1962

*Apr. 26
June 25

DIRECT LUMBER COMPANY LIMITED (*Plaintiff*) ..... APPELLANT;

AND

WESTERN PLYWOOD COMPANY LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

*Trade—Discriminatory practices—Discounts—Whether legislation gives civil cause of action for its breach—Criminal Code, 1953-54 (Can.), c. 51, ss. 411(1)(c) and 412(1)(a) and (2).*

The plaintiff company sued the defendant, a distributor of building products, founding its cause of action upon an alleged breach by the defendant of two sections of the *Criminal Code*, s. 411(1)(*c*) and s. 412(1)(*a*) and (2), the first having to do with conspiracy to limit production or to enhance prices or to prevent or lessen competition, the second having to do with discrimination. A counter-claim was filed by the defendant claiming a sum of money—the balance owing for goods sold and delivered. The defendant pleaded that the statement of claim disclosed no cause of action and at the opening of the trial moved to

*PRESENT: Kerwin C.J. and Locke, Martland, Judson and Ritchie JJ.

have it struck out. The trial judge granted the motion to dismiss the action and allowed the counter-claim. This judgment was affirmed on appeal and the plaintiff then appealed to this Court.

*Held:* The appeal should be dismissed.

Neither s. 411(1)(*c*) nor s. 412(1)(*a*) and (2) of the Code gave a cause of action in damages to a person who alleged a breach of these sections by a defendant. This legislation creating a new crime was enacted solely for the protection of the public interest and did not create a civil cause of action. *Transport Oil Ltd. v. Imperial Oil Ltd. and Cities Service Oil Co.*, [1935] O.R. 215, discussed; *Cutler v. Wandsworth Stadium Ld.*, [1949] A.C. 398; *Orpen v. Roberts*, [1925] S.C.R. 364; *Philco Products Ltd. et al. v. Thermionics Ltd. et al.*, [1940] S.C.R. 501, referred to.

The defence to the counter-claim, *i.e.*, a plea that the sales in question were illegal transactions, the illegality being the violation of s. 412 of the Code, failed. The vendor sued only for the price of goods sold and delivered on a contract untainted by illegality. It was no defence to say that the vendor sold similar goods to another person for a lower price in breach of a statute. Assuming that the vendor did so, there was no connection between the illegality pleaded and the transaction in question.

The plaintiff's claim to commissions on sales made by the defendant to a third party also failed, the evidence not having established any contract to pay commissions on these sales.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming a judgment of Primrose J. Appeal dismissed.

*G. Amerongen*, for the plaintiff, appellant.

*T. Mayson*, for the defendant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellant sued the respondent for damages, founding its cause of action upon an alleged breach by the respondent of two sections of the *Criminal Code*, s. 411(1)(*c*) and s. 412(1)(*a*) and (2), the first having to do with conspiracy to limit production or to enhance prices or to prevent or lessen competition, the second having to do with discrimination. The appellant is a lumber dealer and the respondent is a distributor of plywood and other building products. The precise claim was for $19,114.18 for price discrimination and $57,000 general damages for loss of sales. The respondent pleaded that this statement of claim disclosed no cause of action and at the opening of the trial moved to have it struck out. The learned trial judge did so and his judgment was affirmed on appeal[1].

[1] (1962), 37 W.W.R. 177, 32 D.L.R. (2d) 227.

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It is apparent from the pleading and the course of the argument that the plaintiff's claim was really based upon price discrimination and not upon conspiracy. In any event, in my respectful opinion, the judgment under appeal is correct and neither section gives a cause of action in damages to a person who alleges a breach of these sections by a defendant.

The statement of claim simply pleads that during the years 1953 to 1959 the plaintiff bought from the defendant plywood and other materials for which it was charged $382,283.61, of which it paid $368,554.13. It says that in these transactions it was discriminated against to the extent of $19,114.18 because of discounts, allowances or price concessions granted by the defendant to other purchasers. It sues for this $19,114.18 and also for general damages.

The section relied upon reads:

412. (1) Every one engaged in trade, commerce or industry who

(*a*) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of the purchaser, in that any discount, rebate, allowance, price concession or other advantage, is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage, available at the time of such sale to such competitors in respect of a sale of goods of like quality and quantity;

is guilty of an indictable offence and is liable to imprisonment for two years.

(2) It is not an offence under paragraph (*a*) of subsection (1) to be a party or privy to, or assist in any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

I am satisfied, as was Johnson J.A. in the Court of Appeal after a full review of the cases culminating in *Cutler v. Wandsworth Stadium Ld.*[1], that this criminal legislation gives no civil cause of action for its breach and I would affirm the judgment under appeal for the reasons given by Johnson J.A. that this legislation creating a new crime was enacted solely for the protection of the public interest and that it does not create a civil cause of action. There is no new principle involved and in spite of repeated consideration of the problem, nothing has been added to what was said about it by Duff J. in *Orpen v. Roberts*[2]:

But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable

[1] [1949] A.C. 398.

[2] [1925] S.C.R. 364 at 370.

by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty.

Although there is no prior decision on the civil consequences of this legislation, the problem was touched in the judgment of the Court of Appeal of Ontario in *Transport Oil Ltd. v. Imperial Oil Ltd. and Cities Service Oil Co.*[1], which held there can be no claim for damages for conspiracy based upon a breach of the *Combines Investigation Act*—a conspiracy closely related to that dealt with in the present s. 411 of the Code. The constitutionality of the legislation there in question was settled in *Proprietary Articles Trade Association v. Attorney-General for Canada*[2], and it followed as a natural consequence that when this legislation relating to price discrimination was challenged in *Attorney-General for British Columbia v. Attorney-General for Canada*[3], it was held to be a valid exercise of the power under s. 91, head 27, of the *British North America Act*.

The appellant's main submission to this Court on this branch of the case was that the *Transport Oil* case ought to be distinguished. This judgment was based on two grounds, the first being that as a matter of construction the legislation gave no civil cause of action, the second being the sweeping statement that under our dual legislative system, the Parliament of Canada in legislating in relation to criminal law intended to confine its legislation to crime and did not intend to interfere with provincial jurisdiction over property and civil rights. Some doubt has been expressed whether the second ground given by Middleton J.A. for supporting the legislation was really necessary to his decision. The first ground is clearly right and, in my opinion, as in that of Johnson J.A., ought to be adopted in this case.

I recognize that there may be a difference between a common law action for damages based on conspiracy and one based on price discrimination. The common law itself imposes liability for harm caused by combinations to injure by unlawful means but the common law never gave any cause of action for price discrimination unaccompanied by

[1] [1935] O.R. 215, 2 D.L.R. 500, 63 C.C.C. 108.
[2] [1931] A.C. 310, 100 L.J.P.C. 84.
[3] [1937] A.C. 368, 1 D.L.R. 688.

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conspiracy. To this extent some of the dicta in the *Transport Oil* case, which was a conspiracy case, may be open to question and it may well be doubted whether any constitutional principle is raised when dominion criminal legislation is silent upon the question whether a civil action arises upon breach of its terms. This doubt has been expressed by Wright in Cases on the Law of Torts, 2nd ed., 279; Laskin, Canadian Constitutional Law, 2nd ed., 863; and Finkelman, 13 Canadian Bar Review, 417, and it is probably the basis for the statement of Duff C.J. in *Philco Products Ltd. et al. v. Thermionics Ltd. et al.*[1], when he said:

> If B commits an indictable offence and the direct consequence of that indictable offence is that A suffers some special harm different from that of the rest of His Majesty's subjects, then, speaking generally, A has a right of action against B. As at present advised, I think it is not obvious that this well settled doctrine does not apply to indictable offences under section 498 of the *Criminal Code*; . . . .

I would reject in this case the existence of the cause of action for the sole reason given by Johnson J.A.

The second point in this appeal arises from the counter-claim of the respondent-vendor for the sum of $13,729.48, being the balance owing for goods sold and delivered. The appellant-purchaser's defence to this counter-claim was a plea that these sales were illegal transactions, the illegality being the violation of s. 412 of the *Criminal Code*. The appellant-purchaser admits that it bought the goods and that it contracted to pay the price demanded. Its defence in substance is that it should not have to pay anything for these goods because the vendor sold similar goods to other people at a lower price. When stated in this way it is at once apparent that the defence of illegality fails. There was no illegality in the transaction between the vendor and the purchaser and the vendor was not involved in any proof of illegality in order to establish its claim. The vendor sued only for the price of goods sold and delivered on a contract untainted by illegality. It is no defence to a claim of this kind to say that the vendor sold similar goods to another person for a lower price in breach of a statute. Assuming that the vendor did so, there is no connection between the illegality pleaded and the transaction in question. *Wilkinson v. Harwood and Cooper*[2], and *Philco Products Ltd. et al. v. Thermionics Ltd. et al., supra.*

[1] [1940] S.C.R. 501 at 504.

[2] [1931] S.C.R. 141, 2 D.L.R. 479.

The amount of the claim was not disputed. Judgment was correctly given for the vendor on its counter-claim and this branch of the appeal fails.

A third issue raised in this appeal is a claim by the appellant to commissions on sales made by the respondent to a third party. Evidence was heard on this claim and only on this claim. It appears that this third party had been buying goods from the appellant and that it told the respondent that unless it could purchase direct from the respondent it would look elsewhere for its supplies and that in no event would it deal with the appellant. Some evidence was given of a meeting between the officers of the two litigant companies at which it was said that the respondent would make things right and pay a three per cent commission on these direct sales. Only one commission was in fact ever paid, on March 23, 1956. The commission slip reads:

> 3% on Poplar to Alldritt
> October 20th - End of 1955 ..... 226.92

The question of commission was never raised again until this action was instituted, in spite of the fact that dealings continued between the two companies until 1959. Both the trial judge and the Court of Appeal have held that this agreement to pay commission, if there was such an agreement, offended the Statute of Frauds and I would not disagree with this finding. I think, however, that the evidence falls far short of establishing any contract to pay commission on these sales and that the payment on the one occasion was made by a volunteer under no legal obligation. The appeal also fails on this ground.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Amerongen & Burger, Edmonton.*

*Solicitors for the defendant, respondent: Milner, Steer, Dyde, Massie, Layton, Cregan & Macdonnell, Edmonton.*