INDUCING BREACH OF CONTRACT — DEGREE OF INDUCEMENT NECESSARY TO ESTABLISH LIABILITY — KNOWLEDGE OF PRE-EXISTING CONTRACT — *Re HORNE & PITFIELD LIMITED* v. *WESTERN GROCERS LIMITED*

An unreported judgment of Milvain J. delivered from the Bench in the Supreme Court of Alberta on December 1, 1965, contains an interesting application in the field of contract of a doctrine not frequently relied upon. In *Horne & Pitfield Foods Limited* v. *Western Grocers Limited* the Plaintiff claimed damages from the Defendant on the ground that the Defendant had entered into a contract with a third party knowing of an already existing contract between the Plaintiff and the third party, and further knowing that the pre-existing contract would be breached by the third party's act of entering into the new contract with the Defedant. The relief sought by the Plaintiff, and granted by the learned trial Judge, was the award of damages based upon the tort usually known as inducing breach of contract.

The Plaintiff, engaged in the wholesaling of food products, operated in connection with its wholesale business a franchise program whereby it authorized the persons to whom it granted franchises to call their stores "I.G.A." stores, to sell merchandise bearing the "I.G.A." label, and to participate in I.G.A. advertising and promotion. In return the retailer would exclusively sell goods provided by the wholesaler. Among the terms of the franchise agreement was one providing that the retailer would not sell or dispose of his business without first communicating the terms of any offer to the Plaintiff wholesaler and giving it 15 days to match such offer.

The Defendant conducted a similar business and similarly granted franchises to retailers permitting them to operate as "Red & White" stores.

The third party involved was one Cole, a retailer franchised as an I.G.A. store by the Plaintiff. Cole approached the Plaintiff and advised that he was interested in disposing of his business, and asked the Plaintiff if it knew of any possible purchasers. The Plaintiff over the course of several months suggested several possible purchasers, but nothing materialized in respect of these suggestions.

In the meantime, one Milligan approached the Defendant and indicated that he would be interested in purchasing a store. Cole then contacted the Defendant and asked if the Defendant knew anyone who might buy his store. The result was that the Defendant negotiated with Milligan and Cole and arranged for a transaction in which the Defendant purchased Cole's store building, helped finance the purchase by Milligan of the stock and equipment of the store, and leased the store building to Milligan. Milligan agreed to operate the store as a Red & White store under one of the Defendant's' franchise contracts. Cole did not communicate to the Plaintiff the terms of the transaction and was thereby, as found by the learned trial Judge in an immediately preceding

trial, in breach of the first refusal provision in his franchise contract with the Plaintiff.

The Plaintiff was faced with two main problems in establishing the right to recover damages for the inducement of a breach of contract as against the Defendant. First, it was necessary for the Plaintiff to show on the evidence that the Defendant could be fixed with knowledge of Cole's contract with the Plaintiff and its breach. Second, the Plaintiff then had to show that the tort of inducing a breach of contract could apply in a situation where there was no evidence that the Defendant had expressly encouraged the third party in so many words to break his contract with the Plaintiff.

On the factual question, the learned trial Judge found that by reason of previous transactions between the Defendant and other retailers franchised to the Plaintiff, the Defendant must be found, despite its protestations of innocence, to have known that the Plaintiff had formal franchise contracts with its I.G.A. retailers and that these contracts contained provisions restraining the retailer from selling his business without giving the wholesaler a right of first refusal.

The legal question involved examination by the learned trial Judge of a number of authorities which have defined the extent of the tort of inducing breach of contract.

The first application in modern English law of the doctrine was in *Lumley* v. *Gye*.[1] In that case, the third party was an operatic singer who contracted to sing for the Plaintiff and then contracted with the Defendant. The Defendant was found liable for damages for having persuaded the singer to break her contract with the Plaintiff. The language of the majority judges in that case indicated that the essence of the tort was the procurement by the Defendant of the interference with the Plaintiff's contractual rights.

Once the doctrine was established that the procuring of the interference with contractual rights was a tort, the question which then arose in subsequent cases was whether the procurement had to be "malicious" in the sense in which that term is usually used in law. The suggestion that it need not be malicious appeared in the judgment of Crompton, J. in *Lumley* v. *Gye* where he said at page 752:

> . . . it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting . . .

In subsequent cases, it became clearly established that the words "wrongfully and maliciously" implied no more than that the Defendant knew of the Plaintiff's contract when dealing with the third party. For example, in *Quinn* v. *Leathem*[2] Lord Macnaghten said of *Lumley* v. *Gye*

> Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.

1 118 E.R. 749.
2 [1901] A.C. 495. 510.

Having once established the principle that the words "malicious" or "wrongful" merely involved knowledge that the action complained of violated the Plaintiff's contractual relations, it was still necessary to define what was meant by the words "procure" or "induce". Clearly, it would be a rather unusual principle of law if its application depended on whether the third party approached the Defendant first or the Defendant approached the third party first. In the case at hand, for example, it would be a strange result that the Plaintiff could recover damages if the Defendant had approached Cole and instituted the negotiations for the acquisition of the store but could not recover damages if Cole had initiated the negotiations.

This was clearly recognized and incisively dealt with by Jenkins, L. J. in *D. C. Thomson & Co. Ltd.* v. *Deakin*[3] as follows:

> With these two propositions in mind I turn to consider what are the necessary ingredients of an actionable interference with contractual right.
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> The breach of contract complained of must be brought about by some act of a third party (whether alone or in concert with the contract breaker), which is in itself unlawful, but that act need not necessarily take the form of persuasion or procurement or inducement of the contract breaker, in the sense above indicated.
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> Direct persuasion or procurement or inducement applied by the third party to the contract breaker, with knowledge of the contract and the intention of bringing about its breach, is clearly to be regarded as a wrongful act in itself, and where this is shown a case of actionable interference in its primary form is made out: *Lumley* v. *Gye*.
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> But the contract breaker may himself be a willing party to the breach, without any persuasion by the third party, and there seems to be no doubt that if a third party, with knowledge of a contract between the contract breaker and another, has dealings with the contract breaker which the third party knows to be inconsistent with the contract, he has committed an actionable interference: see, for example, *British Industrial Plastics Ltd.* v. *Ferguson*,[4] where the necessary knowledge was held not to have been brought home to the third party; and *British Motor Trade Association* v. *Salvadori*.[5] The inconsistent dealing between the third party and the contract breaker may, indeed, be commenced without knowledge by the third party of the contract thus broken; but, if it is continued after the third party has notice of the contract, an actionable interference has been committed by him: see, for example, *De Francesco* v. *Barnum*.[6]
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> Again, so far from persuading or inducing or procuring one of the parties to the contract to break it, the third party may commit an actionable interference with the contract, against the will of both and without the knowledge of either, if, with knowledge of the contract, he does an act which, if done by one of the parties to it, would have been a breach. Of this type of interference the case of *G.W.K. Ltd.* v. *Dunlop Rubber Co. Ltd.*[7] affords a striking example.
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> Further, I apprehend that an actionable interference would undoubtedly be committed if a third party, with knowledge of a contract and intent to bring about its breach, placed physical restraint upon one of the parties to the contract so as to prevent him from carrying it out.
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> It is to be observed that in all these cases there is something amounting to a direct invasion by the third party of the rights of one of the parties to the contract, by prevailing upon the other party to do, or doing in concert with him, or doing without reference to either party, that which is inconsistent with the contract; or by preventing, by means of actual physical restraint, one of the parties from being where he should be, or doing what he should do, under the contract.

Of this decision Johnson, J. A., of the Appellate Division of the Al-

3 [1952] Ch. 646, 693-5.
4 (1940), 1 All E.R. 479.
5 [1949] Ch. 556.
6 (1890), Ch.D. 430.
7 (1926), 42 T.L.R. 376.

berta Supreme Court said in *Bennett and White Alberta Ltd.* v. *Van Reeder et al:*[8]

> Since *D. C. Thomson & Co.* v. *Deakin* the law with respect to causing or procuring breach of contract can be said to be settled.

For the purposes of the Plaintiff in the case at hand the important point established by the *Deakin* case was that the "inducement" does not need to be in the nature of direct persuasion or procurement, but that the mere dealing with a contract breaker in a manner inconsistent with the contract is an actionable interference. Thus, it was found in the *Deakin* case to be actionable to do in concert with the contract breaker that which is inconsistent with the contract.

In *Horne & Pitfield Foods Limited* v. *Western Grocers Limited* Milvain, J. put it this way:

> It is my view that the legal concept, at the present time, in these actions of inducing might be resolved by saying the situation becomes actionable where a person having legal knowledge of the existence of a contract creates a reason for breaking it and that, consequently, it is broken.

It is submitted that this statement of the law is accurate and in line with the authorities above quoted. The expression "creates a reason for breaking it" would seem to apply to the situation where the Defendant is willing to contract with the third party knowing of the third party's prior contract, so that the willingness of the Defendant to contract with the third party in a way inconsistent with the prior contract does, indeed, "create a reason" for the third party to break his prior contract.

The final point of legal interest in the *Horne & Pitfield* case concerns the matter of the knowledge of the Defendant of the prior contract. In most of the cases above referred to, the state of mind of the Defendant has been said to be that he has "notice" or "knowledge" of the prior contractual right of the Plaintiff. However, it does not appear that in any of the cases there has been any exhaustive attempt to categorize the knowledge or notice as "actual", "implied", or "constructive".

In *Bennett & White* v. *Van Reeder*[9] counsel for the Defendant Union argued that the Union could not be guilty of inducing a breach of contract by causing the Plaintiff's workmen to leave the job, because there was no evidence tendered that the Defendants were aware of the contents of the employment contracts between the Plaintiff and its workmen and particularly of the clause therein requiring notice to be given when an employee left work of his own accord. This argument was given short shrift by Johnson, J. A. at page 333, where he said:

> This may be so, but the appellants knew that these men were under contract of employment and knowledge of the exact terms or conditions is irrelevant.

In the *Horne & Pitfield* case, the matter was put in this way by Milvain, J.:

> I am persuaded in this day and age in which one of the Commandments has been changed from 'Thou shalt not covet' to 'Thou shalt covet' the court should be more insistent on the preservation of the deep integrities which should be connected with contractual relations. I do not think it enough, in the presence of some agreement in the nature of a franchise agreement for the people dealing under those circumstances to merely be quietly assured that everything is all right without saying, 'Let us see the agreement' and finding out whether or not the course undertaken will or will not be in breach of it. I think that

8 (1956), 6 D.L.R. (2d) 326, 333.
9 *ibid.*

> is particularly so where the people dealing under the circumstances are such that they should be particularly placed on their alert as is the case here where both the plaintiff and the defendant were engaged in similar businesses, they knew of the practice carried out through these franchise agreements.

In view of the above authorities, it seems clear that the tort of inducing breach of contract would be established in Alberta if the Defendant is shown to have had knowledge of the existence of the contract, and if some responsibility for causing the breach can be imputed to him. The knowledge element is satisfied if the circumstances reasonably suggest the existence of a contract which might be breached should the third party enter into a contract with the Defendant; such circumstances would place an onus of inquiry upon the Defendant. The inducement element is satisfied if the Defendant merely "creates a reason for breaching" the contract, meaning he need not engage in actual procurement; mere willingness to enter into the contract with the third party is sufficient.

Thus, should a Defendant enter into an agreement with a third party which causes a breach of a pre-existing contract, the only available defence would be that he had made all bona fide efforts once put on notice of the probability of existence of a contract, to satisfy himself that the third person had discharged his contractual obligations to the Plaintiff.

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