

BAXTER

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THE HIGH COURT

1976 No. 380P

BETWEEN/

JOHN BAXTER

PLAINTIFF

AND

JOHN HORGAN

DEFENDANT

Judgment of Miss Justice Carroll delivered the 21st day of
February, 1986.

This matter first came before me in May, 1982 when it was referred on a memorandum by the Examiner in relation to specific questions arising out of a former partnership between the Plaintiff and the Defendant. The questions dealt with by the Court concerned the computation of profits arising out of three shipments of cattle to Italy in 1973. The selling price and the number of cattle were not in dispute but the weight of the cattle and the buying price were in issue. All the purchases were made under the Defendant's control and all the relevant documents were within the power or procurement of the Defendant. He produced a number of invoices relating to the buying price which I found to be forgeries. He also produced invoices addressed to the Italian buyer showing numbers, weight and total price. The weight in the invoices was at variance with the weight shown in the CU. 29 forms relating to each shipment. The CU. 29 forms were Irish customs documents which were filled in by the shipping agents of the Defendant.

On the evidence produced in Court at that hearing I made

the following findings:

At page 3:-

"Total numbers, weight and total value were shown in the invoices furnished to Mr. Cassese. The shipping agents of the Defendant filled in CU. 29 forms which also showed weights and values 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."

At page six:-

"I might also conveniently deal with weights here, namely, what weight of cattle was 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 on the invoices were approximately the weights sent, otherwise I feel sure Mr. Cassese would not have continued this Order. The last letter from Dr. Suprina mentions mortality in the cattle but there is no query as to weight. Therefore, even though the CU. 29 forms differ in regard to weight it seems to me that the weight sent was approximately the weight shown in the invoices."

The Plaintiff applied for and was given liberty to adduce fresh evidence which was not available at the earlier trial. This consisted of two Italian customs documents and six additional invoices relating to the three shipments. The Italian form A. 22 (the Bolleta) was produced at the first hearing by

Miss Daly from the Department of Agriculture as having been annexed to the claim for MCA payments made by the Defendant. It was taken by the Defendant at lunch-time to be translated and was not returned for the trial. The second Italian form, the A. 46- Statement of Importation, was procured by the Plaintiff in Italy from Mr. Cassese, the purchaser. Of the six additional invoices, five differ completely to the form of invoices produced in Court on the first occasion. They are in a short form and do not set out the details of weight, commission and expenses as contained in the first set of invoices. In the two new invoices relating to the shipment of the 27th April, 1973 a total weight of 8,068 cwt. 2 lbs. appears to have been typed in on a later occasion. This is the weight which formed the basis of the inflated MCA claim referred to in my previous judgment (at pages 2 to 6). The sixth of the new invoices is detailed and relates to the shipment of the 24th May, 1973. It concerns 1,148 cattle, for a total price of £163,972.99 and a deduction for one cow at £114.86 making a total of £163,858.13. It obviously came into existence before the invoice produced in Court on the last occasion, which was for 1147 cattle at a cost of £163,858.

An original invoice signed by the Defendant and Dr. Suprina relating to the shipment of 10th June 1973 which was obtained by the Plaintiff from Mr. Cassese shows merely the number of cattle and the amount. It does not contain any details as to weight.

The Plaintiff asks that the finding of fact in the first judgment that on the balance of probabilities the weight of the cattle sent was that shown in the invoices, should be reversed and for a finding that the weight in the CU. 29 forms is more likely to be correct.

I am completely satisfied as to the authenticity of the

Italian documents. Mr. Cassini, the Italian Customs Agent, explained the two forms in detail. As a result I am satisfied that the description section on the A.46 form showing 1,225 cattle with a weight of 307,750 kg. and a value of £193,672.68 was filled in by the Italian Agent of the Importer, Mr. Cassese. He could only have got his information from commercial invoices or from the transportation documents (i.e. the Bill of Lading or the 3 TL form, a standard E.E.C. form for circulation of goods within the E.E.C. which has to be checked and approved by the Exporting Customs).

The weight (307,750 kg.) is identical to that shown on the CU.29 form which would not have travelled with the ship. It did not derive from the detailed commercial invoice which showed weight equivalent to 359,055.3 kg. It is likely that it derived from the 3 TL form which having been checked by Irish Customs would probably have conformed to their CU.29 form.

The value was derived from a commercial invoice since it shows the total selling price, i.e. purchase price plus 4%, plus expenses (£193,672.68). This is not the same as the value on the CU.29 form (£162,950). This leads me to believe that the agent had the short form of invoice showing price but not the detailed one showing weight.

The Italian document contains a request to check the weight of the cattle. This was for the purpose of claiming exemption from duty. The part of the form showing the result of the inspection was filled in by the Customs Officials (as was the A.22 form, the Bolleta). It shows that 1,219 cattle survived the voyage to be weighed and their net weight was 306,596 kg. This is an average weight of 251.51 kg. The document also shows that 120 days after importation 1,154 cattle were alive, 65 having died which tends to substantiate the Plaintiff's claim that they were poor quality cattle.

I am now satisfied that the basis on which I reached the conclusion that the weights shown on the invoices produced at the first trial were likely to be more accurate than the weights shown on the CU.29 forms, has no foundation. The reason I held that was because I understood there was only one invoice per shipment showing numbers, weight, price, commission and expenses and that these were sent to Mr. Cassese.

It now transpires that more than one invoice existed for each shipment, one with full details and others with numbers and price only.

The Defendant himself gave evidence that three invoices were prepared per shipment, one with details (numbers, weights, amounts, expenses), which he would give to Dr. Suprina, another one signed by himself and countersigned by Dr. Suprina giving numbers and amount which was given to the Bank, and another one signed by himself giving the number of head of cattle and the total amount of money so that he (Dr. Suprina) could show him (Mr. Cassese) what he had paid for.

The original invoice which Mr. Cassese had retained relating to the shipment of the 10th of June 1973 and signed by both Mr. Horgan and Dr. Suprina gave no weights at all.

It therefore seems probable that Mr. Cassese was not given the detailed invoices but was only given the short form of invoice. This view is supported by the other probability that for the shipment of the 27th of April 1973 the agent of Mr. Cassese in filling in the A.46 form did not appear to have the weight shown in the detailed invoice available but did have the exact price shown in the short invoice.

The Defendant himself denied knowledge of how the weight of 8,068 cwt.2 lbs. came to be typed on the original invoice signed by him on the 27th of April 1973. I do not believe

him. He was the person who made an excessive claim for MCA payments on that shipment for a weight of 8,068 cwt 2 lbs. on a claim form and declaration and control form both of which were signed by him. (see judgment at pages 2 to 6).

I have abstracted information from the various documents relating to the three shipments. Where weight was given in hundredweights I have given the equivalent in kilogrammes. In cases where totals were omitted I have supplied totals.

SHIPMENT 27TH APRIL 1973

Documents available in Court May 1982

- (1) Photostat Invoice (detailed)

1225 c (i.e. cattle) Total weight 7068 cwt. 2 lb. (359,055.3

Price £163,912.32

Add 4% commission & expenses as detailed

Total £193,672.68

- (2) Certified copy CU. 29 Form

1225 live cattle: Weight 307,750 kg.: Value £162,950

- (3) 2nd CU. 29 Form (mentioned in judgment (pp3 & 4)) different weights and prices

- (4) Claim Form for MCA (see judgment (pp 3 & 4)) signed by Defendant
1219 cattle @ £1.45 per cwt. = £11,698.60 (i.e. based on a weight of 8068 cwt.)

- (5) Declaration and Control Form (annexed to MCA Claim Form)
(see judgment)

1219 cattle: weight 8068 cwt.2 lb.(409,855.2 kg.)

signed by Defendant

Documents now available

- (6) Photostat Invoice (without details) signed Horgan and Suprina
1225 c. Capi Bovini Vivi da Allevamento C & F Formia: £193,672.

Total weight 8068 cwt. 2 lb. (i.e. 409,855.2 kg.)

[The weight looks as if added at a different time]

- (7) Original Invoice (without details) signed Horgan
Identical information to No. 6 but with a different layout
[The weight looks as if added at a different time]

(8) Original Italian document, Form A.46 Statement of Importation from which the following information is extracted

Description 1225 head : weight 307750 kg. : value £193,672.68

On manifest it appears 1222 (see section B (3))

Result of Inspections

1219 head : weight 306596 kg.

Exemption to duty granted:

120 days after importation 1154 alive - 65 died

(9) Original Italian document, Form A.22 ("Bolleta") (from which the following information is extracted)

1219 head : net weight 306596 kg.

SHIPMENT 24TH MAY 1973

Documents available in Court May 1982

(1) Photostat invoice (detailed)

<u>No.</u>	<u>Weight (in cwts)</u>	<u>(in kgs.)</u>	<u>Price</u>	
916 Male Cattle	5237.5415	(266,067.1)	£124,267.34	
187 Female Cattle	975	(49,530)	£ 20,507.19)	
44 Female (Friesians)	288.69	(14,665.45)	£ 6,867.50)	£27,374.69
)64,195.45
Totals 1147	6501.2315 cwts	330,262.55 kg.	£151, 642.03	

Add 4% commission & expenses as detailed

Total

£163,858.13

(2) Certified Copy CU. 29

	<u>Wt. in kgs.</u>	<u>Value</u>
716 Fat Bullocks	286,400)	£107,400)
) 291,400) £137,400
200 Fat Bulls	5,000)	£ 30,000)
231 Fat Heifers	57,750	£ 34,650
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Totals 1147	349,150 kg.	£172,050

Documents now available

(3) Copy/letter of credit

about 1200 Bovini vivi di prima qualita

(4) Original Bill of Lading

716 live Bullocks

231 live Heifers

200 live Bulls

1147 Capi bovini vivi da Allevamento

(5) Photostat invoice (detailed)	<u>Wt. (in cwts)</u>	<u>(in kgs.)</u>	<u>Price</u>
916 male cattle	5237.5415	(266,067.1)	£124,267.34
188 female cattle	(1)980	(49,784)	£ 20,622.05
44 female Friesians	288.69	(14,665.45)	£ 6,867.50
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Totals 1148	6506.2315	(330,516.55)	£151,756.89

adding 4% plus expenses as detailed

Total £163,972.99

less one female @ £110.46 plus 4% commission

£ 114.86

£163,858.13

Totals 1147

Note: I have discounted 1000 cwts. of the weight shown for 188 female cattle as it must be a mistake (-see invoice No. 1 where 187 cattle weigh 975 cwts.)

(6) Original Invoice (without details) unsigned

1147 Bovini vivi di prima qualita F.O.B. Dublin £163,858.13

SHIPMENT OF 10TH JUNE 1973

Documents available in Court in May 1982

(1) Photostat invoice (detailed)	<u>Wt. (in cwts.)</u>	<u>(in kgs.)</u>	<u>Price</u>
678 male cattle	4068	(206,654.4)	£91,530
169 female cattle	908.37	(46,145.196)	£19,003.21
11 female Friesians	76.78	(3,900.424)	£1,724.48
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Totals 858	5053.15 cwts.	(256,700 kg)	i.e. £112,257.69

Add 4% commission & expenses as detailed

Total £135,243.94

(2) Certified copy CU. 29 Form	Weight	Value
858 Fat Cattle	258050 kg.	£113,006.69

Documents now available

- (3) Original Invoice (no details unsigned)
Bovini Vivi C & F Formia £135,243.94
(no numbers, no weights)

- (4) Original Invoice (no details) signed Horgan and Suprina
858 Bovini Vivi C & F Formia £135,243.94
given by Mr. Cassese to Plaintiff

- (5) Photostat of No. 4
Produced by Mr. Cassese

- (6) Letter of credit (original and copy)
about 858 Bovini Vivi £130,000 more or less 15%

- (7) Original Bill of Lading
858 Bovini Vivi

It can be seen from these extracts that for the shipment of the 27th of April 1973 four different averages emerge.

- (1) per invoice (No. 1) 359,055.3 kg. for 1,225 cattle : average 293.10
- (2) per CU. 29 (No. 2) 307,750 kg. for 1,225 cattle : average 251.22
- (3) per MCA claim (Nos.4&5) 409,852.2 kg. for 1,225 cattle : average 334.57
- (4) per Italian documents 306,596 kg. for 1,219 cattle : average 251.51
(Nos. 8 & 9)

The heaviest weight relating to the MCA claim has already been discounted in the previous judgment

For the shipment of 24th May 1973 the averages for the total numbers are as follows:-

- (1) per invoice (No. 1) 330,262.55 kg. for 1,147 cattle : average 287.93
- (2) per CU. 29 (No. 2) 349,150 kg. for 1,147 cattle : average 304.40

Alternatively, taking male and female cattle separately the averages are

- (1) per invoice (No.1) 266,067.1 kg. for 916 male : average 290.46 kg.
- (2) per CU. 29 (No. 2) 291,400 kg. for 916 male : average 318.12 kg.
- (1) per invoice (No. 1) 64,195 kg. for 231 female : average 277.9 kg.
- (2) per CU. 29 (No.2) 57,750 kg. for 231 female : average 250 kg.
- (3) per invoice (No.5) 64,449.45kg. for 232 female : average 277.79 kg.

Note When deducting one cow from the invoice for 1148 cattle, the Defendar only allowed 5 cwt. (254 kg.)

For the shipment of 10th June 1973 these are the averages:

- (1) per invoice (No.1) 256,700 kg. for 858 cattle : average 299.18 kg.
- (2) per CU. 29 (No.2) 258,050 kg. for 858 cattle : average 300.75 kg.

The Plaintiff has asked me to hold that the weight shown on the CU. 29 forms is more likely to be correct than the weight on the invoices.

While I am satisfied that the weight in the invoices cannot be relied on, I am not satisfied that the weight in the CU. 29 forms can be relied on. The evidence given in the previous hearing was to the effect that while the numbers were accurate the weight and price was only estimated. That evidence still stands.

Evidence which I can rely on is the fact that 1,219 head of cattle arrived on the first shipment in Italy and their weight was then 306,596 kg. giving an average weight of 251.51 kg. per animal. I also have the Plaintiff's own evidence that he saw all three shipments as they were being shipped out, (near enough to a 100 per cent) and that they were all of poor quality, and I accept his evidence. Conversely I do not accept the Defendant's evidence that they were of good quality (prima qualita) as described in the letter of credit. The purchaser's agent, Dr. Suprina was taking a backhander so his counter signature on an invoice describing the cattle as being of first quality carries no weight as far as I am concerned.

Evidence was given on behalf of the Defendant that there is a weight loss in cattle on a sea voyage which was put at the lowest at 7 per cent and at the highest at 20 per cent. Taking the lower percentage I calculate that an animal weighing 270.44 kg. with a weight loss of 7 per cent (i.e. 18.93 kg.) would arrive weighing 252.51 kg. which corresponds to the weight mentioned in the Italian documents. An animal weighing 270.44 kg. is approximately 5.32 cwt. The Plaintiff estimated the weight of the animals to be 4 to 5 or 5½ cwt.

What I propose to do then, using a combination of my

calculations relating to the first shipment where weights on arrival in Italy are available and allowing for some loss of weight on the voyage and the Plaintiff's own evidence from observation of the cattle being shipped, I propose to find that all three shipments averaged out at $5\frac{1}{2}$ cwt. per animal.

Since national tables of prices exist only for heavier cattle and not for the lighter cattle, I will adjourn the matter to enable the Plaintiff to call evidence to establish the price paid for 3 shipments of cattle for the numbers involved with an average weight of $5\frac{1}{2}$ cwt. at the appropriate periods.

Mella Cancell.

Approved.

12.3.86.