Privy Council Appeal No. 78 *of* 1926.

The Crown Milling Company, Limited, and others - - - *Appellants*

v.

The King - - - - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JANUARY, 1927.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT FINLAY.
LORD WRENBURY.
LORD DARLING.
SIR JOHN WALLIS.

[*Delivered by* VISCOUNT FINLAY.]

This case raises questions of great importance with regard to the construction and effect of the New Zealand Act, 1910, No. 32, which came into operation on the 1st January, 1911. It is entitled "An Act for the Repression of Monopolies in Trade or Commerce," and is cited as "the Commercial Trusts Act, 1910."

This Act is directed against what are known as commercial trusts. In Section 2 "commercial trust" is defined as meaning any association or combination of persons having as an object:—

> (*a*) (i) Controlling, determining, or influencing the supply or demand or price of goods in New Zealand or elsewhere: or (ii) of creating or maintaining in New Zealand . . . . or elsewhere a monopoly whether complete or partial in the supply or demand of any goods, or (*b*) acting in New Zealand or elsewhere with any such object as aforesaid.

The Act applies only to goods mentioned in the Schedule, which has been amended by subsequent Acts, and includes in its enumeration many of the principal necessaries of life.

The most important of the enacting clauses are Section 3 and Section 5.

Section 3 makes it an offence to give or offer in respect of any dealings in goods any valuable consideration

(*a*) For dealing exclusively with any person or class of persons ;

(*b*) For not dealing with any person or class of persons :

(*c*) For restricting dealings with any such person or class :

(*d*) For being, or becoming, a member of a commercial trust ; or

(*e*) For acting under the direction of any commercial trust with regard to the sale, purchase or supply of goods.

Section 5 makes criminal any conspiracy to monopolize or control the demand or supply in New Zealand of any goods, if such monopoly or control is of such a nature as to be contrary to the public interest.

There are other sections of a subsidiary nature to which reference has been made, particularly Sections 4, 6, 7 and 8. Provision is also made for the infliction of a penalty for offences against the Act, and for the granting of injunctions (Sections 10 and 13).

The present proceedings were instituted against the Crown Milling Company, Limited, of Dunedin, and three other companies carrying on business in New Zealand as flour millers. A company entitled "Distributors, Limited," of Christchurch, flour millers' agents, were also joined as defendants.

The statement of claim charged against the defendants conspiracy in breach of Section 5 of the Commercial Trusts Act, and set out the agreement entered into in furtherance of the conspiracy alleged. The defendants denied that there had been any infraction of the Act, and alleged that so far from prejudicing the trade, what had been done by the defendants had been beneficial in its operation.

The case came on for hearing before Sim, J., in the Supreme Court of New Zealand, and after a trial which lasted for ten days Sim, J., gave judgment in favour of the defendants. An appeal was brought against this decision to the Court of Appeal in New Zealand, and after a hearing before five Judges, being the first and second divisions of the Court of Appeal sitting together, the Court by a majority set aside the decision of the Supreme Court, and entered judgment for the Crown. The Court consisted of five members—Chief Justice Stout, Herdman, Reed, MacGregor and Alpers, JJ., the majority consisting of three Judges. The defendants by this appeal to His Majesty in Council ask that the judgment of Sim, J., should be restored.

The object of these proceedings was to put an end to a combination of flour millers in New Zealand, the nature and objects of which are stated in the form of agreement scheduled to the statement of claim.

The company known as Distributors, Limited, was incorporated for the purpose of acting as agent for the millers in the campaign which it was proposed to initiate against the evils from which the trade in flour, etc., was alleged to suffer. They cannot

be better stated than in the language of the preamble to the agreement, adhesion to which it was the office of "Distributors, Limited," to promote. The parties to this agreement were, on the one hand, the mill owners who signed it, and, on the other, "Distributors, Limited." The preamble is as follows:—

> "Whereas the company is incorporated with powers to buy, sell, deal in, and act as agent for the sale of wheat, flour, and other products of milling and cereals: And whereas by the unnecessary multiplicity of marketing and distribution processes the cost of producing, marketing, and distributing flour by flour millers individually is unnecessarily expensive, and results in the net price obtainable by flour millers being unremunerative: And whereas, with a view to minimizing necessary and eliminating unnecessary expenses to individual flour millers, the company is prepared to use its organization for the purpose of canvassing for orders, issuing invoices to purchasers, and marketing and distributing flour sold, and otherwise acting as agent in respect of the sale of flour and such other products as aforesaid: And whereas, by reason of difficulties in finance arising from delays and failures in payment by purchasers of flour from flour millers, it is advisable that adequate protection should as far as practicable be obtained against sales to purchasers who are insolvent or unable to pay for flour purchased within a reasonable time: And whereas the company is in a position to dispose of flour to better commercial advantage than can be obtained by individual flour millers, having regard to the difficulties aforesaid: And whereas the said mill owners are the owners of a certain flour mill situated at ....., and hereinafter called 'the said mill': And whereas the said mill owners have agreed that the company shall act as their sole agent for the sale of flour and its by-products, upon the terms and subject to the provisions hereinafter contained: And whereas the company in consideration thereof has agreed to extend to the said mill owners the advantages it possesses in the marketing and distribution of such flour: Now, this agreement witnesseth that the parties hereto do hereby, in consideration of their mutual covenants and agreements hereinafter contained and implied, mutually covenant and agree in manner following, that is to say:—"

Then follow the details of the agreement. Distributors, Limited, were to sell on behalf of the mill owners (Clause 3 (*a*)), the agency was to be exclusive (Clause 4) and was to be in the nature of a *del credere* agency at 5 per cent. commission, subject to modification (Clause 7). The price was to be fixed by the directors of the company (Clause 11) and arrangements were to be made for the equitable distribution of the trade (Clauses 12 and 13). There were a number of other provisions which it is not necessary to state in detail, and provision was made for the final settlement of any dispute which might arise in carrying them out by reference to arbitration (Clause 31).

There has been a singular difference of judicial opinion in this case. Of the six Judges who took part in it, one who formed the Court of first instance and five in the Court of Appeal, three were in favour of the Crown and three in favour of the defendants. The defendants thus succeeded in the Court of first instance, where Sim, J., sitting alone, was in their favour, but the Crown succeeded in the Court of Appeal, where three were in favour of the Crown and two in favour of the defendants.

It will be convenient in the first instance to state shortly the conclusions at which their Lordships sitting on this Board have arrived, and the principles on which it appears to them that the decision must depend, and then to proceed to an examination of the conflicting views expressed in the judgments in the Courts below.

In order that the Crown may succeed in this case, it is necessary to show that there had been an offence either under Section 3 or under Section 5 of the Commercial Trusts Act, 1910, there being no other sections in the Act which for the purposes of the present case would constitute an offence.

Section 3 of the Act runs as follows :—

> " 3. Every person commits an offence who, either as principal or agent, in respect of dealings in any goods, gives, offers or agrees to give to any other person any rebate, refund, discount, concession, allowance, reward, or other valuable consideration for the reason or upon the express or implied condition that the latter person—
>
> (*a*) Deals or has dealt or will deal, or intends or undertakes or has undertaken or will undertake to deal, exclusively or principally, or to such an extent as amounts to exclusive or principal dealing, with any person or class of persons, either in relation to any particular goods or generally ; or
>
> (*b*) Does not deal or has not dealt or will not deal, or intends or undertakes or has undertaken or will undertake not to deal, with any person or class of persons, either in relation to any particular goods or generally ; or
>
> (*c*) Restricts or has restricted or will restrict, or intends or undertakes or has undertaken or will undertake to restrict, his dealing with any person or class of persons, either in relation to any particular goods or generally ; or
>
> (*d*) Is or becomes or has been, or has undertaken or will undertake to become, a member of a commercial trust ; or
>
> (*e*) Acts or has acted or will act, or intends or undertakes or has undertaken or will undertake to act, in obedience to or in conformity with the determinations, directions, suggestions, or requests of any commercial trust with respect to the sale, purchase, or supply of any goods."

In the opinion of their Lordships the facts of this case do not disclose any infraction of Section 3. That section provides that an offence is committed by any person who, either as principal or agent, in respect of dealing in any goods, gives, offers or agrees to give to any other person any rebate, refund, discount, concession, allowance, reward or other valuable consideration for the reason, or on the express or implied condition that the latter person does or does not do any of the things specified under heads (*a*), (*b*), (*c*), (*d*) and (*e*) in that clause.

The agreement of flour millers with Distributors, Limited, is said to show an offence under this section. If Distributors, Limited, fell within the description of " other person " mentioned in the first sentence of Clause 3 as the person to whom the consideration is given or promised, there would be abundant evidence of such an infraction. But the position of Distributors, Limited, was that of

mere agents for the millers, who were parties to the dealing in goods in respect of which the provisions of Clause 3 come into play. In the opinion of their Lordships that clause applies only to cases in which the consideration was given or the promise made to another party to the "dealing." Section 3 has no application to the case of an advantage given or promised by or on behalf of one of the parties to the dealing to his own agent. The essence of the offence in Section 3 is that the advantage must have been given or promised to a party to the dealing. It follows that the prosecution cannot rely upon Section 3.

Section 5 remains for consideration. It runs as follows:—

> "Any person who conspires with any other person to monopolize wholly or partially the demand or supply in New Zealand or any part thereof of any goods, or to control wholly or partially the demand or supply or price in New Zealand or any part thereof of any goods, is guilty of an offence if such monopoly or control is of such a nature as to be contrary to the public interest."

This clause deals with conspiracy to monopolize in New Zealand the demand or supply of any goods or to control the demand, supply or price. *if such monopoly or control is of such a nature as to be contrary to the public interest.* It is upon these last words that there has been in the Courts below so great a difference of opinion. The question is whether the monopoly or control which it was the object of the defendants to establish was of such a nature as to be contrary to the public interest. The legislature has not attempted to define the class or classes of monopoly or control which are to be deemed contrary to the public interest within the meaning of this clause. The Courts have to decide this question for themselves.

It is apparent that the effect of the Act is not to treat every monopoly or control as necessarily contrary to the public interest. No offence is committed against the enactment unless the maintenance or control is of such a nature as to be contrary to the public interest. The most obvious form of prejudice to the public interest would be if the effect of the monopoly were to cause an unreasonable rise of price in articles which are necessaries of life. There are in the Act sections dealing with the exaction of unreasonable prices fixed under the influence of any "Commercial Trust." *e.g.*, Section 6 and Section 7. but it is not charged against the defendants in the present case that the prices have been raised to an unreasonable point within the meaning of any such provision.

Of course, if the legislature of New Zealand or of any part of His Majesty's Dominions had enacted that any particular acts or omissions should stamp any monopoly or control as contrary to the public interest. every Court would be bound to give effect to such a law. But with regard to the transactions with which their Lordships are now concerned. the legislature has not taken this course: it is left to the Courts to ascertain in each case whether the nature of the monopoly or control is contrary to the public

interest as a matter of fact, or as a matter of law under some provision of the law, whether common law or statute.

It is not for this tribunal, nor for any tribunal, to adjudicate as between conflicting theories of political economy. Strong views may be entertained on the one side or on the other, but the one material question here is whether the monopoly or control is of such a nature as to be contrary to the public interest. The burden of establishing this is, of course, upon the party who asserts that the monopoly or control is of such a nature.

It is clear that the legislature had in view that there might be cases of monopoly or control which would not be contrary to the public interest, and that it is so contrary must be established in each particular case of prosecution in which it is sought to prove an offence under the Act. The burden of proof is, of course, upon the person who asserts any proposition, and this applies with special force when, as here, the commission of crime is in question. Their Lordships do not think that this proposition has been established in the present case, and for this reason, in their opinion, one essential element in the case for a successful prosecution is wanting. The point is one upon which opinions may differ, as a reference to the judgments of the Courts below in the present case will abundantly show.

It is now necessary to consider the course which the case has taken and the grounds on which the various Judges arrived at their conclusions.

In the Court of first instance Sim, J., dealt first with Section 3 of the Commercial Trusts Act, 1910. He pointed out that the agreement here is for the appointment of an agent for the sale of goods, not an agreement for the sale of goods, as in the *Coal Vend* case (*Adelaide Steamship Company* v. *His Majesty The King*) 15 C.L.R. 65, and *Attorney-General of Commonwealth* v. *The Adelaide Steamship Company*, 1913, A.C. 781, which had been relied on for the Crown. Sim, J., goes on to consider whether the monopoly and control in the present case are of such a nature as to be contrary to the public interest under Section 5. He gives the history of the agreement between the millers, which formed the subject of the prosecution, and on his consideration of the evidence held that the Crown had failed to establish its case. He therefore gave judgment for the defendants.

The case was taken on appeal to the Court of Appeal in New Zealand. The judgments revealed great diversity of view, not only as to the answer to be given, but also as to the point of view from which the question should be considered.

Stout, C. J., says, record, page 176 :—

> " It cannot therefore, in my opinion, be said that this contract was not of " " [such] a nature as to be contrary to the public interest. First, the Distributors Company had the power of fixing the price ; second, it had the power of fixing the amount of production, and where the production was to take place at different parts of the Dominion, and it had the power of declaring that flour produced in New Zealand must be exported (*see* paragraph 5). It was therefore a contract of such a nature as to be contrary to the public interest."

And, further, on page 177 at line 10 he said :—

" It is surely not necessary to show that the monopoly and control of food and its price are contrary to the public interest."

NOTE.—The insertion in the Record of the word "not" before "contrary" is an obvious misprint.

He therefore held that the offence had been committed under Section 5 of the Act.

Herdman, J., on the other hand, held that no offence under Section 5 had been proved, and pointed out that because there is some restraint of trade, it does not necessarily follow that a contract is detrimental to the public interest. In his opinion, no offence against the Act had been committed, as it was not shown that what had been done was prejudicial to the public.

Reed, J., arrived at the same conclusion as the Chief Justice, though not quite for the same reasons :—

" It is urged that this is necessary to the life of the flour-milling trade, that unrestricted competition in the past resulted in fluctuating prices of flour and, in some cases, in sales below a remunerative price.

" No doubt the law will uphold, in exceptional cases, an anti-competitive contract if it is clearly shown that unrestricted competition will result in ruin to private interests, and an ill-regulated supply, for such cannot be of advantage to the public. In the *Salt* case Viscount Haldane, L.C., said as follows (1914 A.C. 469) :—

" ' 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.' "

In the result Reed, J., gave judgment for allowing the appeal. After adverting shortly to the evidence as to the history of flour milling in New Zealand, he went on to say (page 195, line 29) :

" As, for eighty years, with open and unrestricted competition, flour millers were able to carry on without the suggested dire results following, it would require the most cogent evidence that circumstances had so changed that at the present day it would be ruinous to private parties engaged in the industry if a return to such unrestricted competition were made, before the Court should assist in imposing upon the public such an extremely detrimental monopoly. The evidence called entirely failed in that respect.

" For these reasons I think the appeal should be allowed."

MacGregor, J., was of opinion that the judgment of Sim, J., should be reversed. He said, with reference to Government control of flour supplies, that it was originally a war measure adopted in 1917, when shipping was almost unprocurable. This control had been continued year after year until apparently it had become intolerable, and after a reference to the evidence, went on (page 202, line 36) :—

" Is it not abundantly plain from all this that the aim and object of the flour millers was, when the Government monopoly ceased, to fasten on the public of New Zealand in their own interest a similar measure of monopoly, not public, but private, not conceived from any motive of public policy, but wholly self-serving and contrary to the public interest? In other words, they deliberately conspired together to perpetuate under their own control the State monopoly which the Government itself was about to abandon as undesirable in the public interest."

And on the next page, 203, line 27, goes on to say :—

> " A mass of evidence was produced in support of and against these grave allegations. I need not refer to that evidence in detail. In the result, I am of opinion that the main charges made by the Crown have been established as against the respondents. In most cases, indeed, the facts were indisputable."

Alpers, J., at the commencement of his judgment (Record, page 206) says :—

> " Three questions fall to be discussed on this appeal . . . in my opinion, each of these questions should be answered in the negative."

He also expressed his agreement with the judgment of Herdman, J., which already has been adverted to in this opinion. On the third question he expresses his agreement with the view of Sim, J., trial Judge.

In the result this case, which has occupied so much time in its progress through all the Courts, resolves itself into one question, namely, Has the prosecution established that on the facts of this particular case the monopoly or control was of a nature contrary to the public interest ? The question is, of course, such as to lend itself to prolonged discussion, and it has been fully and ably argued on both sides. In their Lordships' opinion, the question in the circumstances of the present case is really one of fact and cannot be decided merely as a matter of law. Their Lordships, after reviewing and weighing the evidence, have come to the conclusion that the prosecution has not discharged the burden of proof which lies upon it, and that the judgment of Mr. Justice Sim should be restored.

The respondent should pay the costs of the appeal.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

THE CROWN MILLING COMPANY, LIMITED,
AND OTHERS

v.

THE KING.

DELIVERED BY VISCOUNT FINLAY.

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