**McEllistrim v Ballymacelligott Co-operative Agricultural & Dairy Society Limited**

**In Retrospect**

**David Foxton QC[[1]](#footnote-1)\***

**22nd March 2019**

**Introduction**

This Sunday marks the 100th anniversary of the House of Lords’ decision in McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society Limited.[[2]](#footnote-2) It is, perhaps, a thing of wonder that this dispute between a Kerry farmer and the co-operative creamery society of a small Kerry village should have reached the House of Lords at all, and even more remarkable that we should all be here a century on to consider the decision, and its historical and contemporary significance. I am a rather unlikely key note speaker on this occasion. My personal experience of the Irish co-operative movement comprised trips as a boy with my uncles to the Mitchelstown creamery in Cork. In those days, the milk was still taken from the farm to the creamery in churns by car, tractor and donkey, and my own interest in the proceedings was limited to the bag of *Tayto* cheese and onion crisps which usually followed. My knowledge of Kerry has largely been shaped by my Cork relatives, itself heavily influenced by G.A.A. rivalries, who frequently told me that the only good thing to come out of that county was the road to Cork. And my professional engagement with the McEllistrim decision exclusively comprises a decision I delivered as a deputy High Court judge in a case called Aldcroft v. International Cotton Association[[3]](#footnote-3), in which I grappled with the application of the restraint of trade doctrine to the rules of voluntary associations of members.

In this introductory speech, I want to begin by setting McEllistrim in its historical context: both by reference to the development of the doctrine of restraint of trade; and by reference to the co-operative creamery movement in Ireland. I then want to look at the decision itself, following its tortuous path through the Irish court system and across the Irish Sea, with the benefit of the case papers now kept in the House of Lords Archives. And finally, I want to look at the aftermath of the decision and of the legal issues which the decision raised.

**The doctrine of restraint of trade**

The genealogy of the modern doctrine of restraint of trade is generally traced back to three forebears.[[4]](#footnote-4) The first is a series of medieval statutes intended to prevent interference with food supplies by those intent on buying up goods before they reached the retail market, or in the colourful legal lexicon of the time, prohibiting “badgering, forestalling, regrating and engrossing”.[[5]](#footnote-5) The second was the common law’s response to trade guilds attempts to control the trade of their members, and to prevent the trade of non-members. These came under adverse judicial scrutiny in a series of cases in the seventeenth century, including the decision in the Ipswich Tailor’s case[[6]](#footnote-6)which struck down a requirement that no one be allowed to conduct the profession on tailor in that town save as a member of the guild. The court observed:

“The law abhors idleness, the mother of all evil … and especially in young men, who ought in their youth (which is their seed time) to learn lawful sciences and trades which are profitable to the commonwealth and whereof they might the reap the fruit in their old age, for idle in youth, poor in age”.

And what parent of teenage boys would not agree. And the third in our unholy trinity was the hostility which the common law courts manifest to monopolies granted by the Stuart kings.

It was Chief Justice Parker in Mitchel v Reynolds[[7]](#footnote-7) who developed these disparate strands into something resembling the modern doctrine of restraint of trade. That judgment identified the mischief with which the law was concerned – such restraints deprived individuals of their livelihood and the community of useful workers. It also recognised that such restraints would be upheld when they served a legitimate interest such as ensuring towns were not overstocked with practitioners of a particular trade or allowing old men to sell their businesses to new proprietors. And finally it recognised that the scope of the covenant – for example its length or geographical application, was relevant to a determination of whether it would be enforced. By the start of the twentieth century, these principles had been refined in cases such as Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. Ltd.[[8]](#footnote-8) and Herbert Morris Ltd. v. Saxelby[[9]](#footnote-9), producing the two-fold test of first, whether the term was reasonable in the interests of the parties, going no further than necessary to provide adequate protection to the covenantee, and second whether it was reasonable in the interests of the public. The law on restraint of trade developed principally by reference to two fact patterns, and was applied with varying rigour dependent on which of those fact patterns was issue. In the first, the sale of a business, the law was applied benevolently, on the basis that the purchaser of a business had a legitimate interest in protecting the goodwill he had just paid to acquire from competition from the seller. In this context, it is another manifestation of the traditional hostility of the common law to attempts to derogate from grant. In the second, restrictions imposed on a departing employee to prevent him competing with his erstwhile employer, the law was applied strictly, reflecting both the inherent inequality of bargaining power and the adverse impacts on an employee unable to pursue his trade.

However the law on exclusive supply contracts – or vertical restraints - was comparatively under-developed. The Canadian courts had upheld the validity of a trade association agreement under which the members agreed to sell all their salt to the association.[[10]](#footnote-10) When a similar agreement came before the House of Lords in In North Western Salt Co. v. Electrolytic Alkali Co.,[[11]](#footnote-11) the House of Lords overturned the Court of Appeal decision invaliding the agreement on restraint of trade grounds. They did so because the issue of restraint had not been pleaded, but the terms of their judgment offered considerable encouragement to such combinations. Viscount Sankey L.C. observed:[[12]](#footnote-12)

“Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view. The same thing is true of a supposed monopoly. In the present case there was no attempt to establish a real monopoly, for there might have been great competition from abroad or from other parts of these islands than the part which was the field of the agreement. On material questions of fact such as these the Court of Appeal had not the proper evidence before it, and the pleadings of the respondents had thrown on the appellants no duty to bring forward such evidence.”

Indeed a leading monograph on restraint of trade published in 1914, William Arnold Jolly’s *Contracts in Restraint of Trade*[[13]](#footnote-13)*,* went so far as to suggest that:

“A contract conferring on A the exclusive right of purchasing a particular commodity from B or of supplying a particular commodity to B is not within the principle of restraint of trade at all, provided A is under an obligation to purchase or supply”.

Nonetheless, Jolly warned of new challenges which the doctrine of restraint of trade might have to meet, from “powerful amalgamations and associations of manufacturers” which had “grown up in almost all industries”.[[14]](#footnote-14) However, the application of the restraint of trade to vertical restraints was to be determined not in a case involving a powerful amalgamation of industrial manufacturers, but in an association of a distinctly more bucolic character, formed for altogether more altruistic purposes.

**The Irish co-operative movement**

The founding fathers of the Irish co-operative movement were the Honourable Horace Curzon Plunkett and his “man Friday” Robert Anderson.[[15]](#footnote-15) They began with a co-operative shop in Doneraile in 1889, but soon recognised that if the co-operative movement was to establish itself in Ireland, it would need to extend beyond the retail base which characterised the English co-operative movement and attract the support of Irish peasant farmers now enjoying security of tenure. Plunkett and Anderson focussed particular effort on the small dairy farmers of south and west Ireland. The Irish share of the English butter market had fallen from 40% in 1848 to 3.3% in 1882[[16]](#footnote-16), largely as a result of the market share gained by the re-organised and re-vitalised Danish agricultural industry. Plunkett and Anderson toured Ireland promoting the establishment of co-operative creameries as a means of reversing this decline, establishing the first co-operative creamery in 1890 and a further 15 by the end of the following year. To co-ordinate the creameries’ efforts, and promote the co-operative movement’s goals, Plunkett and Anderson formed the Irish Agricultural Organisation Society with 33 creamery members in 1894. By 1900, the IAOS had 235 creamery members. Plunkett and Anderson had confounded the views of one German economist who had said:

“You Irish – you can conspire. But you cannot combine”.[[17]](#footnote-17)

The constitutions of co-operative creameries, following models established by the IAOS, usually provided for members to take shares, in proportion to their cows, with the members electing a committee to manage the co-operative. Those shares were invariably not fully paid up, with the co-operatives funding the construction and equipment of their creameries through bank loans which were subject to joint and several guarantees by the more credit-worthy members who usually became committee members. This capital commitment, and credit exposure, left the co-operatives and their members particularly exposed to the risk of members selling their milk to rival creameries. Such sales also undermined attempts to improve milk quality which was felt to be essential to the promotion of the Irish butter brand, because farmers whose milk was rejected by the co-operatives were free to sell their milk to less fastidious proprietary creameries.[[18]](#footnote-18) In 1902, inspired by a similar practice in the Danish dairy industry, the IAOS included a so-called “binding rule” in its model contract, obliging members who took shares to sell all their milk to the creamery.[[19]](#footnote-19) The first version of that term provided:

“Any member who shall without the consent in writing of the committee supply milk to any creamery other than that owned by the society for a space of three years from the date of his admission to membership, shall forfeit his shares together with all money credited thereon”.[[20]](#footnote-20)

Over the years, this term was modified to include a liquidated damages provision of one shilling per cow for each day milk went undelivered (with a similar penalty payable by the society if it refused to accept the member’s milk on any day).

The legal efficacy of these provisions went untested for many years, but the years from 1910 onwards witnessed increasingly bitter competition for milk between co-operative creameries, and the so-called “proprietary creameries” owned by wholesale or retail rather than producing interests. The result was a series of court battles between co-operative creameries, acting with the support of the IAOS, and individual farmers, generally financed by proprietary creameries, in which various forms of binding rule were attacked on the basis that they were in restraint of trade.

**The battles in the courts**

The first reported case was Hanley v. Tipperary Co-operative Dairy Society[[21]](#footnote-21), a case in which the society sued a member who had never supplied it with milk, for £25 in penalties. His Honour Judge Moore in the Tipperary County Court declared the binding rule to be unenforceable, but, with the support of the IAOS,[[22]](#footnote-22) the Society appealed the case to the Irish High Court, where the King’s Bench Division reversed the decision. However a further appeal was taken to the Irish Court of Appeal, probably with the support of the Condensed Milk Manufacturing Company,[[23]](#footnote-23) where the drafting of the binding rule was described as being “so obscure as to be unintelligible”. The rule was held to go far beyond what was necessary to protection to any legitimate interest of the Society. It was unlimited as to its sphere of geographical application (raising the spectre of a member who bought a farm in Armagh having to take his milk to Tipperary), and the member’s ability to terminate the obligations of membership was conditional upon the committee consenting to the sale of his shares and a purchaser being willing to buy them. In short, like the Hotel California, this was a society where you could check out, but never leave.

The IAOS instructed counsel to re-draft the rule, and the new formulation included a geographical limit and only prevented sales to other creameries, but it did not address the issue of temporal scope.[[24]](#footnote-24) The IAOS selected test cases to try out the new law, supporting claims by the Athlacca Creamery in Limerick. In the first, Athlacca Creamery v. Houlihan,[[25]](#footnote-25) the revised rule was upheld in proceedings commenced by the creamery in the County Court, leading an IAOS official to suggest that this “pretty well establishes the validity of the binding rule, which now may go unchallenged”.[[26]](#footnote-26) The following year, in Athlacca Creamery v. Lynch[[27]](#footnote-27), the creamery succeed both in Limerick County Court and on appeal before the High Court, Ronan LJ holding that the new rules had been “carefully framed” to exclude “the evils” identified in the Hanley case, and the fact that the rule was perpetual was not sufficient to invalidate it. The IAOS’ success seemed complete when the rule was upheld once again by the County Court and the King’s Bench Division in Coolmoyne and Fethard Co-operative Creamery Ltd. v. Thomas Bulfin[[28]](#footnote-28). Madden J., in the King’s Bench Division, suggested that the restraint of trade doctrine should apply less stringently to organisations with avowed social as well as commercial objects:

“If the general public have an interest in the successful carrying out of the objects of a society, a rule of such a society which operates as a limited restriction of trade, if it can be shown to be necessary to the successful working of the society, appears to me to hold a different position from a similar rule forming part of a purely commercial undertaking”.

On this occasion the farmer, presumably with the support of a proprietary creamery, took the case to the Irish Court of Appeal, instructing one of the leading names at the Irish Bar, Serjeant Sullivan KC. The creamery’s defence was paid for by the IAOS legal fund, which had been established in 1917 because “few societies can afford the expenses of higher court litigation and in any case it is not right or just that any one Society should be allowed to fight at its own expense any principle for which all Societies should equally contend”.[[29]](#footnote-29) The IAOS triumphed again, the Lord Chancellor Sir Ignatius O’Brien finding that the rules had been amended “so that the defects which had been discovered should be remedied”, and suggesting that the creamery was “little more than an ordinary partnership under the terms of which the members bind themselves to pool the farming produce which they severally control within a very restricted area, for their mutual benefit, and to prevent undue competition against the whole body”.[[30]](#footnote-30)

Thus far, all of the actions had involved proceedings commenced in the County Court by a creamery, which had found their way to the King’s Bench Division by way of a case stated, and hence to the Irish Court of Appeal. Proceedings commenced by this civil bill procedure could not make their way to the House of Lords sitting in its appellate capacity over the Irish legal system. However, the proprietary creamery interests were not prepared simply to sit passively and wait for farmers to be sued. In McEllistrim v. The Ballymacelligott Co-operative Agricultural and Dairy Society Limited, they took the offensive, supporting the Kerry farmer Richard McEllistrim in seeking a declaration from the Irish High Court that the binding rule was unenforceable as a restraint of trade. As proceedings commenced in the Irish High Court, these were capable of being taken all the way to the House of Lords, and it may be that for this reason, the creamery sought to stay the proceedings in favour of arbitration, relying on a rule of the association which provided that all disputes between members and the society should be resolved by the IAOS. That application was rejected both by Pim J. in the Chancery Division and a majority of the Irish Court of Appeal,[[31]](#footnote-31) leaving the stage set for a final showdown which would proceed all the way to the House of Lords and be determined by judges with less familiarity with the creamery movement or the social conditions in which they operated.

**Ballymacelligott Co-operative Dairy Society v. McEllistrim**

Cases which proceed to the House of Lords gratify the legal historian not just because they tend to be legally significant, but because the filing requirements which appeals to the House of Lords must meet provide an insight into the underlying legal process which might otherwise be lost. From the papers in the Case Appendix, it is apparent that McEllistrim’s case was pleaded by the well-known Irish nationalist and former 1916 Volunteer, Arthur Clery, later a judge of the Dail Supreme Court,[[32]](#footnote-32) together with A.M. Sullivan KC, who had defended Sir Roger Casement at his trial for treason but was otherwise associated with the Irish Parliamentary Party.[[33]](#footnote-33) While the aftermath of the Ballymacelligott case saw various attempts to link the interests of the co-operative with advanced nationalist sentiment – for example Father Trant, a local priest and member of the society who had introduced the new rules at the meeting, who described the co-operative movement as “applied Sinn Feinism … sane common-sense Sinn Feinism reduced to practice”[[34]](#footnote-34) – it is not easy to fit the conflict between proprietary and co-operative creameries into the conventional divisions of Anglo-Irish history of this period.

The extent to which the case was a proxy battle between the proprietary creameries and the IAOS emerges clearly from the evidence at trial. Richard McEllistrim, the lead plaintiff, had two sons who were managers of creameries owned by Mr Slattery, who owned creameries in Kerry and Limerick, including at Kilquane and Gortalea. Slattery’s son was a solicitor, and he co-ordinated the attempt by a minority of the society’s members to resist the amendment of the society’s rules to adopt the IAOS’s suggested terms, and sent other solicitors along to represent them at the meetings.[[35]](#footnote-35) One of those solicitors told the members that if they passed the rule “there would be an action in the Chancery Court”.[[36]](#footnote-36) On the other side a representative of the IAOS, Charles Riddall, attended the meetings. He had a particular responsibility in picking out test cases on the binding rule for the IAOS,[[37]](#footnote-37) and one witness said he “seem[ed] to be in charge of the meeting”.[[38]](#footnote-38) J.D. O’Connell, a solicitor instructed by the IAOS, was in attendance.[[39]](#footnote-39) Evidence was given to the Court that the IAOS had said “if the action was taken to a very high court – for instance the House of Lords”, the IAOS had indicated they would pay the costs.[[40]](#footnote-40) The secretary of the society defended the binding rule as necessary “to protect the society against unscrupulous competition … the competition of those who may pay a special price for the purpose of killing the new branch in its infancy”[[41]](#footnote-41).

On this occasion, the proprietary creamery triumphed at first instance.[[42]](#footnote-42) Barton J. attached significance to the inability to transfer shares (the only means of ceasing membership) without the committee’s consent, noting that there might be good reason why the committee would be reluctant to allow members with large dairy farms to leave. He held that merely by joining a society which made provision for its rules to be changed by vote of two thirds of its members, those opposed to them could not be said to have freely assented to the rules such that it could be said that they themselves should be treated as the best judges of whether the restraint was reasonable. This was said to provide a point of distinction with the Athlacca and Coolmoyne cases, in which members had voluntarily assented to the rules before seeking to challenge them. In effect, Barton J. said, it was not the binding rule which he was holding to be invalid, but “the alleged agreement which it is sought to attribute to every member … that he would be bound by any and every new rule in restraint of trade without having the opportunity to exercise his free judgment upon its reasonableness”.[[43]](#footnote-43)

Barton J.’s decision produced the rather startling suggestion that the rule bound those existing members who voted for it, and those new members who joined after it had been adopted, but not those existing members who had voted against it. It was scarcely surprising, therefore, that the Court of Appeal reversed the decision, holding that the case was indistinguishable from the Coolmoyne case which had already held the rule to be valid and which the Court decided was binding upon.

However, the House of Lords was subject to no such restriction. By a majority of 4 to 1, they held the restraint void, and overruled the Coolmoyne and Athlacca cases. The principal focus of the majority was the inability of the member to leave the society without the consent of the committee to the transfer of his shares, consent which on the evidence before the court was very unlikely to be given. Lord Birkenhead appeared to question whether even the geographic restriction to the operation of the rule was reasonable, noting “in a sparsely inhabited agricultural neighbourhood … a prohibition of trade in every township within a radius of ten miles might have precisely the same effect .. as if the preclusion extended to the remotest corner of Donegal”.[[44]](#footnote-44) However he ultimately rested his decision on the duration of the restraint – “for sixty years or more”. Lord Finlay, Lord Atkinson and Lord Shaw rested their decisions exclusively on the duration of the restraint. Only Lord Parmoor, dissenting, acknowledged that the particular character of a co-operative society might justify a different approach, suggesting that “the relationship between a co-operative society and its members is similar not to the relationship between a producer and an ordinary wholesale purchaser, but to the relationship of a partner to his partnership firm”.[[45]](#footnote-45)

The result, therefore was success for the proprietary creameries, at a cost to the IAOS of some £3,850.[[46]](#footnote-46) The IAOS, for its part, presented the decision as a near-miss, Anderson later suggesting that “as the rule ran, it operated *in saecula saeculorum*, whereas if we had limited it to a definite period , I think the appeal would have been dismissed. This has now been rectified in accordance with the judgment of the House of Lords”. [[47]](#footnote-47) Ingrid Henriksen, Eoin McLaughlin and Paul Sharp have suggested that “the lack of a binding rule seems largely due to the incompetence of the IAOS and their counsel”.[[48]](#footnote-48)

However, in defence of those counsel, it must be observed that the challenge of drafting a rule which would have passed muster in the House of Lords and yet addressed the structural challenges of a co-operative creamery, should not be underestimated. Lord Atkinson suggested that the notice period to leave the society should have been of the order of six to 12 months, Lord Finlay no more than “reasonable notice” and Lord Shaw would have upheld a 3 year commitment. The members of the creamery committees, guarantors of their debts to the banks and reliant on a continuous supply of milk to generate cashflow, might have blanched at any period short of the duration of the loans taken out to build and equip the creamery facilities. Certainly any creamery would have had to have thought carefully about the long term commitment in borrowing funds to build an auxiliary branch, as the Ballymacelligott society had at Gortalea, if the binding rule had been of such a limited duration.

**The immediate aftermath**  
Mr Slattery’s sense of triumph must have been short lived. Some five months after judgment was handed down, one of the Slattery’s proprietary creameries was destroyed, a note posted on the local chapel wall declaring it was done in answer to the decision, and that “there is a higher tribunal than the House of Lords, and that tribunal decided that Slattery’s creamery no longer exists”.[[49]](#footnote-49) Further attacks followed – equipment belonging to Slattery’s was destroyed, cheese stolen, and suppliers to Slattery’s intimated and threatened, leading to a claim for compensation by Slattery’s in which Serjeant Sullivan was once again instructed, and his solicitor were attacked (reportedly) by sons of farmers who sent their milk to the Ballymacelligott creamery, and Sullivan attacked again when going to give evidence against his assailants.[[50]](#footnote-50) The Ballymacelligott creamery was later the sight of a battle between Crown and Republican forces,[[51]](#footnote-51) the latter under the command of a certain Tom McEllistrim who had a long political career in post-independence Ireland.[[52]](#footnote-52) Following independence, measures were taken to nationalise the proprietary creameries, many of which were later transferred to co-operatives or closed down to give the co-operatives a free-run in their locality.[[53]](#footnote-53)

**The legal aftermath**

The McEllistrim decision was one of the first cases to confront the difficulties which arise when applying the restraint of trade doctrine outside the domain of transactional contracts – provisions which have a one-off effect as between two parties – but in the context of relational contracts, where the restraint may be said to be one of the terms of an ongoing joint venture.[[54]](#footnote-54) In the former category – business sales, or covenants which take effect at the end of a relational contract such as the termination of employment or partnership – the interests of the parties have essentially diverged, the connection between contractual benefit and burden is much more attenuated, and it is possible to find statements of the restraint doctrine of the widest width. However the application of the doctrine to relational contracts during their life involves very different considerations. No one, for example, has suggested that contractual terms preventing employees competing against their employers during the period of employment, or partners competing against the partnership while members of it, could be struck down as restraints of trade. The result is that the application of the doctrine of restraint of trade is highly context-specific, leading Lord Reid to observe of some of the wider statements of the restraint doctrine in Esso Petroleum Ltd. v Harper’s Garage (Stourport) Limited[[55]](#footnote-55) that “it may be misleading to take [these] passages out of context and try to apply them to cases of quite different nature”.

The issue of restraint of trade came before the English Courts in relation to a commodity almost as important to the health and well-being of the populace as milk in English Hop Growers Limited v. Dering[[56]](#footnote-56). The case concerned a hop growing association, whose members agreed to sell all their crops to it, with liquidated damages payable in default. The society was non-profit making, its role to increase the price obtained for the hops by co-ordinating sales. Membership involved a commitment of crops for a five-year period. One member, Sir Edward Dering, sought to resist the society’s claim for damages on the basis that the agreement was a restraint of trade, but received rather shorter shrift than Richard McEllistrim and, surprisingly, the McEllistrim decision was not even cited. Scrutton LJ observed[[57]](#footnote-57) that he had “a strong opinion as to the conduct of Sir E. Dering in this matter, but I think it better not to express it, and leave him to be judged by the Societies of Kentish Men and Men of Kent, and others prominent in the county of Kent, a county well known for honesty and good sportsmanship”. As to the restraint argument, he noted:

“It is now well established that the Courts will view restraints of trade which are imposed between equal contracting parties for the purpose of avoiding undue competition and carrying on trade without excessive fluctuations and uncertainties with more favour than they will regard contracts between master and servant in unequal positions of bargaining”.

McEllistrim was cited in Lewis v. Interflora (Ftda) Bu Ltd. [[58]](#footnote-58), a case involving action by two members of a non-profit making co-operative for florists through which orders for the delivery of flowers placed with one member could be fulfilled by another operating in or near the place of delivery. The articles of association were amended to provide that if a member joined or became affiliated to any rival flower relay organisation, the member would be deemed to have withdrawn from Interflora. The plaintiffs joined a rival organisation, and issued proceedings to prevent Interflora acting on the relevant provision of the articles, which they contended was an unlawful restraint of trade. Vinelott J. noted:[[59]](#footnote-59)

“The court will be slow to interfere on this ground with the constitution and rules of a co-operative society (whether a corporate body or an unincorporated association) which has been freely entered into by the members and which the members are free to alter, and which binds them only as members and which they are free to leave. Both the principle and its application to a co-operative society are well illustrated by the decision of the House of Lords in McEllistrim v Ballymacelligott Co-operative Agricultural and Dairy Society Ltd”.

There was no difficulty in leaving Interflora – on the contrary a member who breached the rules was expelled. Vinelott J. said that this was the reason why the binding rule had been held to be invalid in McEllistrim, and he upheld the binding rule before him.

The English Hop Growers and Interflora decisions were cases in which there was no suggestion that the members would be unable to pursue their livelihoods outside of the membership of the association. In those circumstances, one can well see why the ability to leave the association would provide a convincing answer to the complaint of a member that the restraint was unreasonable as regards the member. In Dickson v Pharmaceutical Society of Great Britain[[60]](#footnote-60), the House of Lords considered the operation of the restraint of trade doctrine in the context of a society incorporated by Royal Charter to represent the profession of registered pharmacists, of which all registered pharmacists were required to be members. The restraint in question was a rule intended to restrict members’ ability to sell non-pharmaceutical products from their pharmacies. The rule was held both to be ultra vires and, at least by some judges, also a restraint of trade, but there are strong indications that when the rules of a society of members will benefit from some “margin of appreciation” before they will be struck down at the suit of a member as a restraint of trade. Lord Wilberforce, for example, held that the Charter “ought to be construed so as to give the members a wide degree of autonomy” particularly “in relation to standards of professional conduct” noting that:

“When, as to this matter, rules are laid down, and submitted by proper procedure to democratic approval and approved by a majority, the court will normally allow them to take effect”.[[61]](#footnote-61)

The fact pattern which confronted me in Aldcroft v. International Cotton Association[[62]](#footnote-62) came somewhere between these two positions. Mr Aldcroft was an arbitrator member of the International Cotton Association, and challenged rules of the Association which limited the number of arbitral appointments which an arbitrator appointor could hold at one time, or accept from an arbitrating party in a particular period. Mr Aldcroft could certainly have left the Association without ceasing to be an arbitrator, unlike the pharmacists in Dickson, but the consequences of doing so would have been severe, because the vast majority of cotton arbitration disputes were arbitrated on International Cotton Association terms by International Cotton Association arbitrators.

Nonetheless, I took the view that the voluntary nature of Mr Aldrcroft’s adhesion to the rules, and the fact that the rules had been implemented by the proper procedures and were capable of being amended if a sufficient number of members decided this was appropriate, gave the Association considerable discretion as to how best to address legitimate topics of concern, even if the particular means adopted restrained the trade of arbitrator members to some degree. From an analysis of the authorities, I concluded that:[[63]](#footnote-63)

“The rules of an association of members, professional body or co-operative are not exempt from the doctrine of restraint of trade. However, rules which limit the activities of members in order to meet legitimate objects of the association, body or society, and which have been properly passed in accordance with the internal rules of governance, will ordinarily be treated as a “domestic matter”, with the court being ready to intervene only when the rule adopted falls outside the range of decisions reasonably open to the body for the purpose of meeting the objective”.

In particular, it seemed to me that, in contrast to one-off transactions, it was difficult to apply the rule that a restraint must be no more than reasonably necessary to address the legitimate interests of the covenantee with its full rigour. I observed:[[64]](#footnote-64)

“In this regard, it is relevant that the rules of an association have a dynamic quality which is absent from many other sets of contractual terms such as the terms of an employment contract regulating the post-employment conduct of an employee, or those which regulate post-sale competition in a contract for the sale of a business. It is open to the membership of the association or the relevant bodies to revise those rules if their practical operation identifies issues or areas for improvement or if prevailing sentiment with regard to the appropriateness of the rules changes.”

**Concluding observations**

The difficulty with the doctrine of restraint of trade is that its operation should, and does, differ markedly between different types of contract and different contracting contexts. I have referred already to a distinction between the transactional and relational phases of contracts. One of the challenges of the McEllistrim case is that it involved classic transactional contracts – the buying and selling of goods – but in a classic-relational context of long-term investment, and promotion of a common goal and brand. In addition, in determining what is an “acceptable cartel”, the extent to which the cartel is serving exclusively commercial or wider social objectives seems of obvious relevance. The differing reactions of English and Irish judges in McEllistrim appears in part to rest on different approaches to this question. In Coolmoyne[[65]](#footnote-65), Madden J. had suggested that the society should be treated differently “from a purely commercial undertaking”, and Lord Parmoor too thought it significant that “the relationship between a co-operative society and its members is similar not to the relationship between a producer and an ordinary wholesale purchaser”.[[66]](#footnote-66) Lord Birkenhead, by contrast thought that “no excellence of motive on their part, no record of efficient public service … can place them in a different position from that occupied by any private contracting party”.[[67]](#footnote-67) And finally, how far should the ability of members to change the rules of the association influence the court’s assessment of whether it is reasonable in the interests of the parties, and goes no further than necessary? We can thank the litigants and lawyers in McEllistrim for presenting us with these thought-provoking questions, the case being one of many good things to have come out of Kerry. In addition to the road to Cork.

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1. \* Barrister, Essex Court Chambers. [↑](#footnote-ref-1)
2. [1919] A.C. 548. [↑](#footnote-ref-2)
3. [2018] Q.B. 725. [↑](#footnote-ref-3)
4. For this introduction see J. Dyson Heydon, *The Restraint of Trade Doctrine* (LexisNexis Butterworths Australia, 2018) 4th  edition chapter 1. [↑](#footnote-ref-4)
5. See W. Herbruck, “Forestalling, Regrating and Engrossing”(1920) 27 Mich. L.R. 265. [↑](#footnote-ref-5)
6. (1614) 11 Co. Rep. 53a at 53b-54a; 77 E.R. 1218 at 1219-20. [↑](#footnote-ref-6)
7. (1711) 1 P Wms 181; 24 E.R. 347. [↑](#footnote-ref-7)
8. [1894] A.C. 535. [↑](#footnote-ref-8)
9. [1916] 1 A.C. 688. [↑](#footnote-ref-9)
10. Ontario Salt Co. v. Merchants Salt Co. (1871) 18 Gr. 540. [↑](#footnote-ref-10)
11. [1914] A.C. 461. [↑](#footnote-ref-11)
12. At pp.469-470. [↑](#footnote-ref-12)
13. (Butterworths, 1914) 3rd p.16. [↑](#footnote-ref-13)
14. Note 10, Preface. [↑](#footnote-ref-14)
15. See generally Patrick Bolger, *The Irish Co-operative Movement: Its History and Development* (Institute of Public Administration, 1977): chapter 6 and following; R.A. Anderson *With Plunkett in Ireland: The Co-op Organiser’s Story* (Irish Academic Press, 1983) and Louis P.F. Smith and Sean Healy, *Farm Organisations in Ireland: A Century of Progress* (Four Courts Press, 1996) chapter 1. [↑](#footnote-ref-15)
16. Smith and Healy p.16. [↑](#footnote-ref-16)
17. Anderson p.87. [↑](#footnote-ref-17)
18. See the IAOS Annual Report 1905 p.7. [↑](#footnote-ref-18)
19. Ingrid Henriksen, Eoin McLaughlin and Paul Sharp, “Contracts and co-operation: The relative failure of the Irish dairy industry in the late nineteenth century reconsidered” p.9. [↑](#footnote-ref-19)
20. IAOS Annual Report 1902, p.20. [↑](#footnote-ref-20)
21. [1912] 2 I.R. 586. [↑](#footnote-ref-21)
22. Ingrid Henriksen, Eoin McLaughlin and Paul Sharp, “Contracts and co-operation: The relative failure of the Irish dairy industry in the late nineteenth century reconsidered” p.13. The IAOS suggested that a number of previous County Court cases had upheld the binding rule. [↑](#footnote-ref-22)
23. See *Irish Times* 25 April 1912. The Condensed Milk Company of Ireland, or Cleeve’s, was a large manufacturer of dairy products. [↑](#footnote-ref-23)
24. The IAOS Annual Report 1913, pp.10-11. [↑](#footnote-ref-24)
25. (1914). [↑](#footnote-ref-25)
26. Ingrid Henriksen, Eoin McLaughlin and Paul Sharp, “Contracts and cooperation: The relative failure of the Irish dairy industry in the late nineteenth century reconsidered” European Historical Economics Society Working Papers in Economic History No. 71 p.22. [↑](#footnote-ref-26)
27. (1915) I.L.T.S.J. 233. [↑](#footnote-ref-27)
28. [1917] 2 I.R. 107. [↑](#footnote-ref-28)
29. IAOS Annual Report 1917 p.34. [↑](#footnote-ref-29)
30. At pp.122-123. [↑](#footnote-ref-30)
31. [1917] 1 I.R. 93. [↑](#footnote-ref-31)
32. For Clery see David Foxton, *Revolutionary Lawyers: Sinn Fein and Crown Courts in Ireland and Britain, 1916-1923* (Four Courts Press, 2008) p.33. [↑](#footnote-ref-32)
33. Appendix pp.2, 7. [↑](#footnote-ref-33)
34. Quoted in Ingrid Henriksen, Eoin McLaughlin and Paul Sharp, “Contracts and cooperation: The relative failure of the Irish dairy industry in the late nineteenth century reconsidered” European Historical Economics Society Working Papers in Economic History No. 71 page 41. Father Trant gave evidence at the trial for the creamery. When it was suggested that at the meeting that he had pushed one of those opposing the rule change, he responded: “I am 32 years a present and I have never yet even pushed a parishioner – except metaphorically in the right direction”: Appendix pp.151-152. [↑](#footnote-ref-34)
35. Appendix pp.105, 109. [↑](#footnote-ref-35)
36. Appendix p.133. [↑](#footnote-ref-36)
37. Ingrid Henriksen, Eoin McLaughlin and Paul Sharp, “Contracts and cooperation: The relative failure of the Irish dairy industry in the late nineteenth century reconsidered” European Historical Economics Society Working Papers in Economic History No. 71 p.22. [↑](#footnote-ref-37)
38. Appendix p.100. [↑](#footnote-ref-38)
39. Appendix p.113. [↑](#footnote-ref-39)
40. Appendix p.145. [↑](#footnote-ref-40)
41. Appendix p.130. [↑](#footnote-ref-41)
42. Barton J.’s judgment appears at Appendix p.172. [↑](#footnote-ref-42)
43. [1918] 1 I.R. 313 at 322. [↑](#footnote-ref-43)
44. At p.562. [↑](#footnote-ref-44)
45. At p.604. [↑](#footnote-ref-45)
46. Patrick Bolger, *The Irish Co-operative Movement: Its History and Development* (Institute of Public Administration, 1977) p.206. [↑](#footnote-ref-46)
47. R.A. Anderson *With Plunkett in Ireland: The Co-op Organiser’s Story* Irish Academic Press, 1983) p.171. [↑](#footnote-ref-47)
48. Ingrid Henriksen, Eoin McLaughlin and Paul Sharp, “Contracts and cooperation: The relative failure of the Irish dairy industry in the late nineteenth century reconsidered” European Historical Economics Society Working Papers in Economic History No. 71 p.47. [↑](#footnote-ref-48)
49. See generally Eoin McLaughlin and Paul Sharp, “A Higher Tribunal than the House of Lords” *History Ireland* (1918) Volume 26 issue 4. [↑](#footnote-ref-49)
50. David Foxton, *Revolutionary Lawyers: Sinn Fein and Crown Courts in Ireland and Britain, 1916-1923* (Four Courts Press, 2008) p.178. [↑](#footnote-ref-50)
51. For one perspective. See Tom McEllistrim, Bureau of Military History statement 882 File No. S.887. [↑](#footnote-ref-51)
52. His precise relationship with Richard McEllistrim remains unclear. Eoin McLaughlin and Paul Sharp, “A Higher Tribunal than the House of Lords” *History Ireland* (1918) Volume 26 issue 4 suggest they were uncle and nephew, who found themselves on opposite sides of the binding rule dispute (and see also Ingrid Henriksen, Eoin McLaughlin and Paul Sharp, “Contracts and cooperation: The relative failure of the Irish dairy industry in the late nineteenth century reconsidered” European Historical Economics Society Working Papers in Economic History No. 71 pp.44-45). The House of Lords papers do refer to one of Richard’s nephews, Tom, who joined the creamery to support the adoption of the new rules and who was “close on 20, perhaps more”: Appendix pages 107-108 (Tom McEllistrim the IRA commander would have been 24 at the time). [↑](#footnote-ref-52)
53. See Professor Breathnach’s letter in *History Ireland* (2018) Volume 26 Issue 6. [↑](#footnote-ref-53)
54. Cf. the categorisation developed by the American contract scholar Ian R. Macneil, e.g. in *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell, 2001). See also Professor David Campbell, “Good Faith and the Ubiquity of the Relational Contract” (2014) 77 *M.L.R.* 475. [↑](#footnote-ref-54)
55. [1968] AC 269 at 294. [↑](#footnote-ref-55)
56. [1928] 2 K.B. 174. [↑](#footnote-ref-56)
57. At p.180. [↑](#footnote-ref-57)
58. [1990] ECC 178. [↑](#footnote-ref-58)
59. At pp.183-184. [↑](#footnote-ref-59)
60. [1970] AC 403. [↑](#footnote-ref-60)
61. At p.439. [↑](#footnote-ref-61)
62. [2018] Q.B. 725. [↑](#footnote-ref-62)
63. At [133(iii)]. [↑](#footnote-ref-63)
64. At [132]. [↑](#footnote-ref-64)
65. [1917] 2 I.R. 107. [↑](#footnote-ref-65)
66. [1919] AC 548 at p.604. [↑](#footnote-ref-66)
67. Ibid p.564. [↑](#footnote-ref-67)