FRANCHISING—COURT RESTRICTS RIGHT OF FRANCHISOR TO TERMINATE FRANCHISE—A PRELUDE TO THE FRANCHISE PRACTICES ACT?—*Shell Oil Co. v. Marinello*, 120 N.J. Super. 357, 294 A.2d 253 (L. Div. 1972).

In 1959, Frank Marinello was solicited by a representative of Shell Oil Company to become its dealer at an existing Shell station in Fort Lee, New Jersey. He accepted Shell's offer and executed the standard lease and dealer contracts. This relationship between the parties continued on a year-to-year basis until May, 1969, when Shell and Marinello entered into a new three year contract which provided for termination on May 31, 1972. On February 2, 1972, Marinello met with Shell's representatives at the company's district office whereupon he was informed that his lease would not be renewed. Two months later Shell sent formal notice to Marinello and demanded that he surrender the premises on the termination date. However, on June 1, Marinello refused to quit the premises despite his contractual obligation to surrender possession peaceably.

Shell brought suit in the county district court for possession of the premises,[1] and, in response, Marinello commenced an action in the superior court seeking injunctive relief against his eviction by Shell. By order of the assignment judge the two actions were consolidated in superior court for trial. In *Shell Oil Co. v. Marinello*,[2] the court granted extraordinary relief by implying the existence of a covenant that the franchisor would not terminate the franchise as long as there was "substantial performance" by the franchisee and thus greatly restricted Shell's right to terminate the franchise relationship.[3] The court, prevented from expressly applying the New Jersey Franchise Practices Act,[4] based its decision in part on the underlying spirit of the Act, thus for the first time providing some insight into the expected application and effect of the legislation on the franchise relationship in New Jersey.[5]

Judge Gelman noted four distinct issues:

1 Shell's suit was brought pursuant to N.J. STAT. ANN. § 2A:18-53 (1952).

2 120 N.J. Super. 357, 294 A.2d 253 (L. Div. 1972).

3 *Id.* at 376, 294 A.2d at 263.

4 N.J. STAT. ANN. §§ 56:10-1 *et seq.* (Supp. 1972-73).

5 Judge Gelman noted that

> legislative judgments may be and frequently are highly persuasive in pointing out to the courts the direction in which they ought to go in the individual case . . . . The Franchise Practices Act . . . strongly suggests that the relationships projected by such agreements, whether in existence prior to or created after its effective date, require special attention and should be the subject of close judicial scrutiny and supervision.

120 N.J. Super. at 375, 294 A.2d at 263.

(a) Was the Franchise Practices Act applicable to lease and dealer agreements?

(b) Was the franchisor's statutory and contractual right to possession of the premises absolute, or was it subject to limitation due to the special relationship evidenced by the course of dealings?

(c) If Shell's right to possession was not absolute, did Marinello substantially perform his contractual obligations?

(d) Was Shell prevented from seeking relief by virtue of the unclean hands doctrine?[6]

The court resolved the first issue by concluding that the Franchise Practices Act, which prohibits a franchisor from terminating or failing to renew a franchise "without good cause,"[7] was not applicable to Marinello's relationship with Shell.[8] This provision embodies the primary intent of the Act, which is to prevent an unjust cancellation by the "dominant" franchisor. The lease and dealer agreements executed by Shell and Marinello clearly constituted a relationship which was subject to the Act, but the legislation controlled only those franchise agreements entered into after the effective date of the statute, December 21, 1971.[9] Since the Act was clearly prospective in its effect, and Marinello entered into his franchise agreement prior to the effective date of the Act, the court was prevented from expressly subjecting Shell's failure to renew Marinello's lease to the "good cause" test set out in the Act.[10]

---

6 *Id.* at 368, 294 A.2d at 259.

7 N.J. STAT. ANN. § 56:10-5 (Supp. 1972-73), provides in pertinent part:

> It shall be a violation of this act for a franchisor to terminate, cancel or fail to renew a franchise without good cause. For the purposes of this act, good cause for terminating, canceling, or failing to renew a franchise shall be limited to failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise.

8 120 N.J. Super. at 370-71, 294 A.2d at 260.

9 N.J. STAT. ANN. § 56:10-8 (Supp. 1972-73) provides:

> This act shall not apply to a franchise granted prior to the effective date of this act, provided, however, that a renewal of a franchise or an amendment to an existing franchise shall not be excluded from the application of this act.

10 120 N.J. Super. at 369-71, 294 A.2d at 259-60. The court found that the history of the act unequivocally evidenced the intention of the Governor and the legislature to make the Act's application prospective. Governor Cahill vetoed the Act in its original form because he believed that it was retroactive and therefore unconstitutional. He advised the legislature thusly:

> If such were the case, it would have the effect of impairing the obligation of existing contracts. This is prohibited by both the United States and New Jersey Constitution. It is my recommendation that this language be amended so that the act shall not apply to any existing franchises.

Id. at 370, 294 A.2d at 260. The Governor's recommendation was incorporated into the act as finally passed. *Id.*

In spite of the fact that Marinello was not able to invoke the aid of the Franchise Practices Act, the spirit of the Act was effected through the court's use of a variety of equitable remedies. Addressing itself to the issue of whether Shell could unilaterally terminate the agreements and take possession of the leased premises at the end of the stipulated term, the court, despite authority which supported Shell's "absolute right" to exercise unilateral termination of the franchise,[11] went beyond the four corners of the franchise agreement. Judge Gelman examined the history of the relationship between the parties, their "true intent and purpose and the reasonable expectations of the parties."[12] The court noted that it was not dealing with the usual landlord-tenant relationship, but rather a form of commercial venture for the distribution of plaintiff's products in which both parties had a stake in promotion. In light of these considerations the court questioned whether Shell could sever its ties with the defendant without good cause.[13]

Judge Gelman concluded that the franchisor could not do so and Marinello was given the extraordinary remedy of reformation, as the court implied the covenant that Shell would renew so long as the defendant "substantially performed his obligations" to his franchisor.[14] The court justified its action by relying on the philosophy articulated in *Marini v. Ireland*[15] and *Henningsen v. Bloomfield Motors, Inc.*[16]

---

11 *See, e.g.*, Parks v. Baldwin Piano & Organ Co., 386 F.2d 828 (2d Cir. 1967); Shain v. Washington Nat'l Ins. Co., 308 F.2d 611 (8th Cir. 1962); All States Serv. Station, Inc. v. Standard Oil Co., 120 F.2d 714 (D.C. Cir. 1941). *See also* Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465, 468, where the author noted that a court's reformation of a termination clause was the exception rather than the rule, because freedom of contract usually prevailed over a defense of breach of good faith.

12 120 N.J. Super. at 371-72, 294 A.2d at 261.

13 *Id.* at 372, 294 A.2d at 261.

14 *Id.* at 376, 294 A.2d at 263.

Courts ordinarily will not afford the remedy of reformation except in certain well-defined situations. In Heake v. Atlantic Cas. Ins. Co., 15 N.J. 475, 105 A.2d 526 (1954), the court concluded that

> relief will be granted only where there is mutual mistake or where a mistake on the part of one party is accompanied by fraud or other unconscionable conduct of the other party.

Id. at 481, 105 A.2d at 529. Furthermore, in Agee v. Travelers Indem. Co., 264 F. Supp. 322 (W.D. Okla. 1967), the court held:

> To justify reformation of a written instrument the proof should be clear, unequivocal and decisive. There must be more than a mere preponderance of the evidence and the evidence must be sufficient to take the question out of the range of reasonable controversy.

Id. at 326.

15 56 N.J. 130, 265 A.2d 526 (1970) (court allowed equitable defenses in a dispossess action and further held that a tenant may deduct cost of repairs from future rent if landlord fails to repair vital facilities necessary to maintain premises in a livable condition).

While neither of these cases involved a franchise relationship, they stand for the proposition that a court can reform a contract to the reasonable expectations of the contracting parties.[17]

Henningsen is sound precedent because many of the aspects of an adhesion contract involved in that case, which prompted that court to grant reformation, were also present in *Shell Oil Co. v. Marinello*: lack of free bargaining in light of the economic imbalance between franchisor and franchisee, use of the standard form agreement imposed by the franchisor and injury to the public interest by the literal enforcement of the contract.[18] Likewise, *Marini* provided a solid basis for a court to reform a contract when a literal construction would have circumvented public policy.[19] Implicit in both *Henningsen* and *Marini* is the recent willingness of courts to scrutinize contracts entered into by parties of vastly different economic strengths.[20] Judge Gelman's response in *Shell Oil Co. v. Marinello* reflected this growing propensity, and eventually caused him to reform the contract to effectuate the reasonable expectations of the parties. He found these expectations to be such that if Marinello "substantially performed his obligations to Shell," considering his investment in money, time and effort, Shell "would in turn continue to renew his lease and dealership."[21] The court buttressed its action by noting the relative bargaining positions of the two parties, observing that Marinello was "compelled to rely upon Shell's good faith in living up to these expectations."[22]

In this connection Judge Gelman permeated his opinion with criticism of Shell's marketing system and that of the oil industry as a whole.[23] While courts have traditionally avoided remedial action which

---

16 32 N.J. 358, 161 A.2d 69 (1960) (court refused to give effect to a disclaimer clause in an automobile sales contract and implied a warranty of merchantability).

17 *See* Note, *Sales: Privity: Disclaimer Clauses in Standardized Warranties*, 46 CORNELL L.Q. 607, 607-08 (1961); Note, *Remedies—Tenant's Right to Rent Deduction for Repair Expenditures*, 2 SETON HALL L. REV. 267, 271-72 (1970).

18 120 N.J. Super. at 375-76, 294 A.2d at 263. *See generally* Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

19 120 N.J. Super. at 375-76, 294 A.2d at 263.

20 *See* Hewitt, *Termination of Dealer Franchises and the Code—Mixing Classified and Coordinated Uncertainty with Conflict*, 22 BUS. LAW. 1075, 1079 (1967); Comment, *Contracts of Adhesion under California Law*, 1 U. SAN FRANCISCO L. REV. 306, 307-10 (1967).

21 120 N.J. Super. at 373-74, 294 A.2d at 262.

22 *Id.* at 374, 294 A.2d at 262.

23 *Id.* at 372-73, 294 A.2d at 261-62. Judge Gelman relied extensively on the reasoning in Shell Oil Co. v. FTC, 360 F.2d 470 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967), where the court went well beyond the literal contract and examined the franchise relationship.

> The relationship of a major oil company to its service station dealer goes

required the reformation of termination clauses in franchise contracts,[24] there is authority suggesting that some courts will reform a cancellation clause when its enforcement would be inequitable.[25] Courts granting

beyond the bigness-littleness antithesis that exists in innumerable contract negotiations and in the operations of a modern, large business. The inherent leverage a major oil company has over its dealers results from the market structure of the industry and the special dependence on the company of the service station dealer . . . . While it is true that it is expensive for Shell to switch dealers, it is far more expensive, in relative terms, for a dealer to lose his station.

Id. at 487 (footnote omitted).

[24] *See* note 11 *supra*. Also, in A.B.C. Packard, Inc. v. General Motors Corp., 275 F.2d 63 (9th Cir. 1960), the court allowed termination without damages pursuant to a cancellation clause in a franchise agreement. The court observed:

There is no question but that one party was . . . an economic giant, the other, relatively, an economic pigmy. Such economic inequality may well be a tangible force of tremendous power in shaping the terms of the contract eventually signed . . . . But once the contract is signed, such economic inequality *per se*, does not create a legal fiduciary relationship between the contracting parties, *absent* (a) those terms within the contract sufficient to create that relationship; or (b) those facts outside the contract which, *per se*, create "fraud" sufficient to require the creation of a duty to disclose no matter what technical relationship may be created by the terms of the contract.

Id. at 67 (footnote omitted). *See also* Phoenix Hardware Co. v. Paragon Paint & Varnish Corp., 122 N.J. Eq. 140, 192 A. 45 (Ct. Err. & App. 1937) (court held that mutual covenants in distributorship arrangement need not be co-extensive); Brower v. Glen Wild Lake Co., 86 N.J. Super. 341, 206 A.2d 899 (App. Div. 1965) (court held that when lease gave lessees right to renew for a ten-year period with renewal to be in all respects on same terms and conditions set forth in the lease, lessees were not entitled to renewal including renewal clause for additional ten-year period so as to make original lease subject to perpetual renewals).

[25] *See* J.R. Watkins Co. v. Rich, 254 Mich. 82, 84-85, 235 N.W. 845, 846 (1931), where the court held:

A provision in a contract for termination at the option of a party is valid. But where the relationship is commercial and does not involve fancy, taste, sensibility, judgment, or other personal features, the option may be exercised only in good faith.

Furthermore, in Philadelphia Storage Battery Co. v. Mutual Tire Stores, 161 S.C. 487, 492, 159 S.E. 825, 827 (1931), the court stated that the defendant, who objected to termination of his contract, was entitled

to show by the evidence . . . that it would be against equity and good conscience to permit plaintiff . . . to terminate the jobber's agreement in the manner, and with the intent and purpose alleged against it . . . .

In deTreville v. Outboard Marine Corp., 439 F.2d 1099 (4th Cir. 1971), a federal court of appeals broadened the rule established in *Philadelphia Storage Battery* by holding that provisions in a franchise agreement authorizing either party to terminate the agreement without cause upon stipulated notice did not provide a complete defense to a dealer's action for wrongful termination even in the absence of fraud or duress, where termination would constitute an actionable wrong if the manner of termination was contrary to equity and good conscience. *Id.* at 1100.

Also, in Seegmiller v. Western Men, Inc., 20 Utah 2d 352, 353-54, 437 P.2d 892, 894 (1968) (footnote omitted), the court observed:

[Franchise contracts] are almost always drawn up by the franchiser and are presented to a dealer . . . for acceptance . . . rather than for negotiation as to terms. They also invariably provide for ample protection to the rights of the franchiser,

the remedy of reformation have based their actions on such theories as unjust enrichment, estoppel, waiver and economic duress.[26]

In *Shell Oil Co. v. Marinello* the court, while considering all of these defenses, relied primarily on the theory of economic duress. This approach was based on the highly unequal bargaining positions of the respective parties which causes the franchisee to be at the mercy of the franchisor during negotiations.[27] In deciding to reform the contract, the court was doubtlessly influenced by the fact that over a 13-year period Marinello had transformed a sub-par station that was pumping less than 38,000 gallons per month into one which dispensed more than 78,000 gallons.[28] The court further intimated that Shell could be equitably estopped from enforcing its contractual right to cancel because agents had represented to Marinello that if he made the requisite investment of labor and skill "he would have a 'future' with Shell."[29]

After meticulously taking similar principles from factually varying cases and piecing them together to provide authority, Judge Gelman reached out for further support by relying on the spirit of the Franchise Practices Act which he had found inapplicable to the franchise agreement under consideration.[30] The court felt compelled to take cognizance of the fact that "the public interest has been legislatively declared to be vitally affected."[31]

> including the right of termination. . . . [W]hen parties enter into a contract of this character, and there is no express provision that it may be cancelled without cause, it seems fair and reasonable to assume that both parties entered into the arrangement in good faith, intending that if the service is performed in a satisfactory manner it will not be cancelled arbitrarily.

26 *See* Gellhorn, *supra* note 11, at 485-93, where the author discussed the various equitable remedies used to combat unconscionable enforcement of a cancellation clause.

27 120 N.J. Super. at 373-74, 294 A.2d at 262.

In United States v. Bethlehem Steel Corp., 315 U.S. 289 (1942), Justice Frankfurter noted:

> "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress."

Id. at 326-27 (Frankfurter, J., dissenting) (quoting from Union Pac. R.R. v. Public Serv. Comm'n, 248 U.S. 67, 70 (1918)). *See also* Comment, *Dealer Franchising in the Gasoline Industry: Current Developments*, 4 U. SAN FRANCISCO L. REV. 65 (1969), where it was noted that "[t]he F.T.C. found that the marketing system of the petroleum companies has reduced the retail dealer's position from an independent businessman to an economic serf." *Id.* at 65 (footnote omitted).

28 120 N.J. Super. at 373, 294 A.2d at 262.

29 *Id.*

30 See note 10 *supra*.

31 120 N.J. Super. at 375, 294 A.2d at 263. *Contra*, Buggs v. Ford Motor Co., 113 F.2d 618 (7th Cir.), *cert. denied*, 311 U.S. 688 (1940), where the court ignored a statute which provided for the suspension or revocation of the license of an automobile manufacturer who wrongfully and without provocation terminates a franchise, holding that the statute

In contrast to Judge Gelman's decision is the recent case[32] involving Marinello's brother which was based on similar facts but brought in the New Jersey federal district court. Judge Coolahan, in granting Shell's motion for summary judgment on a count of its counterclaim, specifically rejected a plea for reformation of the termination clause because there was no evidence of fraud or mistake in the execution of the instrument in controversy.[33] The court further maintained that unequal bargaining power at the time the lease was negotiated was not a basis for granting reformation.[34] Ignoring *Henningsen* and *Marini* which Judge Gelman had so heavily relied upon, the court found no New Jersey authority for such judicial action.[35] Lastly, the federal court did not take into consideration an expressed legislative intent or public policy evidenced by the Franchise Practices Act.

After implying the existence of a covenant that Shell could not cancel without good cause, Judge Gelman had to determine whether such good cause existed to justify Shell's refusal to renew the lease. Once again he turned to the Franchise Practices Act for an interpretation of good cause, and applied the test of whether Marinello had "substantially performed" his contractual obligations.[36]

Shell's major allegation was that Marinello violated the cleanliness clause of the lease. After hearing extensive testimony the court rejected Shell's evidence as not being credible.[37] This dismissal was due in part

---

could "not apply to, or *affect*, existing valid contracts." *Id.* at 621 (emphasis added). *But see* Kuhl Motor Co. v. Ford Motor Co., 270 Wis. 488, 71 N.W.2d 420 (1955), where the Wisconsin Supreme Court, on rehearing, held that a franchise statute was indicative of public policy against unfair cancellations and thus could be the basis of an injunction. *Id.* at 503a, 71 N.W.2d at 428.

32 Mariniello v. Shell Oil Co., Civil No. 1506-72 (D.N.J., filed Dec. 13, 1972). [The brothers spell their surname differently.]

33 *Id.* slip opinion at 6.

34 *Id.* slip opinion at 6-7.

35 *Id.* slip opinion at 8-9.

36 120 N.J. Super. at 378-79, 294 A.2d at 264-65. See note 7 *supra*.

See generally Gellhorn, *supra* note 11, at 495-521, where the author discussed various tests to insure fairness in franchise termination.

37 120 N.J. Super. at 381, 294 A.2d at 266. Article 7 of the 1969 lease provided:

> Lessee shall at all times maintain the premises . . . in good condition and repair, and keep the same, as well as Lessee's own property thereon, neat, clean and orderly.

Id. at 366, 294 A.2d at 258.

In Shell Oil Co. v. FTC, 360 F.2d 470 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967), the court discussed Shell's organizational structure which led to overly extensive control of its franchisees, and noted that such control resulted, in part, from the "devise of house-

to the vagueness of the Shell representatives' work sheets, which usually failed to detail objections. However, the real attack on Shell's credibility surfaced in another part of the opinion, where the court scrutinized the plaintiff's marketing system. The court observed that the representatives had sales quotas for Shell's tires, batteries and accessories (TBA). It was established that a representative's TBA sales record played at least some part in the promotion procedure for the representative and his immediate superior, the sales supervisor for the district.[38] Unfortunately for Marinello, while running a very productive service station, his purchases of TBA were well below that of the average dealer.[39] Consequently, after examining Shell's marketing system, the court could not view the testimony of the Shell representatives concerning Marinello's performance as reliable, because

> [t]he very individuals who initiate the life-or-death decision for Shell dealers are also the same individuals who are most directly and immediately concerned with the sale of Shell TBA to its dealers.[40]

Since the court was convinced that a built-in bias in the corporate records existed against Marinello, it is not surprising that Shell's evidence was given little weight. Judge Gelman held that Shell had no just cause to terminate the franchise because Marinello had substantially performed his obligations under the lease and dealer agreements.[41]

Although this finding was dispositive, the court, however, went on to additionally consider the applicability of the clean hands doctrine. Marinello's defense of unclean hands rested on two specific aspects of Shell's marketing practices: it was alleged that Shell unlawfully discriminated against Marinello in the pricing of gasoline sold to him, and that Shell illegally refused to renew his lease because of his failure to purchase a sufficient amount of Shell TBA.[42]

The court first found that Marinello's allegation of price discrimination was supported by sufficient evidence.[43] As a result, Shell had violated both state and federal legislation which prohibited such prac-

---

keeping requirements concerning the station's use, maintenance and appearance which, if breached, could result in immediate cancellation of a lease without notice." *Id.* at 481.

38 120 N.J. Super. at 387, 294 A.2d at 269.

39 *Id.* at 386, 294 A.2d at 268-69. Marinello did not have an express obligation to purchase TBA, but the court found it to be implicit in Shell's relationship with all its dealers. *Id.* at 382-83, 294 A.2d at 267.

40 *Id.* at 388, 294 A.2d at 269.

41 *Id.* at 382, 385, 294 A.2d at 265, 268.

42 *Id.* at 385, 294 A.2d at 268.

43 *Id.* at 390, 294 A.2d at 270.

tices.[44] Judge Gelman also found Shell's marketing of its TBA to be fraught with antitrust violations.[45] The court maintained that Shell's organizational structure for marketing its products was inherently coercive—the result of tying the sale of gasoline to its franchisees to their purchase of Shell TBA. Judge Gelman compared this to the marketing system condemned by the United States Supreme Court in *Atlantic Refining Co. v. FTC*,[46] where Atlantic agreed to promote Goodyear TBA and the FTC successfully enjoined the use of coercion exerted by Atlantic on its dealers in the promotion of the plan. The Court held that this arrangement was in restraint of trade.[47] Judge Gelman concluded that Shell's marketing system was even more anti-competitive than the one in *Atlantic Refining* because Shell was actually selling its own branded TBA to its dealers.[48] Since Shell's conduct toward Marinello was violative of these statutory prohibitions, the court concluded that his defense of unclean hands also barred plaintiff's dispossess action.[49]

However, Judge Gelman's application of the unclean hands doctrine should be scrutinized. There is no hard and fast rule controlling when the defense should be available because courts have given the doctrine a flexible construction.[50] Generally, the defense is viable when

44 The Unfair Motor Fuels Practices Act, N.J. STAT. ANN. § 56:6-22(a), (c) (1964), prohibits distributors such as Shell from granting gas price rebates or allowances or discriminating, either directly or indirectly, in their tank wagon gas prices between retail dealers "except to meet competition." The Clayton Act, 15 U.S.C. § 13(a) (1970), prohibits discrimination in rebates, discounts and underselling in particular localities.

45 120 N.J. Super. at 387-88, 294 A.2d at 269. It is unlawful for a franchisor to enter into an agreement tying in the sale of gasoline to the sale of TBA when it results in restraint of trade. *See* the Unfair Motor Fuels Practices Act, N.J. STAT. ANN. § 56:6-22(b) (1964) and the Clayton Act, 15 U.S.C. § 14 (1970).

46 381 U.S. 357 (1965).

47 *Id.* at 371.

48 120 N.J. Super. at 388, 294 A.2d at 269.

For support of Judge Gelman's conclusion *see* Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), where the court held that an illegal tie-in occurred when the trademark license to sell the franchisor's product included the condition that the franchisee purchase other equipment exclusively from the franchisor. However, in *Chicken Delight* there was an express requirement obligating the franchisee to purchase the franchisor's accessory products while in *Shell Oil Co. v. Marinello* the court found an *implied* tie-in agreement resulting from Shell's coercive marketing system. 120 N.J. Super. at 387, 294 A.2d at 269. Concerning proof requirements involved with implied tie-in agreements, *see* Abercrombie v. Lum's Inc., 345 F. Supp. 387, 390-92 (S.D. Fla. 1972).

Regarding antitrust legislation and the franchise relationship *see* Helm, *The Present Posture of Franchising*, 19 DEPAUL L. REV. 102 (1969); Comment, *supra* note 27.

49 120 N.J. Super. at 392-93, 294 A.2d at 272.

50 *See* Untermann v. Untermann, 19 N.J. 507, 517-18, 117 A.2d 599, 604-05 (1955), where the court discussed the general application of the doctrine.

the party soliciting judicial relief is guilty of unconscionable conduct which is related to the remedy sought.[51] Even if Shell were found to have violated various statutes, it would not necessarily support an unclean hands defense to a dispossess action. In the *Mariniello* opinion[52] of the New Jersey federal district court it was held that the appropriate remedy for these violations was not continued possession of the premises, but rather the penalties prescribed by the allegedly violated statutes.[53] Judge Coolahan relied on *Helfenbein v. International Industries, Inc.*,[54] where the court concluded that when a lease contract between parties is clear and unequivocal any default thereunder could subject the sublessees to a summary eviction.[55] There existed no equitable ground or authority for a federal court to intervene by enjoining the action despite alleged antitrust violations.[56] However, even the court in *Helfenbein* indicated that it would have considered an equitable defense had there been evidence that the eviction proceeding was based upon the sublessees' refusal to continue to buy according to any tie-in agreement.[57]

This was precisely the finding by Judge Gelman in *Shell Oil Co. v. Marinello*, as he observed that plaintiff

> elected to expand its marketing activities to include the sale of TBA to its dealers, and it has created an organizational structure to carry out that objective which is inherently coercive and which inevitably tends to tie in the sale of its gasoline to its dealers to their purchase of Shell TBA.[58]

---

[51] *See* City of Paterson v. Schneider, 31 N.J. Super. 598, 607, 107 A.2d 553, 558 (App. Div. 1954), where the court noted that the alleged conduct

> must . . . be related to the act of the plaintiff which is the subject matter of the cause of action, and it must be an evil practice or wrongful conduct in the particular transaction in respect to which the plaintiff seeks redress.

[52] Mariniello v. Shell Oil Co., Civil No. 1506-72 (D.N.J., filed Dec. 13, 1972).

[53] *Id.* slip opinion at 5.

[54] 438 F.2d 1068 (8th Cir. 1971).

[55] *Id.* at 1071.

[56] *Id.*

[57] *Id.* The court in *Helfenbein* found "no evidence that the eviction proceeding [was] based upon plaintiffs' refusal to continue to buy according to any tie-in agreement." *Id.*

Judge Coolahan also cited Kelly v. Kosuga, 358 U.S. 516 (1959), as support for his decision that violations of federal and state antitrust statutes would not support a defense of unclean hands to a dispossess action. In *Kelly* the Court stated "that the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction." *Id.* at 519. However, it should be noted that *Kelly* differed from the *Mariniello* case in two vital aspects. First, *Kelly* was concerned with a commercial contract while *Mariniello* involved a special contractual relationship, the franchise relationship. Secondly, in *Kelly* the defendant was seeking to avoid all contractual responsibility due to plaintiff's alleged antitrust violations, while Mariniello only proposed the reformation of the cancellation clause of his contract.

[58] 120 N.J. Super. at 387, 294 A.2d at 269.

Since such a tie-in violated both state and federal law,[59] and Judge Gelman found that Marinello's eviction was the result of his failure to buy an adequate amount of TBA from Shell,[60] the clean hands doctrine was an appropriate defense even under *Helfenbein*.

The need for a franchise act in New Jersey is manifested by the uneven results reached in the two cases involving the brothers and Shell Oil. The Franchise Practices Act will supplement the equitable remedies applied by courts against unfair cancellation in such random fashion. However, franchise legislation has recently come under constitutional attack. There is authority[61] suggesting that such legislation contravenes the contract clause of the United States Constitution, based primarily on *Globe Liqor Co. v. Four Roses Distillers Co.*[62] In *Globe Liquor* the Delaware Supreme Court struck down the Delaware Franchise Security Law,[63] holding that the statutory damages were excessively punitive[64] and that the Act was an unconstitutional violation of the contract clause. However, the court concluded that such a federal constitutional deficiency resulted from the fact that the legislation altered *previously existing* contractual obligations due to its retroactive effect.[65]

New Jersey's legislation will not be subjected to the same attack because, although it severely limits contractual freedom in the fran-

---

59 *See* note 45 *supra*.

60 120 N.J. Super. at 388, 294 A.2d at 269.

61 *See* Comment, *Franchise Regulation: An Appraisal of Recent State Legislation*, 13 B.C. IND. & COM. L. REV. 529, 558-64 (1972).

62 — Del. —, 281 A.2d 19, *cert. denied*, 404 U.S. 873 (1971).

63 DEL. CODE ANN. tit. 6, §§ 2551 *et seq.* (Cum. Supp. 1970). This was the first state statute to deal with general franchise terminations, affording protection to franchised distributors and preventing unjust cancellation by franchisors. Comment, *supra* note 61, at 558.

64 — Del. at —, 281 A.2d at 24. The court set forth the damages proscribed in the Act:

> 1. The value of the franchised distributor's tangible assets attributable to the franchise;
> 2. Loss of good will;
> 3. Loss of profits, presumed to be not less than five times the profit in the most recently completed fiscal year;
> 4. All other damages allowed by law; and
> 5. Counsel fees and expenses.

Id. at —, 281 A.2d at 20.

65 *Id.* at —, 281 A.2d at 21. The court stated:

> We think the Delaware Franchise Security Law . . . makes a substantive change in the rights and obligations under *this* contract. These substantive changes are the imposition on Four Roses of the obligation to deal with Globe indefinitely, and the imposition of a penalty in the form of damages if it attempts to insist on its contractual rights. It is therefore not a minor change or infringement permissible under the exercise of the police power. It is therefore proscribed by the Contract Clause of the Federal Constitution.

Id. (emphasis added).

chising field, the Franchise Practices Act has no excessive punitive damage clause[66] nor does it affect existing contract rights due to its prospective application.[67] The United States Supreme Court in *W. B. Worthen Co. v. Thomas*[68] held that the contract clause was not absolute. It must yield to the rights of the state to legislate to protect the vital interests of its citizens, even if so doing results in an incidental retroactive alteration of the rights of contracting individuals.[69] However, when the legislation is prospective and thus the contract clause is inapplicable, states have considerably greater constitutional latitude, particularly in the area of economic regulation.[70] Most state franchise legislation protecting a particular industry has withstood constitutional attack on the basis that the state was employing a legitimate use of its police power, notwithstanding the fact that the persons to be benefited were confined to one class of citizens.[71] Likewise, federal franchise legislation has been held not to violate the fifth amendment as being vague, arbitrary, discriminatory or an unlawful taking of property.[72]

However, while the New Jersey Franchise Practices Act will probably be upheld constitutionally, its practical effect will depend on judicial application. The Automobile Dealers' Day in Court Act,[73] like the Franchise Practices Act, was passed to establish a balance of power between manufacturers and dealers and thus to avoid unfair cancellation of dealerships. Yet the intent of the legislation has been circumvented and automobile dealers have met with limited success in invoking its protection.[74] This has resulted from a judicially imposed narrow

---

66 N.J. STAT. ANN. § 56:10-10 (Supp. 1972-73), provides:

> Any franchisee may bring an action against its franchisor for violation of this act . . . to recover damages sustained by reason of any violation of this act and, where appropriate, shall be entitled to injunctive relief. Such franchisee, if successful, shall also be entitled to the costs of the action including but not limited to reasonable attorney's fees.

67 See note 10 *supra*.

68 292 U.S. 426 (1934).

69 *Id.* at 432-33.

70 *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34; Rodes, *Due Process and Social Legislation in the Supreme Court—A Post Mortem*, 33 NOTRE DAME LAW. 5 (1957).

71 *See generally* Annot., 7 A.L.R.3d 1173, 1192-98 (1966).

72 *See* Blenke Bros. Co. v. Ford Motor Co., 203 F. Supp. 670, 672-73 (N.D. Ind. 1962), which upheld the constitutionality of the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221 *et seq.* (1970). Constitutional attacks against federal franchise legislation must be based on the fifth amendment, because the contract clause has been held to apply only to state legislation. *See* John McShain, Inc. v. District of Columbia, 205 F.2d 882, 883-84 (D.C. Cir. 1953).

73 15 U.S.C. §§ 1221 *et seq.* (1970).

74 *See* Freed, *A Study of Dealers' Suits under the Automobile Dealers' Franchise Act*, 41 U. DET. L.J. 245, 259-61 (1964).

construction applied to the Act due to the fact that it was a limitation upon basic contract rights.[75] In addition,

> absent clear evidence of unreasonableness, the courts have been unwilling to find a manufacturer liable for a termination or nonrenewal based upon putative "business reasons." By subtly transferring the focus of attention from its alleged abuses to the inadequacies of the cancelled dealership, manufacturers have been able to successfully defend against dealer's suits.[76]

Thus the success of the Franchise Practices Act will depend to a great extent on its reception by the judiciary. The courts must be willing to liberally construe and apply the Act, as well as respond to attempts by franchisors to defeat the purpose of the legislation.[77]

In *Shell Oil Co. v. Marinello* Judge Gelman demonstrated a liberal approach to the Act by looking at the spirit of the legislation even though it was not officially applicable. He further preserved the proper implementation of legislative intent by using witness credibility to subdue the threat posed by the franchisor's "building book" on the franchisee.[78] The Franchise Practices Act does not provide guidance regarding the evidential value of the corporate files which could be subtly manipulated to show good cause for termination where none actually exists. The court recognized an inherent bias in the Shell representatives' grading reports by looking behind the mere corporate records.[79] Reflecting a distrust of the subjective test of an individual's ratings to determine good cause or substantial performance, the court instead applied an objective test which considered the respective performance of other franchisees.[80] This method will be effective in com-

---

75 *Id.* at 260.

76 *Id.*

77 Judge Gelman commented upon his role in effecting legislative intent:

> The fact that the Legislature has acted to provide a remedy . . . does not mean that the judicial branch is limited to the boundary lines of the legislative expression in fashioning or denying remedies in a particular case. Legislation of necessity concerns itself with regulations of a general nature which look to the future; it cannot deal with the specific case of *Shell Oil Co. v. Frank Marinello.* The latter is peculiarly the function of the courts: to examine the facts and circumstances of the particular case and accomplish justice and fair play as between the parties who are before the court.

120 N.J. Super. at 375, 294 A.2d at 263.

78 *Id.* at 381-82, 294 A.2d at 266-67. This evidentiary problem was noted in Horton, *Legal Remedies of a Distributor Terminated Pursuant to a Contractual Provision of Termination upon Notice,* 3 CREIGHTON L. REV. 88, 95 (1970). The author observed that "[t]he large manufacturer will generally have a well-documented file to show the legitimate business reasons that led to . . . termination," and suggested that a court, when judging the value of such evidence, insure that the identical standard was applied to other distributors of that manufacturer. *Id.* This was basically the approach adopted by Judge Gelman.

79 120 N.J. Super. at 380-85, 294 A.2d at 265-68.

80 *Id.*

batting the possible use of "book building" by a franchisor to thwart the intent of the legislation.[81]

Judge Gelman has laid important groundwork for the vital future role to be played by the judiciary in balancing the power between parties of a franchise relationship by his compilation of various equitable remedies guided by the spirit of the Franchise Practices Act. With the ever-expanding popularity of the franchise arrangement,[82] protection must be afforded the franchisee who invests substantial time and effort from unfair conduct by the dominant franchisor. This legislation serves to supplement these traditional equitable remedies by presenting a clear expression of legislative policy to insure uniform treatment of parties to a franchise agreement.

Thomas J. Spies

---

81 It is especially important to take an objective approach to a franchisee's performance because "[t]he usual requirements of the franchise contract are impossible to attain, so that it may well be said that franchisees are always in default." Brown, *Franchising—A Fiduciary Relationship*, 49 TEXAS L. REV. 650, 662 (1971) (footnote omitted).

82 *See* Augustine & Hrusoff, *Franchise Regulation*, 21 HASTINGS L.J. 1347, 1347-48 (1970).