The Supreme Court in *Peninsula Securities Ltd v. Dunnes Stores (Bangor) Ltd* [2020] UKSC 36 has departed from the 1966 decision of the House of Lords in *Esso Petroleum Co Ltd v. Harper's Garage (Stourport) Ltd*

By Peter Susman QC

1 In the *Peninsula* case [2020] UKSC 36 (judgment given on 19 August 2020) the Supreme Court unanimously decided to invoke its rarely exercised power to depart from an earlier and otherwise binding precedent, in this case the 1966 decision of the House of Lords in *Esso Petroleum Co Ltd v. Harper's Garage (Stourport) Ltd*, reported at [1968] AC 269. The appeal in the *Peninsula* case was from the Court of Appeal in Northern Ireland, but the decision of the Supreme Court is of course binding also in England and Wales.

2 In the 1960s there was general concern that oil companies might be exercising oppressive economic power by insisting that leases of premises to the operators of petrol stations should include a tie requiring the operator to purchase petrol only from that particular oil company, and similarly by brewers insisting that leases of pubs should tie the publican to purchasing beer only from that particular brewery. In the *Esso* case the House of Lords confirmed that in some cases (but only in some cases), such a restrictive covenant should be unenforceable as being in restraint of trade if a Court considered it unreasonable. In the view of the majority of the House of Lords, the only cases where the reasonableness of the contractual provision could be considered by the Court were if the party with less economic power (such

as the operator of a petrol station, or the publican) had given up some "pre-existing freedom". For example, if the operator of the petrol station or the publican was acquiring a new lease of premises, neither would have given up some "pre-existing freedom", and could not ask the Court to declare the restrictive tie to be an unreasonable and accordingly unenforceable restraint of trade. Lord Wilberforce in his minority speech agreed that there should be some restriction on the Court's power to consider whether a restrictive covenant was or was not reasonable. However, he proposed that the test should be whether the restrictive covenant was accepted as part of the structure of a "trading society": by this he clearly meant 'usual in commerce'.

3 The "pre-existing freedom" test was met with immediate and sustained academic and professional criticism, and has been rejected in Australia and parts of Canada, as demonstrated by Lord Wilson's review of cases in those jurisdictions in his judgment in the *Peninsula* case.

4 The "pre-existing freedom" test is now unanimously rejected by the Supreme Court in favour of Lord Wilberforce's "trading society" test. In reaching this conclusion the Supreme Court was "fortified" (but not "influenced"!) by the availability of an alternative statutory remedy, in England and Wales under the Law of Property Act 1925, section 84 (as amended), giving the Upper Tribunal jurisdiction to consider whether to modify or discharge restrictive covenants affecting land.

5 The outline facts of the *Peninsula* case were that the claimant was the owner of land in Londonderry on which a shopping mall had been constructed, and the defendant was a retailer who had the benefit of a restrictive covenant preventing any trade rival retailer being established in that shopping mall. The claimant sued for a declaration that the restrictive covenant was unenforceable. The decision of the Supreme Court was that review of the

reasonableness of the restrictive covenant was indeed precluded by the "trading society" test, a conclusion "fortified" by the availability in Northern Ireland of an equivalent statutory remedy to section 84.

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