Romeo S. Fabbi and Stanley A. Fabbi carrying on business under the firm name and style of "Purity Dairy Ltd." and the said Purity Dairy Ltd. (*Defendants*) *Appellants*;

and

William Owen Jones (*Plaintiff*) *Respondent.*

George Fleck and Robert W. Fleck carrying on business under the firm name and style of "Fleck Bros." and the said Fleck Bros., Bernard Riehl, Jr., Edward Kriese, Edward Siebert, Adolf Lang, Joseph Pogany Jr. and Thomas Jensen (*Defendants*) *Appellants*;

and

William Owen Jones (*Plaintiff*) *Respondent.*

1972: May 23; 1972: June 29.

Present: Martland, Judson, Ritchie, Pigeon and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Inducing breach of contract—Contracts between plaintiff and milk producers for transport of milk to defendant dairy—Repudiation by producers because of pressure from dairy—Claims in tort and contract successful.

Certain milk producers were members of a co-operative through which they marketed their milk. The co-operative agreed to sell its business to the defendant dairy operators, and included in the agreement was an undertaking by the operators to purchase specified quantities of milk from named producers (among whom were all the defendant producers) at prescribed prices. The various producers then entered into contracts with the plaintiff for the transport by him of their milk in cans to the dairy. The contract arrangements were carried out by the plaintiff over the succeeding months and the dairy accepted the milk delivered by him without question.

At the time these contracts were negotiated, thought was given to the eventual replacement of milk can transport by bulk tank hauling. The dairy

operators were interested in doing the bulk tank hauling themselves and both the producers and the plaintiff were aware of this. Various meetings were held, and in the result, the producers signed contracts with the plaintiff, dated March 9, 1963, for transport of their milk by him by bulk milk tanker. As in the case of the earlier contracts, these contracts were said to be subject to the consent of the Public Utilities Commission because of a statutory requirement of a licence to enable the plaintiff to provide the transport services. Consent, carrying a grant of licence, was given on May 7, 1963.

On May 2, 1963, the dairy wrote to the various producers advising of its intended tanker operation and that payment of milk would be F.O.B. producer's premises, which meant that the operators proposed to absorb the cost of transporting milk to their dairy. Meetings were subsequently held between the producers and an official of the dairy and thereafter a letter was written by the producers to the plaintiff which amounted to a repudiation of their transport contracts.

The plaintiff sued the dairy operators for inducing breach of these contracts and he later sued the producers for breach thereof. The two actions were consolidated for trial and both were dismissed by the trial judge. On appeal, the Court of Appeal found for the plaintiff on both claims in appeal, and referred the case back for an assessment of damages. Appeals from the judgment of the Court of Appeal were then brought to this Court.

Held: The appeals should be dismissed.

The contention that there was no contract between the plaintiff and the producers until May 7, 1963, and that, consequently, even if there were acts of inducement as alleged, they were not directed to any subsisting contract, was rejected. The parties in entering into the executory agreements had left nothing for further negotiation; they were bound to one another, and it was the performance of the contracts and not their existence that was dependent on a licence from the Public Utilities Commission.

The conduct of the defendants in the first action went beyond merely incidental interference with the plaintiff's contracts with the producers in pursuit of the defendants' own interests. This was not a case where the defendants merely caused a breach of con-

tract, although knowing of its existence, in pursuit of a different object of their own, but one where there was an intentional and knowing procurement of the breach through pressure on the contracting producers in pursuance of the same object as that realized by the plaintiff in consummating his contracts with the producers.

D. C. Thomson & Co. Ltd. v. Deakin, [1952] Ch. 646, applied; *McKenna and Mitchell v. F. B. McNamee & Co.* (1888), 15 S.C.R. 311, distinguished.

APPEALS from a judgment of the Court of Appeal for British Columbia, allowing the respondent's appeal from a judgment of Branca J. Cross-appeal from the refusal of the Court of Appeal to award punitive damages. Appeals and cross-appeal dismissed.

S. W. Enderton, for the defendants, appellants, Romeo S. Fabbi *et al.*

M. E. Moran, Q.C., for the defendants, appellants, George Fleck *et al.*

R. H. Vogel, for the plaintiff, respondent.

The judgment of Martland, Pigeon and Laskin JJ. was delivered by

LASKIN J.—The appellants in this Court are two sets of defendants who were sued in separate actions by the respondent Jones. The first action, instituted on June 21, 1963, was against the two Fabbi brothers for damages for the tort of inducing breach of contracts between the plaintiff and certain dairy farmers, being milk producers, for the transport of bulk milk from the Creston area in British Columbia to a dairy in Cranbrook operated by the Fabbi brothers. On December 16, 1963, Purity Dairy Ltd., in which the Fabbis had an interest and of which one of them was president, was added as a defendant, and a further claim was made against all defendants for damages for breach of a contract of November 2, 1962, with the plaintiff whereby he was to haul dairy products from the dairy in Cranbrook to the Creston area and points in between. This claim was rejected at the trial and no appeal was

taken in respect thereof; accordingly, it is not in issue here.

The second action by the plaintiff was instituted on November 2, 1964, against the milk producers above mentioned for damages for breach of the transport contracts which were the subject of the tort claim against the Fabbi brothers. The two actions were consolidated for trial and both were dismissed by the trial judge. He held that the tort claim failed because the evidence did not show that the Fabbis induced or sought to induce breach of the transport contracts with the milk producers; and he held that the contract claim against the latter failed because of an implied condition of those contracts that the dairy would accept the milk when delivered by the plaintiff, and there was no evidence to this effect (indeed, there was no obligation upon the dairy to continue purchasing from the milk producers), nor did Jones pick up any milk to try to make delivery in performance of his obligation under the contracts.

Despite a finding by the trial judge of the credibility of the evidence of the chief witness for the defendants, one English, the dairy manager, the British Columbia Court of Appeal found for the plaintiff on both claims in appeal, and referred the case back for an assessment of damages. It refused, however, to hold that the plaintiff should have punitive damages. This was made a matter of cross-appeal in this Court, but counsel were told during the argument that this Court would not interfere with that conclusion of the British Columbia Court of Appeal.

That Court allowed the plaintiff's appeal on his contract claim by rejecting the trial judge's finding of an implied condition; and it found for the plaintiff on his tort claim on the ground that the

Fabbis wrongly sought to change the existing arrangements with the producers for purchase of their milk by the dairy, they making it clear also in that connection that the dairy would refuse to accept the milk if transported by the plaintiff, although they knew that he had transport contracts with the producers.

The facts giving rise to the claims in these proceedings are as follows. The milk producers in the Creston area (including those that were defendants in the second action) were members of an incorporated co-operative through which they marketed their milk under their respective quotas. On July 26, 1962, the co-operative agreed to sell its business to the Fabbis, and included in the formal agreement dated October 11, 1962, was an undertaking by the Fabbis to purchase specified quantities of milk from named producers (among whom were all the defendant producers) at prescribed prices. On October 16, 1962, the various producers entered into contracts with Jones for the transport by him of their milk in cans to the Fabbi dairy in Cranbrook. Jones had to be licensed under the *Motor Carriers Act,* R.S.B.C. 1960, c. 252, to offer such transportation service, and the contracts were made subject to the consent of the Public Utilities Commission, which was the regulatory agency under the Act.

The contract arrangements with the producers were carried out by Jones over the succeeding months and the dairy accepted the milk delivered by him without question. A course of dealing was thus established under which the producers sold to the dairy according to their quotas, and made delivery through Jones pursuant to their contracts with him.

At the time these contracts were negotiated, thought was given to the eventual replacement of

milk can transport by bulk tank hauling. The contracts themselves contained this clause:

> This contract to continue in force until a bulk tank is required or 30 days notice in writing by either the shipper or the carrier for termination of contract.

Bulk tank hauling meant the installation of bulk holding tanks on the various dairy farms and transport of the milk by a bulk tank vehicle, one quite different from the flat deck truck on which the cans of milk were transported. This meant additional capital investments by the producers and by Jones if he was to continue to transport their milk.

The Fabbis were interested in doing the bulk tank hauling of milk to their dairy and the evidence is that the producers were made aware of this in February 1963. Jones was also aware of the wish of the dairy to displace him as transporter of the producers' milk. Various meetings were held, and in the result, the producers signed contracts with Jones, dated March 9, 1963, for transport of their milk by him by bulk milk tanker. The contract in each case stated that "this additional contract to remain in force for 36 months". Then followed this badly worded termination clause:

> THIS CONTRACT may be Cancelled by either party by: CONTRACT MAY BE TERMINATED BY MUTUAL AGREEMENT WITH 90 DAYS NOTICE IN WRITING. OPTION OF CONTRACT RENEWAL TO BE GIVEN 90 DAYS BEFORE CONTRACT TERMINATION.

As before, these contracts were said to be subject to the consent of the Public Utilities Commission because of the statutory requirement of a licence to enable Jones to provide the transport services. Consent, carrying a grant of licence, was given on May 7, 1963.

It was contended by the defendants Fabbi that there was no contract between Jones and the producers until May 7, 1963, and that, consequently,

even if there were acts of inducement as alleged, they were not directed to any subsisting contract. I do not accept this contention. The parties in entering into the executory agreements had left nothing to further negotiation; they were bound to one another, and it was the peformance of the contracts and not their existence that was dependent on a licence from a governmental agency. If, on the facts, there was tortious interference after March 9, 1963, through inducement of the producers to abandon Jones and have the dairy pick up the milk which it was purchasing, then the fact that Jones was at the time not yet licensed would not be a bar to imposition of liability upon the Fabbi brothers.

The latter knew of the contracts in question at least as early as March 23, 1963. Jones proceeded on the strength of the contracts to purchase a bulk milk tanker on April 22, 1963. He had met with the producers in February 1963 on this matter, and the contracts had resulted notwithstanding that the dairy had itself taken steps in February 1963 to acquire a bulk milk tanker, and had advised the producers at a meeting in the first week of March 1963 that it intended to do the hauling of the milk that it was buying from the producers.

What happened after the first week of March 1963 and after Jones and the producers entered into their contracts of March 9, 1963, is the critical inquiry. I note here that the bulk tank hauling could not begin until the bulk tanks of the producers were calibrated in accordance with government requirements. The evidence shows that such hauling was not possible until May 31 or June 1, 1963, and it was the dairy that took it over at that time.

There was a motel meeting on March 23, 1963, attended by Jones, by a spokesman for the producers and by representatives of the dairy. The record shows that the bulk tank hauling was the matter discussed, and that Jones' contract position was made clear as was the intention of the dairy to haul the producers' milk in its own tank truck.

On May 2, 1963, the dairy wrote to the various producers in these terms:

Purity Dairy milk tanker will be in operation as soon as the farm tanks are installed and calibrated.

The policy on payment of milk will be F.O.B. premises.

The reference to "F.O.B. premises" meant, of course, that the Fabbis proposed to absorb the cost of transporting milk to their dairy. In answer to the letter of May 2, 1963 (some were dated May 3, 1963), the producers, following a meeting which they held, wrote to the dairy as follows on May 4, 1963:

We the undersigned milk producers of the Creston-Lister area wish to advise you we have retained, under contract, a tank truck and driver as you were previously advised.

The milk will be transported by our contracted tanker F.O.B. to Purity Dairies, Cranbrook, as previously arranged.

As a result of this correspondence, a meeting was held between representatives of the producers and English, the dairy manager. What happened then is not very clear other than that there was at least a reiteration of existing positions; the producers would stand by their contracts with Jones, and the dairy wished to take over the bulk tank hauling. Another meeting followed on May 10, 1963, between English and the producers and this resulted in a decision by the producers to write a letter of even date to Jones, which amounted to a repudiation of the contracts of March 9, 1963. That letter was in the following words:

Mr. W. O. Jones,
Creston, B.C.
Dear Sir:

It was decided at the meeting tonight that we would let you haul our bulk milk providing you get a hauling contract from Purity Dairies.

B. Riehl
A. Lang
J. Pogany
Fleck Bros.
T. Jensen
E. Siebert
Ed. Kriese

Per: Robt. W. Fleck

It was obvious from the course of events to that time that Jones would not get a hauling contract from the dairy. The producers were caught in the middle of a contest between Jones and the dairy; and although they may have regretted signing hauling contracts with Jones, the question in this Court as in the Courts below is whether they decided upon repudiation because of illegal pressure from English (by way of a threat to refuse to take delivery of their milk from Jones) or simply as a matter of coming to their own decision uncoerced but knowing that the dairy wanted to do the hauling.

The trial judge accepted the testimony of English that he did not threaten refusal to accept the producers' milk if they shipped through Jones. But English also said that the dairy's tanker was going into service, and that it was up to the producers to determine whether they wished to ship in the dairy's tanker. Evidence on the other side of the case did go to establish a threat to cut off purchases from the producers. The British Columbia Court of Appeal acted on this evidence in reaching its conclusion that there was unlawful pressure upon the producers.

The exact form of words used by the representatives of the dairy in their meetings with the milk producers might literally be innocent, and yet in the setting and circumstances in which they were uttered they might be instinct with wrongful coercion. In assessing the evidence from this standpoint, it appears to me that a key matter is the course of trade between the dairy and the producers during the months of March, April and May, 1963. There is nothing in the evidence to show that the producers had other outlets for their milk, and it is a fact that the Fabbi dairy was 70 miles from the Creston area where the producers had their farms. What is deducible from the transaction between the Fabbi brothers and the incorporated co-operative and the ensuing course of events is that the dairy replaced the co-operative as the willing purchaser of the producers' milk. Any threat to cut off this dealing, although lawful in itself, would take on a different

character if it was used, not in the course of bargaining for changes in the dealing, but in order to coerce the producers to break their contracts with Jones.

I do not say that the Fabbi brothers could not buy milk elsewhere; what I hold that the evidence establishes is that they continued to accept milk offered to them by the defendant producers up to their respective quotas, without indicating any dissatisfaction with the arrangement, and without seeking to alter it until they saw it as a weapon to use in order to gain for themselves the transport contracts which they knew Jones had with the producers. The record of the various meetings persuades me that the dairy's representations to the producers were made on the basis of using its position as purchaser of their milk to enforce compliance with its demand that it should become the transporter for the producers.

This is pointed up by the fact that the course of dealing between the dairy and the producers was on an F.O.B. Cranbrook basis in pursuance of the provision to this effect in the agreement of October 11, 1962, between the Fabbi brothers and the co-operative. Jones came into the picture thereafter to carry out the transport for the producers. I have already mentioned the dairy's letter of May 2 (and May 3), 1963, advising of its tanker operation and that payment would be F.O.B. producers' premises. The culminating acts were (1) a letter from the dairy to Jones dated May 30, 1963, saying that it was confirming a statement made to him on March 27 that "we are taking over our own hauling effective June 1"; and (2) actual pick up of milk by the dairy from the producers on that day.

The letter of May 30 to Jones cannot stand on the simple footing that the dairy was now free to take over the hauling because the producers had themselves terminated, albeit wrongly, their relationship with Jones. As the letter shows, it was in pursuance of a calculated policy going back at least to March 27, and at that time the contracts between Jones and the producers had not been disturbed by the latter.

In my opinion, the conduct of the defendants in the first action went beyond merely incidental interference with Jones' contracts with the producers in pursuit of the defendants' own interests. This is not a case where the defendants merely caused a breach of contract, although knowing of its existence, in pursuit of a different object of their own, but one where there was an intentional and knowing procurement of the breach through pressure on the contracting producers in pursuance of the same object as that realized by Jones in consummating his contracts with the producers: see *D. C. Thomson & Co. v. Deakin*[1].

An issue was raised during the argument in this Court as to whether the dairy had recouped transportation charges after it had agreed to absorb them in its letters of May 2 (and May 3) ("the policy on payment of milk will be F.O.B. premises") or whether there was merely a price adjustment on purchased milk. The determination of this issue is immaterial to my conclusion above stated.

Counsel for the producers, in seeking restoration of the trial judgment in their favour which absolved them of liability in damages for breach of their contracts of March 9, 1963, with Jones, relied on the judgment of this Court in *McKenna and Mitchell v. F. B. McNamee & Co.*[2] That was a case in which the appellants contracted to complete certain government construction work for the respondent which had lost the contract for the work but hoped to regain it. The parties had entered into their agreement knowing that its performance depended on the government contract being restored. It was not—there was no fault of either party—and it was held that the appellants could not charge the respondent on the basis of an implied obligation to provide the work.

[1] [1952] Ch. 646.
[2] (1888), 15 S.C.R. 311.

The similarity to the present case was said to lie in the fact that Jones and the producers contracted on the footing of previous knowledge, common to both, that the dairy intended to take over the hauling. The dairy was not, however, in the position of the government in the *McKenna and Mitchell* case, having at its disposal the subject-matter of the contract; but rather was, putting the matter at its highest, a competitor with Jones to provide services to the producers at their behest. It was for them to determine with whom they would contract. I would, accordingly, affirm the judgment in Jones' favour against the producers.

A question of right of indemnity of the producers against the dairy was raised in the course of the hearing, although the matter was not made the subject of any pleading. There is no material in these proceedings upon which this Court can determine the right of indemnity, if any, and I express no opinion on it.

In the result, the judgment of the British Columbia Court of Appeal in favour of Jones and referring the case back for an assessment of damages should be affirmed. The parties did not address any argument to this Court on the meaning of the termination clause in the contracts of March 9, 1963, and I am not disposed to interfere with the view thereof taken by the British Columbia Court of Appeal.

I would dismiss the appeals with costs but allow only one counsel fee in this Court and I would dismiss the cross-appeal without costs.

The judgment of Judson and Ritchie JJ. was delivered by

RITCHIE J.—I have had the advantage of reading the reasons for judgment of my brother Laskin with which I am in agreement.

I am, however, somewhat disturbed as to the result in so far as the milk producers are concerned.

While I am satisfied, like my brother Laskin, that the farmers are technically liable, I am nevertheless concerned about the fact that these people were really the victims of the dispute between

Jones and the dairy company and as a result were placed in an almost impossible position. If they fulfilled their contract with Jones, they were under threat from the dairy company and by yielding to that threat they have been subjected to the costs of litigation which has been decided against them in the Court of Appeal of their own Province and now in this Court.

Counsel for the respondent Jones indicated at the hearing before us that his client did not intend to proceed with steps to recover damages from the producers, and under all the circumstances, I would make no award as to costs against the producers in this appeal.

Appeals dismissed with costs; cross-appeal dismissed without costs.

Solicitors for the defendants, appellants, Romeo S, Fabbi et al.: Emberton, Kent & Holland, Nelson.

Solicitors for the defendants, appellants, George Fleck et al.: Moran, D'Andrea & Geronazzo, Castlegar.

Solicitors for the plaintiff, respondent: Cooper & Vogel, Creston.