PREMIER DAIRIES

1981 No. 3226P

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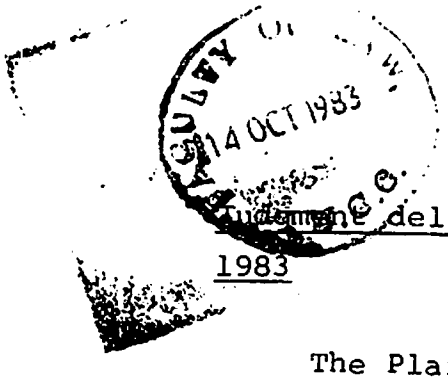
PREMIER DAIRIES LIMITED



.v.

MICHAEL JAMESON

Judgment delivered by Mr. Justice McWilliam on the 1st day of March 1983

The Plaintiff's claim is for damages for breach of a contract alleged by the Plaintiff to have been made with the Defendant at the end of November, 1980, whereby the Plaintiff made part of a milk delivery business available to the Defendant to operate for profit and the Defendant agreed to take all his milk supplies from the Plaintiff for his entire milk business, both old and new for a period of five years. As a further consideration, the Plaintiff agreed to pay the Defendant a sum of £2,000.

The Plaintiff is a very large processor and distributor of milk with its headquarters at Finglas, Co. Dublin. It has a depot at Aughrim, Co. Wicklow, which serves an area from Wexford to Rathnew, including the towns of Wicklow and Arklow. In addition to supplying milk to other persons for sale to retailers, the Plaintiff employs a number of roundsmen to sell milk directly to customers, both shops and householders. There appears to be some agreement as to the districts each roundsman serves with the Plaintiff's milk. There are other suppliers of milk in the area

and this leads to keen competition between the suppliers.

In the Spring of 1980 the Defendant who had not previously been engaged in the sale of milk, bought a milk round from a Mr. Malone. On the sale of a milk round the vendor can only sell the goodwill of the business and cannot ensure that, after introduction, the customers will remain with the purchaser. There is, at no stage, any contract with the retail customer.

Mr. Malone had been purchasing his supplies of milk from the Plaintiff and the Defendant continued to do so until the Autumn of 1980. The Defendant stated that he had not had any previous experience of a milk round. About this time, one of the Plaintiff's competitors appears to have adopted a more aggressiv sales policy and a meeting of the independent roundsmen was held at which it was decided that they would take half of their supplies from each supplier. The Plaintiff refused to agree to this arrangement and the Defendant and three other roundsmen commenced to purchase their entire supplies from the Plaintiff's competitor. This led to negotiations by the representatives of the Plaintiff with these roundsmen who all returned to the Plaintiff for their supplies. The Plaintiff's witnesses alleged

that the terms on which the Defendant returned were that he would take all his supplies from the Plaintiff and that the Plaintiff would hand over its round in Wicklow Town (estimated at thirty-five crates per day) to the Defendant and would, in addition, pay the Defendant the sum of £2,000. This agreement was partly performed by the Plaintiff by introducing the Defendant to customers taking twenty crates per day in Wicklow Town. The Defendant took over these customers and delivered to them for a period of a week or ten days and then informed the Plaintiff that he was not going to continue buying his supplies from the Plaintiff. During this period the Defendant was getting his supplies on credit from the Plaintiff and the money due for these supplies has not yet been recovered from him.

During the negotiations for the return of the Defendant to the Plaintiff for his supplies, I am satisfied that he was fully aware that the agreement entailed that he should take his supplies from the Plaintiff for a definite period, although he stated in evidence that no question of time arose and that he did not know that he was to be bound for some definite period of time in the future. The representative of the Plaintiff who

conducted these negotiations with the Defendant stated that he conducted the negotiations on the basis of a period of five years and that this period was discussed with the Defendant. He accepted, however, that the actual period was not agreed and might have been less than five years but said that there would have had to be a minimum period of three years if the Defendant was to get £2,000. The negotiations were conducted by him on the basis that a written form of agreement would be submitted to the Defendant who might or might not discuss the terms of it with his solicitor.

A form of agreement was prepared on behalf of the Plaintiff providing for a term of five years and the payment of £2,000 to the Defendant on the signing of the agreement but this was not submitted to the Defendant as he had already informed the Plaintiff's Aughrim depot that he was not going to take any further supplies from the Plaintiff. This resulted in a letter dated 9th December, 1980, being written by the Plaintiff which was delivered personally to the Defendant by the Plaintiff's area manager. The area manager gave evidence and stated that the Defendant produced a cheque for £2,000 from one of the

Plaintiff's competitors and said that the Plaintiff was too slow but gave no other reason for cancelling the arrangement.

A further letter was written on 11th December, 1980 by the Plaintiff's solicitors alleging that the Defendant had entered into an agreement to take all his supplies from the Plaintiff for a period of five years, stating that the Plaintiff had suffered and would suffer considerable loss and threatening proceedings.

The solicitors for the Defendant replied to this letter on 8th January, 1981, in the course of which having complained of unsatisfactory deliveries of supplies by the Plaintiff to the Defendant as the cause of the difficulties between the parties, referred to the negotiations with the representative of the Plaintiff and made the following observations:-

"Your Company undertook to give our client the service which he requested, namely deliveries at a reasonably consistent time each day and subject to this being satisfactory our client agreed to the arrangement in relation to the payment of £2,000 and the taking of 35 crates of milk. This arrangement was put into operation and within a week difficulty was again encountered in relation to the supply and on one morning our client was

"waiting for his supply until 10-30 a.m." "You did, in fact, give our client the names of four shops to supply and our client was informed by your representative in Aughrim that unless he supplied these shops your firm could not do so. Our client has no objection if you wish to continue to supply these shops." "Our client denies that he is in breach of agreement with your Company and, in fact, it was the failure of your Company to meet what was the most important aspect of the proposed agreement, namely the consistent supply, that forced our client to seek supplies elsewhere." "Your representatives were at all times aware that this was a condition precedent to the entering into any formal agreement and yet your Company had failed to honour their commitments even before any written agreement could be prepared."

Although there was no reference to it in the letter of 8th January, 1981, the Defendant maintained that he had also been promised a milk float, electrically operated as I understand. This was vehemently denied in cross examination by the representative of the Plaintiff who conducted the negotiation.

At the close of the Plaintiff's case, counsel on behalf of

the Defendant asked for the case to be dismissed on the ground that there had not been any concluded contract between the parties notwithstanding the statement in the letter of the 8th January, 1981, that, subject to satisfactory deliveries the Defendant had agreed to the arrangement in relation to the payment of £2,000 and the taking over of 35 crates of milk from the Plaintiff's own roundsmen.

I am satisfied that both parties conducted the negotiations on the basis that there would be a written agreement executed and that, at the time the negotiations concluded there had been no agreement as to the period for which the agreement was to operate and that there had been no discussion at all as to the terms applicable after the period of the agreement although the form of agreement prepared on behalf of the Plaintiff showed that such terms would have been part of any agreement they entered into. Under these circumstances, I was of opinion that there had not been any complete agreement concluded between the parties but I refused to accede to the application on behalf of the Defendant as the acceptance by the Defendant of the additional customers and the renewal of supplies to him could

only be attributed to an expectation of the completion of the proposed agreement and I was of opinion that this created a liability on the part of the Defendant to restore the parties to their previous positions to the best of his ability.

The Defendant stated in evidence that he got a better offer from the Plaintiff's competitor in that he got a sum of £2,400 from him and was supplied with milk on the basis of an increased profit to him of 11p per crate, but he maintained that the reason he ceased to take supplies from the Plaintiff was because the deliveries were so unsatisfactory. He also stated that he signed a written agreement with this competitor to take supplies for a period of three years and that this was signed before he started to take supplies from him. As the bargaining with this competitor must have been in progress at the time of the negotiations with the Plaintiff, it is impossible to accept that he was not aware that some period of time was involved in the negotiations with the Plaintiff. As I have observed, he also stated that he had been promised a milk float by the Plaintiff but I am inclined to accept the evidence on behalf of the Plaintiff that an electric float would not be suited to the Defendant's round. No evidence

was given as to the value of such a vehicle but it occurs to me that it would have made a very substantial addition to the £2,000 offered by the Plaintiff and would have merited very deep consideration by the Defendant in his negotiations with his eventual suppliers and I accept the evidence on behalf of the Plaintiff that this offer was not made.

On behalf of the Defendant it is argued that, if it is accepted that there was no concluded contract, there can be no award of damages for breach of contract and, therefore, there can be no award of damages at all. Alternatively, it is argued that, if the Plaintiff is entitled to damages these must be confined to the loss of profits on the sale of milk for the short period between the handing over of the customers and the date of the letter of 8th January, 1981, when the solicitors for the Defendant stated that the Defendant had no objection if the Plaintiff wished to continue to supply the transferred customers. A further argument was advanced that the whole of the proposed contract was invalid as being in restraint of trade.

On behalf of the Plaintiff, the argument which I had previously rejected was renewed and it was argued that this was

an example of a frustrated contract. I was referred to the case of Fibrosa Spolka Akcyjna v. Fairburn Lawson, etc. (1943) A.C. 3[illegible] Alternatively, it was argued that, if there was no contract, the parties having proceeded on the assumption that there would be a contract any loss must fall on the party responsible for the failure of the negotiations. I was referred to the case of Brewer Street Investments Ltd. v. Barclays Woollen Co. Ltd. (1953) 3 W.L.R. 869 and (1954) 1 Q.B. 428 and to my own decision in Folens & Co. Ltd. v. The Minister for Education & Others dated 4th October, 1982.

For the reasons I have already stated, I am of opinion that there was no concluded contract between the parties. This being so, the Fibrosa case, in which there had been a binding contract which had been frustrated by the outbreak of war, does not appear to be of any assistance.

Nor do the other cases to which I have been referred give much assistance in the circumstances of the present case except in so far as Lord Denning, at page 874 of the Brewer Street case, suggested that there can be a valid claim in restitution. During the course of the arguments I asked counsel of the Defendan

if the Plaintiff would have been entitled to a return of the sum of £2,000 if it had been paid before the proposed contract was abandoned and he agreed that it would. Although the expressi was not used by either of us, I assume that he meant that the money would be recoverable as money which had been paid for a consideration which had failed. I find it difficult to see any difference in principle between such a situation and the situatior which actually arose, that is, that benefits were given to the Defendant at a cost to the Plaintiff, and the observations of Barry, J., in the case of William Lacey (Hounslow) Ltd. v. Davies (1957) 1 W.L.R. 932 appear to be relevant in this context. He said at page 939 "I am unable to see any valid distinction between work done which was to be paid for under the terms of a contract erroneously believed to be in existence, and work done which was to be paid for out of the proceeds of a contract which both parties erroneously believed was about to be made. In neither case was the work to be done gratuitously, ..."

Furthermore, I am satisfied that the negotiations broke down through the default of the Defendant who, having accepted

the benefits of the new customers from the Plaintiff, broke off the negotiations principally or solely because he managed to get better terms from the other distributor and not, as he alleges, because he did not get adequate service from the Plaintiff. This is a matter which Lord Denning considered relevant to be taken into consideration in deciding on whom the loss should fall in a case such as this. He said, at page 875, "It is a very old principle laid down by Lord Coke that a man shall not be allowed to take advantage of a condition brought about by himself."

No evidence was tendered on behalf of the Defendant or any argument submitted on which I could hold that the proposed agreement would have been in unreasonable restraint of trade in relation either to the public or to the Defendant and I reject the suggestion that the proposed contract was invalid as being in restraint of trade, although I am not satisfied that such invalidity would necessarily be a good defence to the Plaintiff's claim.

On the question of damages, I reject the contention on behalf of the Defendant that the maximum damages to which the

Plaintiff could be entitled is the amount of the profit lost by the Plaintiff on the sale of milk between the time of handing over the customers and the letter of 8th January, 1981. The evidence on both sides is that the Plaintiff canvassed the customers to get them back but, in spite of the offer in the letter, the Defendant did not give the Plaintiff any assistance in this respect.

As I understand the evidence, the Plaintiff handed over customers taking twenty crates of milk and, through canvassing managed to recover customers taking eight and a half crates. There is no evidence as to when these customers were recovered. The evidence on behalf of the Plaintiff was that the market rate for the sale of a milk delivery business is calculated on the basis of £200 per crate. The evidence by the Defendant was that he bought his milk round from Mr. Malone in March, 1980, at a figure which works out at £75 per crate. On the evidence before me,, I assess the damages to which the Plaintiff is entitled on the basis of eleven and a half crates at £110 per crate. This comes to £1,265. I have no evidence as to the loss

to the Plaintiff in respect of the period before it recovered such customers as were recovered so I will not take this into account.

Accordingly there will be a decree for £1,265.

Herbert R. McWilliam

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