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Keene Corporation v. R. W. Taylor Steel Company et al : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

KEENE CORPORATION,
a corporation,

Plaintiff and
Respondent,

vs.

Case No. 15787

R. W. TAYLOR STEEL
COMPANY, a corporation,
RALPH W. TAYLOR and
LOU JEAN M. TAYLOR,

Defendants and
Appellants.

FILED

JUL 28 1978

APPELLANT'S BRIEF

Clerk, Supreme Court, Utah

Appeal from Judgment of the Second Judicial
District Court, Weber County, State of Utah
The Honorable John H. Wahlquist

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APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action based upon contract seeking the recovery of the purchase price of goods sold to Grating, Inc., plus attorneys' fees and interest under trade account guarantees between the plaintiff-respondent Keene Corporation (hereinafter "Keene") and defendant-appellants R. W. Taylor

Steel Company, Ralph W. Taylor and Lou Jean M. Taylor (hereinafter "Taylors").

STATEMENT OF FACTS AND
DISPOSITION IN LOWER COURT

In 1965, Grating, Inc. was organized for the purpose of marketing, distributing and fabricating steel grating products including steel bar grating by Ralph W. Taylor, its President and Chief Executive Officer. At this time, Grating Inc. entered into an agreement with Keene to become a distributor of its grating products. As a result, Grating, Inc. began and continued to purchase substantially all of its steel grating from Keene and continued to do so up until April 18, 1975.

On April 26, 1973 R. W. Taylor Steel, Ralph W. Taylor and Lou Jean M. Taylor entered into two agreements with Keene guaranteeing Grating, Inc.'s trade account with Keene.

Throughout the period of time Grating, Inc. purchased its grating from Keene and particularly in the later part of 1974 and early 1975 Keene represented to Grating, Inc. that Grating, Inc. was purchasing steel grating from Keene at prices as low or lower than available from competing manufacturers.

In late 1974 and early 1975 Grating, Inc. discovered that, contrary to Keene's representations Keene, had been selling grating to Grating, Inc. at prices well above prices

at which other manufacturers were selling the same products to Grating, Inc.'s competitors.

As a result of this discovery as well as other facts which are set forth in the Preliminary Statement Concerning Grating, Inc.'s Federal AntiTrust Claims on pages 8 and 9 of this brief, Grating terminated its relationship with Keene and on April 18, 1975 filed suit in the United States District Court, District of Utah, Northern Division (Grating, Inc. v. Keene Corporation and Harsco, NC-75-21) alleging that Keene and a competing manufacturer by the name of Harsco had violated the federal antitrust laws in their dealings with Grating, Inc.

Between March 31, 1975 and April 16, 1975 Grating received deliveries of steel grating with a total purchase price of \$66,674.16.

Because Grating, Inc. felt that it had been overcharged by Keene on these purchases as well as many prior purchases that had been paid for in full resulting in damages to Grating well in excess of \$66,674.16, Grating did not pay for these shipments.

Keene filed a counterclaim against Grating, Inc. in the federal antitrust action for the amounts of the unpaid deliveries and on July 31, 1975 filed this action against the Taylors as trade account guarantors of Grating, Inc. In

their answer to Keene's Complaint in this action the Taylors set forth several affirmative defenses, including defenses that the contracts for purchase of these unpaid deliveries were illegal in that they are in violation of federal antitrust laws and were therefore unenforceable and further that Keene breached its contract with Grating, Inc. in that a condition to the contract of sale was that Grating, Inc. would be charged no more than that charged by competing manufacturers for similar goods and that Grating, Inc. has a valid set-off exceeding the amount claimed by Keene.

On October 4, 1976 Keene filed a Notice of Readiness For Trial. (Record, p. 77). In response the Taylors filed a Motion to Stay the Proceedings until resolution of the federal anti-trust action. (Record, p. 78).

On December 30, 1976 the court ruled that the action would proceed to trial on all issues except the defenses based upon violations of federal antitrust laws. (Record, pp. 110-111).

On February 17, 1977 Keene filed a motion for Summary Judgment on the ground that as a matter of law antitrust violations may not be asserted as a defense to a contract action. (Record, pp. 128-129).

On June 28, 1977 the court ordered that its previous order staying a determination of the defenses based on

antitrust violation would be vacated and ordered that a pretrial conference be held at which time Keene's Motion for Summary Judgment would be heard. (Record, pp. 161-162).

On October 25, 1977 the court, after the pre-trial hearing, ordered that Taylors' defense based on violation of federal antitrust laws be stricken on the ground that they are not available as a matter of law and that the case proceed to trial on the issues of whether a condition of the contract was that Grating, Inc. would not be charged more than that charged other customers of Keene and whether Grating, Inc. would not be charged more than that charged by competing manufacturers. (Record, pp. 164-166).

On November 10, 1977 the court entered a further order granting Partial Summary Judgment in the amount of \$40,000.00 in favor of Keene, representing the agreed reasonable value of the goods sold to Grating, Inc. and dismissed the defense that Grating, Inc. would be charged no more than other customers of Keene.

The court further ordered that the case should proceed to trial on the single issue of whether Grating, Inc. was entitled to deduction because of the defense that a condition of the contract was that Grating, Inc. would not be charged more than that charged by other manufacturers of similar goods. (Record, pp. 185-188).

A non-jury trial of this action was held on November 29 and 30, 1977.

On January 13, 1978 the court filed a Memorandum Opinion in which the court concluded Keene had in fact represented and assured Grating that it was receiving a "competitive price" but these misrepresentations were a breach of a moral obligation and not a legal obligation. The court concluded that the law of sales and the statutes involved would not prevent Keene from benefiting from breach of moral trust. The court invited the plaintiff to prepare findings of fact and conclusions of law consistent with this opinion. (Record, pp. 189-192).

On January 24, 1978 Findings of Fact and Conclusions of Law and a Judgment in the amount of \$66,674.16 together with prejudgment interest in the amount of \$10,334.47 and post judgment interest at eight percent was entered. (Record, pp. 223-225).

On January 26, 1978 Keene filed a Motion for Costs including a reasonable attorney's fee. (Record, pp. 198-199).

On January 27, 1978 the Taylors filed an Objection to Keene's Memorandum of Costs together with a Motion to Have the Costs Taxed by the Court. (Record, p. 205).

On February 3, 1978 the Taylors filed a Motion to Alter

or Amend Judgment and Findings of Fact and Conclusions of Law. (Record, p. 208).

On March 17, 1978 a Judgment was entered awarding Keene attorneys' fees in the sum of \$14,501.16 and costs in the amount of \$334.10 together with interest at the rate of eight percent per annum. (Record, pp.245-246). Additionally the Findings of Fact and Conclusions of Law relating to the Judgment for attorneys' fees was entered on March 17, 1978 (Record pp. 242-244) together with an Order denying Taylors' Motion to Alter or Amend Judgment and Findings of Fact and Conclusions of Law. (Record, pp. 237-238).

On April 17, 1978 the Taylors filed an Amended Notice of Appeal appealing from the court's Order dated October 25, 1977, the Order in Partial Summary Judgment dated November 10, 1977, the Judgments and Findings of Fact and Conclusions of Law dated January 24, 1978 and March 17, 1978 and the Order dated March 17, 1978. (Record, p. 248).

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the court's Order of October 25, 1977 striking the defenses based upon antitrust violations; a reversal of the Judgment together with Findings of Fact and Conclusions of Law dated January 24, 1978; a reversal of the Judgment together with Findings of Fact and Conclusions of Law dated March 17, 1978 and a reversal of

the Order dated March 17, 1978.

Further the appellant seeks an order remanding the case to the district court with instructions to stay all proceedings including any proceedings to collect the Partial Summary Judgment for \$40,000 until the completion of the federal antitrust action.

PRELIMINARY STATEMENT CONCERNING
PENDING FEDERAL ANTITRUST CLAIMS

The critical issues raised by this appeal result from the pendency of an antitrust action in the Federal District Court for the District of Utah, Northern Division, entitled Grating, Inc. v. Keene Corporation and Harsco, NC-75-21.

Due to its relevance in determining these issues a brief explanation of Grating, Inc.'s claims against Keene in the federal action is warranted.

As previously stated, in 1965 Grating, Inc. became a distributor of grating products for Keene and has purchased substantially all of its grating from Keene from 1965 to April, 1975. Commencing in approximately 1971 and continuing until Grating, Inc. ceased dealing with Keene in April, 1975, Keene required Grating, Inc. to resell the grating products purchased from Keene to its customers at prices fixed by Keene and a competing manufacturer by the name of Harsco.

Commencing in late 1973, after the Taylors had entered into the trade account Guarantee Agreements with Keene, Keene began a series of price hikes, raising the prices at which Grating, Inc. was purchasing the grating products from Keene to levels well above the prices competing manufacturers were selling the same products to Grating's competitors.

At the same time Keene assured Grating that it was receiving a "competitive price".

In the federal action Grating has alleged that these price increases were an integral part of a scheme whereby Keene and Harsco fixed the price at which its agents and distributors, including Grating, Inc. could resell their product thus dividing the market. Then Keene increased the price at which Grating, Inc. would buy the products from Keene. The purpose of this scheme was to insure that Grating, Inc. would keep its relative share of the market but also insure that the profits would be passed onto Keene.

Additionally Grating, Inc. has alleged that Keene prevented Grating from purchasing grating from other manufacturers by conspiring with other manufacturers or suppliers to either not sell to Grating or to sell at prices at or higher than Keene's price to Grating, Inc.

As a result of these violations Grating, Inc. is claiming damages to its business in excess of One Million Dollars.

POINT I

THE LOWER COURT ERRED IN RULING AS A
MATTER OF LAW THAT ANTITRUST VIOLATIONS
CAN NEVER BE A PROPER DEFENSE IN A CON-
TRACT ACTION.

15 U.S.C. §1 states that "Every contract ... in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Similarly, Utah Code Annotated §50-1-1 (1953, as amended) provides that "Any combination by persons having for its object or effort the controlling of the prices of ... any article of manufacture or commerce ... is prohibited and unlawful." And, Section 50-1-6 of the Utah Code declares that "Any contract or agreement in violation of any provision of this chapter shall be absolutely void." (Emphasis added).

During the entire course of this action there has been an antitrust action pending in the U.S. District Court of Utah, Northern Division, entitled Grating, Inc. v. Keene Corporation and Harsco, Civil No. NC-75-21, filed April 28, 1975. The appellants in the present appeal are the plaintiffs in the federal antitrust action, and are alleging in that action that Keene Corporation is guilty of a price fixing scheme which greatly raised the price at which appellant could purchase grating. If this allegation is found to be correct, then the contracts under consideration in this case would be illegal, void and of no effect since

they made up part of the alleged inflated price umbrella.

However, this defense of illegality and antitrust violation was stricken by the lower court in its Order of October 25, 1977:

IT IS FURTHER ORDERED that plaintiff's Motion for Summary Judgment insofar as it seeks to have stricken any defense or set off including the First, Second and Fourth Affirmative Defenses in the Answer based in whole or in part on the antitrust laws of the United States is granted on the ground that such defenses are not available to defendants as a matter of law. (Record, p. 165).

Ruling as a matter of law that an antitrust violation is not available as a defense was totally improper.

A. Antitrust Violations Have Been Allowed As Defenses To Contract Actions.

Although it is concededly true that "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor," Kelly v. Kosuga, 358 U.S. 516, 518 (1959), there have been cases which have held the defense to be perfectly valid. The reason so much confusion exists as to whether the defense should be allowed in a contract action was stated by one commentator: "Though a rose is always a rose, contracts are of different types, and antitrust violations take many forms." Sobel, Antitrust Defenses to Contract Actions: A Question of Policy Priorities, 16 Antitrust Bull. 455 at 456 (1971).

Keene Corporation, in its Memorandum in Support of Its Motion for Summary Judgment, filed February 17, 1977 (Record, pp. 120-127), cites a number of U.S. Supreme Court cases which have not allowed the defense of antitrust violation in a contract action. However, since all contracts and all antitrust violations are somewhat different, the cases cited by Keene and presumably relied upon by the lower court should be examined to see if they are controlling in the present case.

It would seem obvious that in order for an antitrust violation to be allowed as a contract defense, there should first be a violation. Yet in many of the cases relied upon, the court held that there was not a clear violation of the antitrust laws: A. B. Small Co. v. Lamborn & Co., 267 U.S. 248 (1925); D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S. 165 (1915); Dickstein v. Dupont, 443 F.2d 783 (1st Cir. 1971). Two of the cases relied upon involved violation of the Robinson-Patman Act which the court has made clear will never be a defense to contract actions: Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947); Exxon Corp. v. Time Industries, Inc., 1974-1 Trade Cases, ¶74,926 at 96,146 (E.D. Mich. 1974).

In a couple of the cases cited by Keene in its memorandum, the contracts in question were held to be clearly

collateral to, and quite distinct from, the alleged anti-trust violations. In these cases the court enforced the contract to prevent the unjust enrichment of allowing a person to receive another's property without making payment therefore. Kelly v. Kosuga, 358 U.S. 516 (1959); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902).

There have been cases, however, with remarkably similar fact situations to the case under appeal here, in which the defense has been upheld. See Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227 (1909); Marathon Oil Co. v. Hadley, 197 S.W.2d 883 (Tex. Civ. App. 1935).

In the Continental Wall Paper case, the plaintiff and defendant entered into an agreement whereby the defendant wall paper distributor was to purchase all of its requirements from the plaintiff for a price to be established by the plaintiff. The plaintiff was part of a combination which had been raising the price of wall paper in violation of the antitrust laws. The plaintiff delivered wall paper to defendant who refused to pay the inflated price demanded by the plaintiff.

In an action for the price of goods sold and delivered, the U.S. Supreme Court held that the defendant could validly raise the defense of antitrust violation, which would prevent the plaintiff from recovering the fixed and exces-

sive price. In so holding the majority declared that a court should not:

... lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which as between man and man he ought perhaps, to pay ... 212 U.S. at 262.

The Marathon Oil Co. case, supra, was an action against the guarantors of an oral trade account whereby the buyer was to purchase gas and oil exclusively from the plaintiff seller and re-sell the product at prices fixed by the plaintiff. The court held that the contract violated the state antitrust laws and was thus illegal and void. The court further held that the plaintiff seller could not recover the price of goods sold and delivered from the guarantors when the primary agreement violated the antitrust laws: "The contract of Mrs. L. M. Hadley to guarantee the payment for purchases thereafter to be made by J. Hall Hadley was tainted with the same vice of illegality as that inuring in the original contract with J. Hall Hadley." 107 S.W. 2d at 886.

These cases show that under the proper circumstances a defense of antitrust violation is totally proper in a contract action. In the case E. Bement & Sons v. National Harrow Co., 186 U.S. 70 (1902), the U.S. Supreme Court stated: "[A]nyone sued upon a contract may set up as a

defense that it is a violation of the act of Congress [Anti-trust laws], and, if found to be so, the fact will constitute a good defense to the action." Id. at 88.

B. It Would Be Consistent With Public Policy To Allow The Defense In This Case For Any Alleged Liability Greater Than The Fair Market Value Of The Goods Sold And Delivered.

On October 31, 1977, the lower court heard argument on Keene's Motion for Summary Judgment, and granted Keene Partial Summary Judgment in the amount of \$40,000, the undisputed fair market value of the grating sold and delivered. (Record, p. 172). After granting the partial summary judgment, the lower court should have ordered the action for the balance of the alleged \$67,674.16 stayed pending the resolution of the federal antitrust action. This would have been consistent with the policies of preventing unjust enrichment and not having a court enforce illegal agreements.

A recent Law Review note outlined the two basic policy considerations involved with determining whether an antitrust violation should be a defense to a contract action as:

1. Whether either of the parties would be unjustly enriched by upholding or dismissing the defense; and
2. Whether dismissal of the defense would make the court a party to the illegality. Note, Anti-trust Violation as a Defense to Breach of Contract: An Expanded Policy Analysis, 30 U. of Miami L. Rev. 1053 at 1055 (1976).

In the present case, neither of the parties would have been unjustly enriched by upholding the defense after the partial summary judgment was entered for \$40,000, and staying the action pending a resolution of the antitrust claims. All of the cases which have denied the defense in holding or dicta have been concerned with the balancing problem explained by Justice Holmes' dissent in the Continental Wall Paper case, supra:

... the policy of not furthering the purposes of the trust is less important than the policy of preventing people from getting other people's property for nothing when they purport to be buying it. 212 U.S. at 270-271.

Thus, in deciding whether or not the defense of anti-trust violation should be allowed in any particular case, a court should balance the policy of not judicially furthering the purposes of the illegal trust or combination, and the policy of preventing unjust enrichment. Applying this balancing standard to the present case, it becomes clear that after the partial summary judgment there was no possibility of unjust enrichment--Keene Corporation received judgment for the value of the goods sold and delivered to Grating, Inc. At that point the policy of not allowing the courts to further the purposes of unlawful trusts should have become of dominant concern, and the court should have ruled that the defense would be available pending a determination in federal court of whether there was actually a

violation of the antitrust laws.

By not staying the action, and by awarding Keene Corporation the full \$67,674.16 plus costs and attorney's fees, the lower court was in a sense a party to the alleged illegal price fixing scheme of Keene. If it is shown in the federal antitrust action currently pending that Keene was guilty of unlawfully fixing prices, then the lower court here will obviously be a party to that scheme by enforcing a contract for the illegally inflated price.

All of the commentators writing directly on the subject agree that the most important considerations in determining whether or not to allow a defense of antitrust violation in a contract action are prevention of unjust enrichment and not allowing a court to enforce illegal agreements. See: Note, 30 U. of Miami L. Rev. 1053 (1976), supra; Sobel, Antitrust Defenses to Contract Actions: A Question of Policy Priorities, 16 Antitrust Bull. 455 (1971); Comment, The Defense of Antitrust Illegality in Contract Actions, 27 U. Chi. L. Rev. 758, 766 (1960); Note, The Supreme Court, 1958 Term, 73 Harv. L. Rev. 126, 203-206 (1959); Lockhart, Violation of the Anti-Trust Laws as a Defense in Civil Actions, 31 Minn. L. Rev. 507, note 85 at 523 (1947). These writers generally agree that the best solution to this type of problem in a case involving goods sold and delivered, is to void the

contract and allow some type of quantum meruit recovery based on the value of the goods.

Both of the important policy objections could have been realized by granting a stay, which appellant moved for November 9, 1977, pending a determination of whether Keene violated the antitrust laws. If it is found in the Federal court action that the contract with Keene did violate the antitrust laws then Keene should only be allowed to recover the \$40,000 representing the value of the grating materials sold. An award of any greater amount would be unjust enrichment for Keene, and would make the court a party to the unlawful scheme.

Since antitrust violations are not cognizable in state courts (15 U.S.C. §15; see also, Sobel, 16 Antitrust Bull. 455, 468-475, supra), the only proper course of action would have been a stay pending a resolution of the Federal action.

POINT II

THE LOWER COURT'S MEMORANDUM OF DECISION STATING THAT EQUITY WILL NOT STOP A CORPORATION DEALING WITH ANOTHER ON A FRIENDSHIP BASIS FROM BENEFITING BY ITS BREACH OF MORAL TRUST, AND DECLARING THAT THERE WAS NO LEGAL RELATIONSHIP BETWEEN THE PARTIES, IS CONTRARY TO THE LAW AND CONTRARY TO THE JUDGMENT AWARDING KEENE CORPORATION \$66,674.16.

In its Memorandum of Decision dated January 12, 1978, the lower court stated:

7. The problem which has caused the Court to study the issues in this case at length might be stated as follows: "When the executives of two corporations deal with one another on a friendship basis, with no legal relationship between them, but in a close human personal trusting relationship, and one does not make a full disclosure but takes a limited advantage of the relationship, will equity step in and stop that corporation from benefiting by breach of moral trust?" The Court concludes that the law of sales and the statutes involved require the answer to be "no". (Record, pp. 191-92; emphasis added).

This statement raises two important questions:

- A. Should one party to a contract or agreement be allowed to benefit by its own breach of moral trust?
- B. Was the relationship between Keene Corporation and Grating, Inc. a legal relationship or was it based on friendship alone?

A. Should One Party To A Contract Or Agreement Be Allowed To Benefit By Its Own Breach Of Moral Trust?

Utah Code Annotated §70A-1-203 provides: "Every contract or duty within this act [Commercial Code] imposes an obligation of good faith in its performance or enforcement." "Good faith" is defined in Utah Code Annotated §70A-1-201(19) as "honesty in fact in the conduct or transaction concerned".

The testimony at trial and the court Memorandum Opinion shows that certain officers of Keene repeatedly assured officers of Grating, Inc. that the price at which Keene was selling grating products was competitive. (See Transcript,

pp. 15-19, 21-24, 75-79, 127-133, 160, 150-151). The officers of Keene also told those of Grating, Inc. not to bother shopping around for lower prices, since no other manufacturer could offer them a better price. (Transcript, pp. 15-19). The testimony and evidence also show very clearly that Keene's prices were not in fact at all competitive, and Grating, Inc. had been deliberately deceived all along. (Transcript, pp. 45-47, 50, 130-131, 155, 161).

In paragraph 7 of its Memorandum of Decision, quoted above, the court finds that Keene did not make a full disclosure to Grating, Inc., breached a moral trust, and took advantage of the relationship between the two corporations. This is not "honesty in fact", and is a clear breach of the statutory obligation of good faith in the performance of a contract or other duty.

The lower court should not have allowed Keene to recover on a contract which it has admittedly breached. At the most, Keene should have been awarded a quantum meruit recovery for the actual value of the goods, which was agreed to be \$40,000. To allow Keene to recover the full contract price when it acted with admittedly bad faith would be inequitable and would encourage bad faith performance in the future.

B. Was The Relationship Between Keene Corporation And Grating, Inc. A Legal Relationship Or Was It Based On Friendship Alone?

The lower court's classification of the relationship

between Keene and Grating as one based on friendship and a close human personal trust, rather than as a legal relationship, raises a rather interesting paradox.

If the relationship was a legal one based on contract, then Keene should not be allowed to recover on the contract because of its breach of the obligation of good faith as already discussed.

On the other hand, if the relationship was based solely on friendship with no legal obligations incurred by either party, then Keene should not be allowed to come into court claiming breach of a contract and seeking damages. If Keene had only a moral obligation with Grating, then Grating had only a reciprocal moral obligation to pay the reasonable value of the goods sold and delivered.

The apparent paradox created by the lower court's classification of the relationship as purely moral can be easily resolved. If it is determined that a legal relationship existed between Keene and Grating, then Keene's recovery would be limited to the reasonable value of the goods sold and delivered because of its breach of the statutory obligation of good faith. On the other hand, if the relationship is determined to be non-legal, but moral and personal, then Keene should not be allowed to recover the contract price of goods sold and delivered, since it is elementary law that

between Keene and Grating as one based on friendship and a close human personal trust, rather than as a legal relationship, raises a rather interesting paradox.

If the relationship was a legal one based on contract, then Keene should not be allowed to recover on the contract because of its breach of the obligation of good faith as already discussed.

On the other hand, if the relationship was based solely on friendship with no legal obligations incurred by either party, then Keene should not be allowed to come into court claiming breach of a contract and seeking damages. If Keene had only a moral obligation with Grating, then Grating had only a reciprocal moral obligation to pay the reasonable value of the goods sold and delivered.

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Twenty, Twenty-Three, Twenty-Four, Twenty-Five, Twenty-Six, Twenty-Eight, Twenty-Nine and Thirty and not supported by either the Record of the court's Memorandum Opinion.

It is evident from an examination of the Findings of Fact filed on January 24, 1977 that Keene is attempting to go beyond the issues in this case and assert Findings of Fact that may be favorable in the federal antitrust case regardless of whether the specific findings are supported by the evidence in this case.

The court erred in not amending these findings in a manner consistent with its opinion and the Record as requested by the Taylors' Motion to Alter or Amend.

CONCLUSION

This case is not a simple action for the purchase price of goods sold and delivered. A highly complex dimension is added to this case by the fact that a highly complex price fixing scheme is inextricably intertwined with contracts for the purchase of goods from Keene by Grating, Inc.

Although the law is unclear as to what type of antitrust violations can be asserted as a defense to a contract action it is clear that in a proper case such violations can be asserted as a defense.

In this case, having entered an Order for Partial Summary Judgment for the fair value of the goods received by

Grating thus preventing any possibility of unjust enrichment by Grating, Inc., the court erred in refusing to stay the action pending the outcome of federal antitrust action and in striking the Taylors defense based on these violations as not being available as a matter of law.

Further the court clearly erred in its conclusion that the law of sales will not prevent a party to a contract from benefiting from its own breach of moral trust.

Consequently, this court should reverse the District Court's Order of October 25, 1977 striking the defenses based upon antitrust violations, reverse the Judgment together with Findings of Fact and Conclusions of Law dated January 24, 1978; reverse the Judgment together with Findings of Fact and Conclusions of Law dated March 17, 1978 and reverse the Order dated March 17, 1978.

Further this court should remand the case to the District Court with instructions to stay all proceedings, including any proceedings to collect the Partial Summary Judgment for \$40,000, until the completion of the federal antitrust action.

DATED this 26 day of July, 1978.

SNOW, CHRISTENSEN & MARTINEAU

By 

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