

10/1946

M<sup>c</sup>CARTHY BROS. (MILK VENDORS) P/L

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THE DAIRY FARMERS CO-OPERATIVE MILK  
Co. LTD.

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Reasons for judgment.

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dated 7 Aug 1946

McCARTHY BROS. (MILK VENDORS) PTY. LTD.

v.

THE DAIRY FARMERS CO-OPERATIVE MILK CO. LTD.

McCARTHY BROS. (MILK VENDORS) PTY. LTD.

v.

THE DAIRY FARMERS CO-OPERATIVE MILK CO. LTD.

ORDER.

Appeal dismissed with costs.

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MCCARTHY BROS. (MILK VENDORS ) PTY. LTD.

v.

THE DAIRY FARMERS CO-OPERATIVE MILK CO. LTD.

REASONS FOR JUDGMENT.

LATHAM C.J.

The plaintiff failed in the Supreme Court by reason of illegality in the retail disposition by the plaintiff of the milk which the plaintiff had bought wholesale from the defendant. The Full Court stated as the basis of its decision that "the intention of one of the parties (the plaintiff Company) was that the goods should be used by it for an unlawful purpose". Further, it was said in the reasons for judgment that "On the conceded facts, all relevant contracts of sale and purchase were made in 1944 and were invalid because made solely for the purpose of its then illegal business by the plaintiff company". I am not prepared to affirm the judgment of the Supreme Court on the ground that the plaintiff in 1944 intended to resell the milk without a certificate and that the plaintiff, and apparently only the plaintiff, was therefore precluded from enforcing any rights under any contract with the defendant relating to the milk. I would not assent to this proposition without further consideration.

But I am of opinion that the appeal should be dismissed on the ground that the rebates claimed by the plaintiff are claimed in respect of sales by the defendant to the plaintiff (and therefore of purchases by the plaintiff from the defendant) which were made in breach of sec. 41(e) of the Milk Act 1931-42 - such sales in 1944 being the necessary basis of the claim. The plaintiff must rely upon these illegal sales in order to establish its case. In my opinion the appeal should be dismissed on this ground.

McCARTHY BROS. (MILK VENDORS) PTY. LTD.

v.

THE DAIRY FARMERS CO-OPERATIVE MILK CO. LTD.

JUDGMENT.

RICH J.

I agree that the appeal should be dismissed.

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McCARTHY BROS. (MILK VENDORS) PTY. LTD.

v.

THE DAIRY FARMERS CO-OPERATIVE MILK CO. LTD.

JUDGMENT.

STARKE J.

The appeal should be dismissed. It is plain under sec. 41 that the sale and supply of milk to a person carrying on a business of a milk vendor who is not the holder of a registration certificate is in contravention of the Milk Act. It is equally plain that a person carrying on business as a milk vendor unless authorised by registration certificate issued under the Act is also in contravention of the Act (see secs. 36 and 41(f)). There was no certificate of registration issued by the Board which covered the transactions in this case. So we have a sale and supply of milk to the plaintiff in contravention of the Act and for the purpose of carrying on his business as a milk vendor also in contravention of the Act. Nevertheless the plaintiff claims, under a precedent arrangement, a rebate on the purchase price of milk so sold and supplied to him.

But the plaintiff cannot recover rebates in respect of transactions that are unlawful and in contravention of the Act.

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McCARTHY BROS. (MILK VENDORS) PTY. LTD.

v.

THE DAIRY FARMERS CO-OPERATIVE MILK CO. LTD.

JUDGMENT.

McTIERNAN J.

I agree with what has just been said by my brother Starke.

It seems to me that the plaintiff is seeking in this action to recover from the defendant a rebate on, or in other words part of, the purchase money paid by the plaintiff to the defendant, under a contract between the parties, for the purchase of these goods, milk, for a purpose which this Act makes illegal. I think that nothing could be clearer than that money is not recoverable at law in such circumstances. The appeal should be dismissed.

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McCARTHY BROS. (MILK VENDORS) PTY. LTD.

v.

THE DAIRY FARMERS CO-OPERATIVE MILK CO. LTD.

JUDGMENT.

WILLIAMS J.

I can only construe the agreement pleaded in the declaration as an agreement that on each occasion that the plaintiff purchased bulk or bottled milk from the defendant the right to a rebate should be one of the terms upon which the milk was purchased. After the plaintiff had lost its certificate of registration it became illegal for it to carry on the business of a milk vendor or for the defendant to sell milk to it when it was carrying on this business. The plea alleges that the claim of the plaintiff arose out of the purchase of bulk and bottled milk for the purposes of its business and was sold by the plaintiff in the course of its business during a period when it was not registered.

As it was illegal for the defendant to sell and therefore for the plaintiff to purchase this milk the contracts of purchase, including the term relating to the rebate, were illegal contracts the terms of which/<sup>including the</sup>term in question the Court will not enforce.

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