AGRA

THE HIGH COURT

1982 No. 4172

BETWEEN:

AGRA TRADING LIMITED

PLAINTIFFS

-and-

THE MINISTER FOR AGRICULTURE

DEFENDANT

Judgment of Mr. Justice Barrington dated the 19th day of May 1983

This is a Motion for liberty to enter final Judgment against the Defendant in the sum of £234,990.93. The claim is in respect of export refunds alleged to be due from the Defendant as the agent in Ireland of the European Community, on the export by the Plaintiffs to Russia of beef sold from intervention stock for that purpose.

Regulations laid down by the E.E.C. require that stringent precautions be taken to ensure that meat sold from intervention for export outside the Common Market is in fact exported outside

the Common Market and does not find its way on to the domestic or internal market where the price for beef is usually higher. For that reason a prospective exporter is obliged to give security that he will carry out the export contract in accordance with its terms. Article 15,paragraph 3 of Commission Regulation (E.E.C.) Number 2173/79 of the 4th October, 1979 provides as follows -

> "In cases of failure to comply with the other obligations laid down in the contract, the competent authority of the member state concerned may declare the security totally or partly forfeit, depending on the seriousness of the breach concerned".

Moreover Article 4 of Commission Regulation (E.E.C.) No. 239/1980 of the 1st February, 1980 provides that products are to be exported "in the same state as that in which they were when removed from intervention stock".

In the present case there is no doubt that the Plaintiffs did in fact export the meat to Russia and the Defendant,

apparently with knowledge of the matter concerning packaging hereinafter referred to, on the 6th February, 1981 accepted that the Plaintiffs had fulfilled their obligations under the export contract and returned to them the security which they had given for the performance of those obligations. The Minister did, apparently, add that the European Commission might query the transaction.

The European Commission did query the transaction. Of the beef sold to the Plaintiffs 297 tonnes were briskets which were "layer-packed" that is to say there was a sheet of polyethylene placed between each layer of brisket in cartons lined with food grade polyethylene.

Mr. Michael A. Corry, who is an Assistant Principal Officer employed in the Department of Agriculture, at Paragraph 6 of his Affidavit in these proceedings, describes the Plaintiffs' subsequent handling of the briskets as follows -

"Subsequent to taking delivery of the meat prior to its export, the Plaintiffs caused the said briskets to be removed from their cartons and broken down into individual

briskets, wrapped individually, and then exported them as individually wrapped briskets. On the export of the said meat the Plaintiff completed export declaration and control and E.E.C. community transit (T.5) forms wherein the Plaintiff described the goods being exported as "brisket cuts", "each piece individually wrapped".

Mr. John Egan, who is the Secretary of the Plaintiff Company, in an Affidavit sworn in these proceedings on the 9th February, 1982, accepts Mr. Corry's statement as being generally correct but, in paragraph 3 of his Affidavit, describes the position as follows -

"While I admit that after taking delivery of the briskets, prior to export, the Plaintiffs caused a portion of the briskets to be removed from their cartons and individually wrapped and then re-packed in the manner outlined by the Defendant, it is incorrect to say that the briskets had to be broken down into individual briskets when being wrapped. The briskets were at all times individual and separated by polythene. Also, thirty tonnes of the

briskets purchased were not dealt with as aforesaid but were at all times individually wrapped".

Because of this interference with the wrapping an issue arises as to whether the briskets were exported "in the same state" as that in which they were bought from Intervention. The Commission apparently takes the view that the briskets were not in the same state as they were no longer layer packed briskets. The Plaintiffs claim that the briskets were in the same state because the meat was in the same state only the wrapping (or portion of it), having been changed.

The issue involved is one of European law and both parties agree that they wish to have the point construed by the European Court in these proceedings or in other proceedings and that it is not a point which I am called upon to attempt to resolve at this stage.

Assuming, for the purpose of this argument only, that the Plaintiffs were in breach of contract or in breach of the regulations in interfering with the packaging of the meat the question arises what loss did the Defendant suffer by reason thereof? It appears from Paragraph 7 of Mr. Corry's

Affidavit that the Defendant paid to the Plaintiffs a further sum of £189,214.45 in export refunds in respect of individually wrapped brisket cuts which he would not have paid had he realised that the briskets in question were the layered packed briskets which had been sold to the Plaintiffs out of intervention. The Plaintiffs deny that this sum of £189,214.45 was not also properly due. Be that as it may Mr. Fitzsimons, who appeared for the Minister, stated that he had express instructions not to pursue this claim for £189,214.45 in the present action. That being so one must look for the Minister's alleged loss elsewhere.

The Minister under cover of his letter of the 6th February 1981 returned to the Plaintiffs their security for the due performance of the contract. In the events which have happened the Minister suggests that he is entitled to the return of the security. Article 16 Paragraph 3 of Commission Regulation Number 2173/79 provides that on the failure of the proposed exporter to comply with obligations laid down in his contract the competent authority of the member State (in this case the

Minister for Agriculture) may declare the security totally or partly forfeit depending on the seriousness of the breach concerned. This reference would appear to cover, if not to contemplate, a form of bond which the Minister might forfeit in whole or in part, as a penalty for breach of contract or regulations even in the case of injuria sine damno.

Neither party had exhibited the security in fact provided in the present case. By agreement, however, I was shown a copy of the security and was informed that the security had been approved by the relevant authority for the purposes of Regulation Number 2173/79.

The security was furnished by the Allied Irish Investment Bank Limited. It is in effect an indemnity whereby the Allied Irish Investment Bank Limited pledges itself to be jointly and severally liable with the principal debtors in respect of every sum which the principal debtors may become liable to pay to the Minister arising out of the contract. It is addressed to the Minister for Agriculture, is dated the 4th February, 1980 and the relevant parts read as follows-

"We, Allied Irish Investment Bank Limited, of 5 College Green, Dublin 2, hereby engage ourselves to be principal debtors to you jointly and severally with Agra Trading Limited, of 39 Lower Leeson Street, Dublin 2 (hereinafter called the Applicant) in respect of every sum which the Applicant shall become liable to pay to you pursuant to security in respect of the purchase of the intervention. beef by them on or after the date of this guarantee under Council Regulation (E.E.C.) Number 98/69 as amended by Commission Regulation (E.E.C.) Number 2173/79 and any such regulations as may be made from time to time.

Our liability under this guarantee shall not exceed the sum of Irish £378,951.27 but within that limit is a guarantee for the whole of each and every sum in which the Applicant shall become liable to you as aforesaid. This guarantee is valid until all obligations arising thereunder have become discharged to the satisfaction of the Minister for Agriculture".

It appears to me that this document is not a bond which can

be forfeited but is an indemnity which can only be invoked if and when it is shown that by reason of some breach of contract or relevant regulation the Plaintiffs have become liable to pay some sum of money to the Minister.

This being so it appears to me that the Minister may have some claim against the Plaintiffs arising out of the matters discussed above. But the claim is certainly not a liquidated claim. I doubt also if it can properly be referred to as a non-liquidated claim for I doubt if it can be quantified in money now or ever. In these circumstances the question arises of whether the Minister should be permitted, at this stage of the proceedings, to set-off his claim against the clear claim of the Plaintiffs. The Plaintiffs, in submitting that the Defendant should not be allowed to plead his claim in these proceedings by way of counter-claim to the Plaintiffs claim, but should be left to bring his claim in independent proceedings, rely upon Order 19 Rule 2 of the Rules of the Superior Courts.

Order 19 Rule 2 reads as follows -

"A defendant in an action may set-off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court may, on the application of the plaintiff before trial, if in the opinion of the Court such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof".

The nature of the Defendant's proposed set-off or counterclaim is clearly indicated in the Affidavits filed on his behalf. However the matter comes before me by way of Motion for judgment in summary proceedings. No defence has been filed and no set-off or counterclaim of the kind which appears to be contemplated by Order 19 Rule 2, has been formally pleaded.

The case in fact comes before me under Order 37 Rule 6

which reads as follows -

"Upon the hearing of any such motion (id est a Motion for Judgment in summary proceedings) by the Court, the Court may give liberty to enter judgment for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for the determination of the question in issue in the action as may seem just".

Whether the question at issue is properly regarded as arising under Order 19 Rule 2 or Under Order 37 Rule 6 or perhaps under Order 37 Rule 6 with due regard to the provisions of Order 19 Rule 2, the parties agree that the question to be decided is one for my discretion, based on what the justice and convenience of the case requires.

Mr. McCracken, who appeared for the Plaintiffs, referred me to the unreported decision of the former Supreme Court in the case of Prendergast .v. Biddle (No. 36 of 1957) in which judgment was given on the 31st July, 1957. In that case the Plaintiff had issued a Summary Summons under the 1926 Rules claiming for a liquidated sum of £1,992.10s.2. The Plaintiff moved for judgment under Order 15 of the 1926 Rules. An Affidavit was filed on behalf of the Defendant wherein she sought to set up a counterclaim for £4,250 damages for breach of contract. Murnaghan J. refused to adjourn the case for plenary hearing and gave judgment on the original claim. This decision was upheld by the majority in the Supreme Court which discussed the relationship between Order 15 of the 1926 Rules and Order 19 Rule 3 of the 1905 Rules, which correspond to Order 37 and Order 19 Rule 2 of the Rules of the Superior Courts.

Mr. Justice Kingsmill Moore, who was one of the majority in the Court, summarised, at page 6 of his unreported judgment, the kind of problem which arises in a case such as the present. He says -

"On such applications it is incumbent on the Plaintiff, if he is to get judgment, to satisfy the Court that he has an unanswerable case, and if he does this he is entitled to immediate judgment. If, however, the Defendant, while admitting that he has no direct defence to the claim, puts forward a plausible counterclaim a difficult problem must arise. Though the necessary evidence to support the claim is already before the Court and judgment on the claim can be given at once, there must usually be delay in formulating the counterclaim in a pleading, in preparing the evidence to support it at a hearing (if it is to be contested) and in waiting for a trial. On the one hand it may be asked, why a Plaintiff with a proved and perhaps uncontested claim should wait for judgment or execution of judgment on his claim because the Defendant asserts a plausible but unproved and contested counterclaim. On the other hand it may equally be asked why a Defendant should be required to pay the Plaintiff's demand when he asserts and may be able to prove that the Plaintiff owes him a

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larger amount. To such questions there can be no hard and fast answer. It seems to me that a Judge in exercising his discretion may take into account the apparent strength of the counterclaim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties. If, for instance, the Defendant could show that the Plaintiff was in embarrassed circumstances it might be considered a reason why the Plaintiff should not be allowed to get judgment or execute judgment, on his claim till after the counterclaim had been heard, for the Plaintiff having received payment might use the money to pay his debts or otherwise dissipate it so that judgment on the counterclaim would be fruitless. I mention only some of the factors which a Judge before whom the application comes may have to take into consideration in the exercise of his discretion".

It appears to me that in the present case the Plaintiffs claim is proved. The Defendant's claim is problematical and, even if proved, would not appear, on the evidence before the Court, to involve any loss quantifiable in money. There was no

delay on the part of the Plaintiffs in asserting their clai
The Minister, on the other hand appears, originally, to have been of the view that the Plaintiffs claim was valid in all respects. He initially returned their security and is now attempting to retain moneys admittedly due to the Plaintiffs as alternative security. It appears to me that there must b considerable delay if the Minister's counterclaim, involving as it does a reference to the European Court, is to be litigated. It appears to me that it would be wrong to keep the Plaintiff Company, which is a trading company, out of such a very large sum of money while the counterclaim is being litigated. Finally there has been no suggestion that the Plaintiff Company is not a solvent company or that it would not be able to pay any sum of money which may at the end of the day, be found to be due from it to the Minister.

In all the circumstances it appears to me that the proper course is to give the Plaintiffs leave to enter final judgment in the sum of £234,990.93, and to allow the Minister to take such steps as he may think proper to assert his claim in independent proceedings.

(Charles Aylmer
P S.C.)

Approved
15/8/83