application".[43] With reference to Lord Wilberforce's statement in *Esso* that a single, all-purpose test to identify trade restraints was probably not possible,[44] the court concluded "independently of the 'trading society' test" that the question was ultimately to be determined by balancing the competing policy considerations:[45] freedom to contract and freedom to trade.

IV. The Singapore Context

Singapore's restraint of trade doctrine is based on English law, and *Nordenfelt* has been adopted and cited many times in the Singapore courts. As regards the *Esso* tests to identify a restraint of trade, the Singapore courts have expressed different views. For example, in *Shell Eastern Petroleum (Pte) Ltd v Chuan Hong Auto (Pte) Ltd*,[46] the High Court supported (*obiter*) Lord Wilberforce's trading society test, while in *National Aerated Water Co Pte Ltd v Monarch Co Inc*,[47] the Court of Appeal seemed to endorse the pre-existing freedom test. However, in *Man Financial (S) Pte Ltd v Wong Bark Chuan David*, the Court of Appeal indicated *obiter* that the applicable test in Singapore was still open.[48]

The Singapore courts have in recent years had to determine the status of provisions not falling neatly into the established trade restraint categories. For example, *Pilkadaris Terry v Asian Tour* concerned a term in the membership rules of a professional golfers' association which prevented members from playing in tournaments organised by rival associations without first obtaining a release.[49] Failure to obtain a release could result in a financial penalty and suspension. The Singapore High Court concluded, without recourse to the *Esso* tests, that the restraint of trade doctrine applied to the rules of trade associations that regulated the conduct of their members. Another less usual provision came before the Singapore courts in *Mano Vikrant Singh v Cargill TSF Asia Pte Ltd*.[50] The context was employment, an area in which the restraint doctrine traditionally operates, but the provision took a different form from a blatant restriction on working for a rival. The employer in this case operated an incentive scheme for key employees, such as the claimant. The terms of the scheme were that payment of 50% of incentive awards would be deferred by

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42 *Ibid* at para 73.

43 *Ibid* at para 71.

44 *Esso*, *supra* note 12 at 332, 333.

45 *Quantum*, *supra* note 4 at para 79.

46 [1995] 1 SLR(R) 902 at para 20 (HC), affirmed on appeal but without reference to this issue, see *Chuan Hong Auto (Pte) Ltd v Shell Eastern Petroleum (Pte) Ltd* [1996] 1 SLR(R) 39 (CA).

47 [2000] 1 SLR(R) 74 at para 29 (CA).

48 [2008] 1 SLR(R) 663 at para 58 (CA).

49 [2013] 2 SLR 385 [*Pilkadaris*] at paras 62-69 (HC). See also Pey-Woan Lee, "Financial Disincentives and Restraints on Trade" (2013) 6 J Bus L 642.

50 [2012] 4 SLR 371 (CA) [*Singh*].

the employer, and these deferred amounts would be forfeited in the event that the employee worked elsewhere in the industry within a specified period of leaving the services of the employer. The relevant provision did not prohibit the employee from starting or working in a rival business, but it was clearly intended to discourage such conduct. The claimant duly left the employer and shortly afterwards started a rival business. As a result, his deferred incentive awards were forfeited, which prompted the claimant to challenge the provision as an unreasonable trade restraint.

The Court of Appeal ruled, contrary to the High Court, that the forfeiture provision engaged the restraint doctrine. Two features of the provision were significant for the court in reaching this conclusion.[51] First, the monies forfeited were already vested in the employee, *ie* they had been awarded to the employee and were being confiscated. Second, the forfeiture provision operated on the employee's conduct after the employment ceased. The court contrasted a payment for loyalty provision where an employee is incentivised to remain with an employer in order to obtain a payment that s/he is not otherwise entitled to.[52] In the court's view, a loyalty provision did not operate in restraint of trade. The court also rejected the American employee choice doctrine relied on by the High Court, which emphasises the choice made by the employee. The Court of Appeal reasoned that if a provision constitutes a trade restraint, public policy requires the provision to be scrutinised, irrespective of a choice having been exercised. The court also suggested, tentatively, that the concept of reasonable expectations, as encapsulated in the doctrine of promissory estoppel, could be used to determine whether a right to deny a benefit constitutes a restraint.[53]

Following *Singh*, the indications are that Singapore law would disagree with an approach that balances the competing policy considerations when identifying a restraint of trade. In *Singh*, the Court of Appeal stated that the balancing of contractual freedom and freedom to trade should only happen at the second stage of the enquiry, which considers the reasonableness of the provision.[54] In *Quantum*, the court openly embraced the need to balance contractual freedom and trade freedom.[55] As discussed in the next section, the trading society test as articulated in *Peninsula* requires an assessment of whether societal acceptance of a provision reflects that an equilibrium between the two policies has been reached. However, as with the earlier point about the possible role of reasonableness in the first stage of the enquiry, it is suggested that recourse to the policy considerations in the two stages is qualitatively different.

V. Discussion of the Trading Society Test

The pre-existing freedom test undoubtedly has its short-comings, including arbitrariness in its operation, as illustrated by the trial court's view in *Peninsula* that the

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[51] *Ibid* at paras 42-44, 75.
[52] *Ibid* at para 45.
[53] *Ibid* at para 67.
[54] *Ibid* at paras 47, 79.
[55] *Quantum*, *supra* note 4 at para 79.

provision was a restraint against the developer but not its successor in title. While it may seem superficially attractive by offering clarity through the relatively simple assessment of whether a right was surrendered, it ignores the policy that motivates the doctrine by focussing on the order in which rights are acquired and forsaken.[56] The view of the two lower courts in *Peninsula*, that the provision did constitute a restraint of trade in the hands of the developer, also shows that the pre-existing freedom test can be over-inclusive, given the Supreme Court's finding that even vis-à-vis the developer, the doctrine was not engaged.

The trading society test, on the other hand, is open to the criticism of being vague, and of offering scant guidance on how to assess whether a provision has gained trading acceptance. The Supreme Court in *Peninsula* recognised as much. Lord Wilson conceded that at first glance the test seemed somewhat nebulous, while Lord Carnwath acknowledged that the test was "no more than an imprecise guide".[57] Lord Wilson defended it, however, as a pragmatic test that takes advantage of the common law's flexibility and ability to adjust in tune with society.[58] Lord Carnwath elaborated that the test asks "whether, in the light of established practice, there is in the relevant context any public policy reason for interfering in the free process of negotiation between the parties".[59] It is apparent that evidence from persons in the industry is likely to be relevant to the enquiry.[60] A compromise that is explicable as an exercise of trade freedom, as in *Peninsula*, rather than the product of bargaining inequality, is not a trade restraint.[61] It is also clear that the mere fact that a provision is widespread or has a long history will not suffice for the trading society test.[62] The test will, unavoidably in some instances, require a granular analysis of the genesis of the provision in order to determine whether it is of a type that the courts should exercise control over. It does not offer a formulaic solution to the question; rather it takes the pulse of commercial needs and interests to make a determination.

The trading society test may appear to rubber stamp established provisions that have their roots in bargaining inequality and not trade freedom,[63] but it is clear that such provisions should not be protected by the test. In *Esso*, Lord Wilberforce spoke of terms that have been "moulded under the pressures of negotiation, competition and public opinion",[64] while in *Peninsula* Lord Carnwath indicated the need to consider whether policy called for redress of the balance between the parties' interests.[65] A related concern is that because the trading society test apparently deals with terms by type or category, it ignores different permutations of terms within a category. For example, Lord Wilberforce in *Esso* saw pub ties as passing the trading society test,[66] which puts them beyond scrutiny for reasonableness. A particular

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56 See *Peninsula*, *supra* note 3 at paras 43, 44.

57 *Ibid* at para 60

58 *Ibid* at para 45.

59 *Ibid* at para 61.

60 *Ibid* at para 51.

61 *Ibid* at para 65.

62 *Ibid* at para 61.

63 See Kwok, *supra* note 3 at 196.

64 *Esso*, *supra* note 12 at 333.

65 *Peninsula*, *supra* note 3 at para 61. For an example, see *Credico*, *supra* note 7 at para 258.

66 *Esso*, *supra* note 12 at 333, 334. Pub ties require pubs to sell only the products of a particular brewery, commonly in return for funding.

pub tie may, however, go beyond established norms and operate unduly restrictively. In this regard, Lord Wilberforce specifically contemplated the need to re-examine any "deviation from accepted standards",[67] and indicated that there were no permanent exemptions.[68]

Another issue regarding the trading society test is its ability to respond universally. It is hard to fault the logic of the Court of Appeal in *Quantum* that a test based on the historical acceptance of practices cannot be used to determine the nature of novel or unique provisions, unless we are willing to treat all such provisions as restraints of trade. Lord Wilberforce may indeed have envisaged such a consequence. This much transpires from his Lordship's explanation for why petrol solus agreements were considered to be restraints in *Esso*, when pub ties were not, despite their apparent similarity: "the solus system is both too recent and too variable",[69] thereby suggesting that novel provisions are to be treated as restraints of trade.

In *Peninsula*, however, Lord Carnwath stated that the emphasis was less on the length of time that a practice has been in existence, and more on whether public policy warrants interfering with freedom of contract or adjusting a bargaining imbalance.[70] The leading judgment of Lord Wilson similarly stated that the trading society test "reflects the importance attached on the one hand to freedom to trade and on the other to the enforceability of contracts in the interests of trade. It is the former which generates the doctrine and the latter which keeps it within bounds."[71] It seems, therefore, that the Supreme Court would agree with the Court of Appeal in *Quantum* that if the agreement is a novel one with no history to draw on, the court must decide its status having regard to the operation of the policy considerations on the facts, and by considering whether a provision of the sort in question strikes an equitable balance between the policies or whether the scales have tilted against freedom to trade. Societal acceptance, pursuant to the trading society test, reflects that this balance has already been struck through "negotiation and competition".[72]

The debate about the appropriate test for a restraint of trade in the last fifty years has focussed on the approaches of Lord Reid and Lord Wilberforce in *Esso*. Less attention has been paid to the judgment of Lord Pearce who suggested asking whether the provision had the effect of absorbing a person's services or sterilising them.[73] These metaphors, it is suggested, can usefully be applied within the auspices of the trading society test. In fact, Lord Wilberforce also referred in *Esso* to provisions that serve to sterilise.[74] The way in which these terms are to be calibrated or applied to factual situations, as with other value judgments, must be determined with reference to past cases and society's needs. That exercise is not alien to the common law and is visible, for example, when courts determine whether the breach of an innominate term allows for termination, or whether the effect of a common mistake or a supervening event is sufficiently fundamental to undermine the contract.

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67 *Ibid* at 335.
68 *Ibid* at 333.
69 *Ibid* at 337.
70 *Peninsula*, *supra* note 3 at para 61.
71 *Ibid* at para 45.
72 *Esso*, *supra* note 12 at 337.
73 *Ibid* at 328, 336; discussed in *Peninsula*, *supra* note 3 at para 25.
74 *Esso*, *ibid* at 336.

The sterilisation metaphor has obvious resonance with the established cases of restraint, namely restricting an employee's right to work after the employment relationship ceases, and restricting a business owner's right to work for a rival business. It can also usefully be applied in more novel situations. Two such cases are *Shroeder Music Publishing Co v Macaulay*,[75] and *Proactive Sports Management v Rooney*.[76] Both involved contracts for the promotion of an individual's talent — the former a musician, the latter a sportsman. Superficially the contracts might have appeared to absorb their services, but the terms were one-sided and stifling. Both took advantage of the individuals' youth and smacked of exploitation reminiscent of unconscionability. In *Macauley*, all rights in the musician's work were assigned for five years to the promoter who was not obliged to promote the work. The promoter could withhold royalties and the agreement was automatically renewable but could be terminated by the promoter.[77] In *Rooney*, the contract gave exclusive rights to exploit a sportsman's image. It was made when he was young and without independent advice. It was of a relatively long duration and was not easy to terminate. The restraint of trade doctrine was found to apply. It did not matter that the individual's primary occupation as a sportsman was not affected. Both contracts were considered to be restraints of trade. Another, and similar, case in which the sterilization metaphor seems apposite is *Pilkadaris* where the members of a golf association were restricted from playing in tournaments organised by other associations but at the same time were not guaranteed places in tournaments organised by their own association.

VI. Conclusion

As acknowledged by the Supreme Court in *Harcus Sinclair*,[78] the body of law governing restraints of trade is "self-contained" and independent of the law governing illegality generally, although both fall under the same umbrella. What they have in common, now that the trading society test has been embraced for trade restraints in the UK, is a flexible approach to identifying when contractual freedom is properly to be curtailed for policy reasons. The broader purview of the trading society test, compared with the single factor of the pre-existing freedom test, and the greater awareness of the policy considerations at this stage of the enquiry, are also consistent with the approach adopted by the Supreme Court for illegality more generally in *Patel v Mirza*.[79]

The position taken in English law is that the doctrine of restraint of trade is a limited exception to contractual freedom, and most terms are not to be regarded as restraints of trade.[80] Restrictions on ex-employees and business sellers from plying

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75 [1974] 1 WLR 1308 (HL) [*Macaulay*].

76 [2010] All ER (D) 201 (EWHC) [*Rooney*].

77 Contrast *Chua Chian Ya v Music & Movements (s) Pte Ltd* [2010] 1 SLR 607 (CA) where the terms were less extreme.

78 *Harcus Sinclair*, *supra* note 28 at para 45.

79 [2016] 3 WLR 399 (UKSC).

80 See *Esso*, *supra* note 12 at 294; *Harcus Sinclair*, *supra* note 28 at paras 31, 61. See *Singh*, *supra* note 50 at para 68.

their trade are at its heart. To determine when it is engaged beyond these situations, the Supreme Court has unequivocally rejected the pre-existing freedom test. Rather than focussing on the narrow question of whether a right has been forsaken by one party, the Supreme Court has endorsed the broader perspective advocated by Lord Wilberforce in *Esso* that considers the normalisation of contractual practices in a community. The trading society test is inevitably vague as it involves a value judgment as to whether a provision has come to be accepted as promoting, rather than inhibiting trade.[81] It does not produce an inevitable output after receiving a specified input, but nor does it purport to do so. It is a flexible and incremental approach that takes account of all relevant factors. *Quantum* has since identified an apparent lacuna in the trading society test when unique provisions are at stake. Both cases seem to agree, though, that the competing policy considerations of freedom to contract and freedom to trade are at the heart of the enquiry. Seen in this light, the position taken in *Quantum* is a logical extension of the trading society test. Singapore's position on how a restraint of trade is to be identified remains open. When that question comes before the Singapore courts, *Peninsula* and *Quantum* will no doubt be of great interest.

[81] See *Esso*, *ibid* at 336.