

HORGAN v. BAXTER



THE HIGH COURT

1979/380P

BETWEEN/

JOHN HORGAN

Plaintiff

and

JOHN BAXTER

Defendant

Judgment delivered on Tuesday the 11th day of May, 1982 by Miss Justice Carroll

APPEARANCES

FOR THE PLAINTIFF:

Mr. Hill, S.C.

Mr. de Valera, B.L.

(Instd. by J. J. Early & Co.,
Solrs.)

FOR THE DEFENDANT:

Mr. O'Driscoll, S.C.

Mr. O'Flaherty, S.C.

Miss Ervine, B.L.

(Instd. by P. J. O'Driscoll
& Son, Solrs.)

JUDGMENT

This matter comes before me on a Memorandum from the Examiner seeking the directions of the Court in relation to five specific questions and in order to answer those questions I have to decide certain questions of fact:

Firstly, did the defendant buy cattle at the average price quoted in the invoices to Mr. Cassese (as claimed by the defendant) or did he buy cheaper and thus make an extra profit (as alleged by the plaintiff)?

Secondly, what was the weight of the cattle shipped out to Mr. Cassese?

Thirdly, can the accounts and documentation submitted by the defendant be relied on?

Fourthly, was the agreement with Doctor Soprina to give him one per cent of the total purchase price (as alleged by the Defendant) or was there an agreement with Doctor Soprina to give him fifteen hundred pounds, a thousand pounds and a thousand pounds on the three shipments respectively (as alleged by the plaintiff)?

Fifthly, did the defendant agree to pay the M C A money to Mr. Cassese?

Sixthly, is the defendant accountable to the plaintiff for M C A

money received and not paid over to Mr. Cassese?

Seventhly, was there a secret profit (as alleged by the Plaintiff) because cattle were described as being under six cwt. and thus avoided Italian customs duty at eight per cent?

I will dispose of the shorter answers first.

In relation to question seven, there is no evidence that any Italian duties were avoided which should have been paid. There is no evidence there was any arrangement between Mr. Cassese and the defendant for payment of monies to the defendant over and above the amount in the invoices and paid through the Letters of Credit.

In relation to the fifth question, I am satisfied that the defendant agreed to collect and transmit the M C A payments to Mr. Cassese. This is supported by the correspondence and also there was no evidence that the M C A payments were for the benefit of the Irish exporter only and should be paid only to him.

In relation to the sixth question, the defendant obtained the sum of eleven thousand seven hundred and one pounds thirty-six pence as Monetary Compensation Amount in respect of the first shipment and he received it a year later. He said he did not transmit it as there had been a falling out with Mr. Cassese and he considered Mr. Cassese was in

breach of contract as he failed to lodge ten thousand pounds as security capital with the Allied Irish Bank in Cork as provided in the Contract. Also Mr. Cassese discontinued ordering cattle from the defendant although he had been appointed sole agent. I will not pronounce on whether Mr. Cassese was in breach of contract or not, in the absence of evidence from him, but, in the event, he did nothing to claim the M C A and his claim, if any, would appear now to be statute barred. But the defendant cannot claim to be entitled to it alone. In so far as the monies were properly obtained as M C A payments the plaintiff is entitled to half as a partner of the defendant in the Italian venture. But the money obtained was obtained on a document in which the weights were not stated in accordance with the invoice. Since the M C A is calculated on an amount per cwt. or kilogramme the weight is an essential part of the claim. Total numbers, weight and total value were shown on the invoices furnished to Mr. Cassese. The shipping agents of the defendant filled in C U 29 forms which also showed weights and value which differed in each case from the invoices. The explanation given by Mr. Ryan on behalf of the agents, Cuddys, was that the agents estimated the weight and price but that the number was correct. He said they were not supplied with information regarding weights and prices. There is a second C U 29 form in respect of the first shipment which

did not go through the system, (that is Customs and Excise, Revenue Commissioners and Collector of Customs and Excise) and in this, the total weight and price differs again. The documents on which the claim for M C A payments was made are a claim form together with a Declaration and Control form. The claim form is for one thousand two hundred and nineteen cattle at £1.45 per cwt. equalling £11,698.60 signed by the defendant and dated the 15th of May, 1973. The Declaration and Control form is for one thousand two hundred and nineteen cattle, weight eight thousand and sixty-eight cwts. two lbs. or 409,855.2 kilogrammes. This is signed by the defendant and dated 15th May, 1973. There is a hand written addition to the claim form which the defendant said is not in his writing, namely 4,098.55 multiplied by 2.855 and in the next column £11,701.36. The explanation of this is that the M C A was paid not at the rate of £1.45 per cwt. but at the rate of £2.855 per hundred kilogrammes. Hence the calculation 4,098.55 multiplied by 2.855. The calculation of monies due on the form is based on the weight in kilogrammes declared in the Declaration and Control form. The Declaration and Control form, when originally sent into the Department of Agriculture and Fisheries, was returned to Customs with a query. Apart from the official section not having been properly completed, the Department raised the

query why one thousand two hundred and nineteen cattle were shown in the Declaration and Control form when one thousand two hundred and twenty-five cattle were shown on the Export Specification, that is C U 29 form. A note on the file from the Customs official confirms that twelve hundred and twenty-five cattle were sent on the ship. Also on file is a photostat of the second C U 29 form showing twelve hundred and twenty-five cattle with the weight of 409,855.2 kilogrammes. Mr. Darcy of Customs and Excise thought that the second form may have come into existence when the query came back from the Department of Agriculture and Fisheries. He thought the Customs official would have contacted the agents again who then filled out the second form. This is also signed by Alex Kavanagh. It seems the likely explanation as the defendant said he never saw a C U 29 form. It would mean that the weight on the second C U 29 form was copied by Mr. Kavanagh from the weights given in the Declaration and Control form and this was then stamped by the Customs officer when he put the missing date stamps on the Declaration and Control form. If the invoice to Mr. Cassese is correct, the claim for M C A was made for an extra thousand cwt. that is 8068 cwt. where the invoice is for 7068 cwt. The defendant must bear responsibility for having made a claim in excess of the invoiced weight. Therefore the monies due to the Department of

Agriculture and Fisheries in respect of the over-payment must be deducted before the M C A money is divided between the plaintiff and the defendant.

I might also conveniently deal with weights here, namely, what weight of cattle were sent. Mr. Cassese was invoiced for a given weight. He does not appear to have queried this. There is no evidence that money payments from Mr. Cassese other than those on foot of the Letters of Credit were made. On the balance of probabilities I would hold that the weights shown in the invoices were approximately the weights sent, otherwise I feel sure Mr. Cassese would not have continued this order. The last letter from Doctor Soprina mentions mortality in the cattle but there is no query as to weight. Therefore even though the C U 29 forms differ in regard to weight it seems to me that the weight sent was approximately the weight shown in the invoices.

With regard to payments to Doctor Soprina, the defendant said he agreed to pay one per cent to him. He said he gave it in cash in English currency after every shipment either at the North Wall or in a hotel. In support he produced an undated, unsigned, typed document on his headed notepaper. He said the payments would be shown in the books of the Company. His accountant however was unable to confirm this as he said he had not been shown the books of the Company. The plaintiff said

there was an agreement to give what was in effect a backhander to Doctor Soprina but it was £1,500, £1,000 and £1,000 in respect of the three shipments. I am satisfied there was an agreement to pay a backhander to Doctor Soprina without the knowledge of his principal, Mr. Cassese, but I don't find the typewritten document credible. I cannot believe that Doctor Soprina would want written proof of his double dealing and he could hardly sue on it. Neither do I find the agreement to pay one per cent credible. Accordingly the refund of VAT amounting to £4,235.76 must be accounted for less £3,500 paid to Doctor Soprina.

Lastly I have to decide to what extent reliance can be placed on documentation supplied and whether cattle were bought at a cheaper rate than the rate invoiced to Mr. Cassese. The defendant claims the agreement with Mr. Cassese was cost plus four per cent plus expenses. The contract produced shows that Mr. Cassese is to furnish a written request for cattle specifying the weight and price and that the defendant or his agents were to purchase them. He said he did this. The plaintiff alleges that the defendant bought at lower prices than the prices quoted to Mr. Cassese and this is a secret profit. The defendant has produced some documentation such as sales bills from various marts

some of which are to him or to his Company and others to other named individuals. At first he said he had several people buying for him but couldn't name them. Later he said only his brother bought for him and the other transactions were where he bought from dealers himself. He said the dockets were what he asked the dealers to give him as proof of weight and price in case the Italian asked (which he never did). He disclaimed any responsibility for the content in those dockets. He later said he couldn't swear to any of the dockets referred to in Court being referable to the shipments. His accountant, Mr. Brian Morley, said he had tendered documents to the plaintiff's accountant for the purchase of cattle before, during and after the time to give an idea of the price. The defendant said he had found the documents in a drawer at home in a search for papers relating to the claim. Two of the bills produced were typed on Dungannon Farmers Mart paper for sales to Shaun McCullagh on the 22nd of May, 1973. Mr. Edmond Wiley, co-owner of the mart, and Mr. Shaun McCullagh both gave evidence denying the authenticity of these documents. Mr. McCullagh denied he gave them to the defendant. He said he had sold a hundred and ninety-nine cattle shown on a different docket (the VAT docket) for £25,357 and that he gave to Mr. Horgan the sale bills of the mart together with his own bill on his own paper with weights

weighed at Newtownstewart. I accept entirely Mr. Wiley's and Mr. McCullagh's evidence which makes the sales dockets emanating from the defendant's possession false. Mr. Solan, Manager of Golden Vale Marts Ltd., said that a Bill of Sale dated 23rd of May, 1973, to John Pearson was not genuine. He gave the correct sales figures for the lots sold on that day showing four of the lots were sold to different purchasers, none of whom was Mr. Pearson. One other lot had not been sold and the sixth did not exist. The genuine prices paid showed that four female cattle were sold with a total weight of twenty-one cwt. averaging 5.25 cwt. each at £19.85 per cwt. The shipment on the 24th of May invoices female cattle at an average weight per head of 5.214 cwt. and an average price of £21.04p per cwt. The average price per cwt. calculated on the face of the false bill is £23.50. The defendant also produced what purported to be the receipted statements from Mr. McCullagh and signed by him. There was one for lairage on the 25th of April, 1973, (a hundred and forty-seven cattle at £171.36), a bill for transport dated 26th of the 4th 1973, (a hundred and fifty-five cattle at £205) and keep for a hundred and forty-four cattle at £180. Mr. McCullagh said he did not sign them and they were not his. He had an account for transport written in his own book by the defendant showing lairage at £50, keep at £60 and £150,

totalling £260. I accept Mr. McCullagh's evidence. The defendant could not explain why the documents he produced were written in the same handwriting on what was obviously numbered pages out of the same book and were similar to other receipted statements from Fred Doyle dated 25th April, 1973, for transport of ninety-three cattle at £186, from Frank Gilmartin for the transport and lairage of a hundred and forty cattle at £283 and one dated 26th April, 1973, from John Pearson for transport of eighty-five cattle at £95. The defendant could not identify the handwriting. I find these documents are not credible and cannot be relied on. Mr. Foley however of the Cork Co-Operative Marts identified the mart sheets of his firm as being genuine. These concerned sales to the defendant. The defendant at this time was buying not only for the Italian deal but also for his general business as well. What I believe happened is that he had to buy animals suitable for the Italian Order within a given weight and not exceeding a given price and he bought as best he could with the order in mind. He probably did not buy at more than the price but he may well have bought at less. The genuine prices paid at Golden Vale Marts Ltd. at Carrigallen, County Leitrim belie the price quoted in the invoice of the 24th of May shipment. According to Mr. Foley of Cork Marts the price of cattle increases from April to May to

June and therefore the June prices should have been dearer but according to the invoices they are not. So perhaps there may be no difference between the buying price and the price sold to Mr. Cassese in June. The only way I see to resolve the difficulty is to get evidence of the average countrywide price paid in the week immediately prior to each shipment. If the countrywide average for cattle of the weight sold to Mr. Cassese is less than the price quoted to him the inescapable conclusion is that a secret profit was made. If the countrywide average is more than the price quoted then I give the defendant credit for having bought below the average price.

The answers to the Examiners questions are therefore:

(1) Additional profits, if any, arising from the difference between the purchase price and the sale price of the cattle formed part of the partnership profits. The second question is: Were there profits arising out of the Italian transaction for which the defendant has not accounted? The answer to that is that it seems likely. In the absence of reliable documentation the only way to ascertain if there was a difference between purchase and sale price is to compare the invoiced price with the national average at the time. The VAT must also be accounted for.

The third question is: Is the defendant chargeable with sums received by

him in respect of refunds of VAT? The answer to that is, yes but the defendant may set off the expense of three thousand five hundred pounds paid to Doctor Soprina.

The fourth question, Is the defendant chargeable for sums received by him in respect of refunds of M C A? The answer is, yes in so far as the M C A was properly claimed. The last question is: Do the accounts submitted by the defendant show accurately the sums spent on the purchase of cattle for export to Italy? The answer to that is no.

*I adopt this transcript as a
note of my judgement in
this matter.*

Mella Cusell.

