

CONATY (Tom) LH

1430 No 5736
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THE HIGH COURT

TOM CONATY LIMITED

PLAINTIFF

-v-

ANDREW GILLESPIE

DEFENDANT

Judgment of Mr. Justice Barron delivered the 25th day of July, 1984.

In the month of June, 1980 the Cyprus Marketing Board was importing potatoes into the port of Derry. The price which they were charging was very realistic and there was a very brisk demand for their product. They employed as shipping agents T. Gallagher & Sons who in turn arranged sales with a number of potato brokers including the plaintiff.

The practice in relation to sales of these potatoes through the brokers was that the brokers took orders by telephone from buyers who wanted loads of potatoes. They either had their own transport or asked for transport to be provided by the broker. When orders were obtained by the broker they notified the agents as to how many loads they were booking. They also notified their representative at the docks as to whether or not the buyer was supplying his own transport or whether they were under an obligation to provide it for him. As the demand for these potatoes was very brisk, there appears to have been a considerable queue of lorries waiting to be loaded and the evidence shows that on many days

the agents for the Cyprus Marketing Board had to indicate to lorry drivers that their lorries could not be loaded on that particular day.

The lorries were checked in and out at the weighbridge at the docks and also when they were loaded. Details were taken at the weighbridge of the weight of the lorry and of its number. At the loading stage the driver of the lorry was required to sign for the load which he was taking. The situation at the docks appears to have been fairly chaotic. There is really no dispute as to this practice and I accept the evidence in relation to it.

Once a lorry was loaded this was regarded by the plaintiff as completion of a purchase contract. Details of the sale were noted in a book known as the potato book and an invoice was then sent within two or three days to the purchaser. Following the sending of the invoice an entry was made in the purchaser's account in the plaintiff company's ledger. The evidence on behalf of the plaintiff shows some confusion as to these basic accounting details. Mr. Conaty senior was of the view that details were sent to him by the agents once the lorries were loaded. The agent's representative who gave evidence in court said that this was not done unless a specific enquiry was made concerning a specific load. It seems to me that the probabilities of the situation are that the

plaintiff company having informed the agents of the number of loads for which they had orders were then told as to the number of loads which could be made available for them. Once they were satisfied that each of their orders could be fulfilled they then entered details of the order in the potato book.

The plaintiff claims that 25 lorries were loaded for delivery to the defendant or to his nominee. The documents produced establish that the plaintiff acknowledged that each of these lorries was loaded upon its instructions and that it became liable for that price to the Cyprus Marketing Board.

The issue is whether the defendant ordered these loads and if so whether they were delivered. Of the 25 loads, 14 were loaded onto the defendant's lorries and 11 onto the lorries of other hauliers. Of the same 25 loads, 18 were for delivery to the defendant and 7 to be delivered to Christopher Dunne, a potato dealer in Dublin. The defendant admits 16 loads and denies all 7 loads to Dunne, 1 load to himself on his own lorry and 1 load to himself on the lorry of an independent haulier.

In relation to the 7 disputed loads to Dunne's in Dublin, there is no direct evidence of delivery by the haulier as alleged. In relation to invoice 142, the evidence is that the defendant's driver Ken Dooley signed

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for that load and this signature was not denied by Dooley in evidence. I accept that he did so sign. The remaining load was taken from the ship, left at the docks, collected again six miles from Derry and ultimately delivered to the store of the haulier's father. The evidence shows that the defendant's lorry was broken down by the trailer when the load was subsequently collected outside Derry. The normal driver of the defendant's lorry denies that he collected this trailer load at the docks. I accept the evidence of the haulier that when he again collected the load six miles from Derry that the defendant's lorry was broken down with the load. In the context of the case as a whole there is sufficient evidence to establish that this load was for the defendant.

The evidence in relation to loads delivered to Dunne in Dublin is totally unsatisfactory. Dunne himself says that he ordered loads from the defendant which were delivered sometimes in the defendant's lorry and sometimes by independent hauliers. Delivery dockets signed by his storeman have been produced by the defendant to establish delivery of 7 loads of potatoes from the defendant. Of these 6 were said by Mr. Dooley to have been delivered by him and that in each case they were taken directly from the docks at Derry and delivered the same day if they were collected early enough or otherwise the following day. The seventh

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docket was produced by the defendant's brother who gave evidence corroborated by Dooley that Dooley's truck broke down between Omagh and Strabane and that he took the load on to Dublin. This docket is dated the 17th of June as is a docket produced by Dooley. Both cannot be correct. Further the only load alleged to have been taken by the defendant's own lorry on the 17th is subject to invoice 142 and is disputed though found by me to have been taken.

There is no proof of any of the invoices which were alleged to have been furnished to the defendant. Evidence has been given by Mr. Conaty junior that the plaintiff ran out of invoices and was forced to photostat as a master invoice one of its remaining invoices. Although this witness gave evidence to the effect that he had himself written some of the invoices which were sent to the defendant none of such invoices was produced to him to be proved. Those that were produced to him were in handwriting which he did not know. No proof was given of the posting of any of these invoices.

When the matter was before the Master what purported to be copy invoices were exhibited in the grounding affidavit. In his replying affidavit the defendant while admitting only 16 loads admitted invoices 81 and 95, both of which are alleged to be deliveries to Dunne in Dublin

which fact appears clearly on invoice 95.

The evidence establishes through a letter dated the 4th of July 1980 from the plaintiff to the defendant and produced by the defendant that the defendant received an account on that date which would have shown him as being debited with all 25 loads. The evidence further establishes that on the 1st of September 1980 Mr. Conaty junior had a meeting in Ballybofey in a local hotel in the course of which he showed the defendant a copy of the ledger account which the defendant did not challenge. The plaintiff's evidence is that the defendant gave as his reason for non-payment the fact that he was short of money. He said that he had £6,000 and he gave a cheque for this amount. On being pressed for more he gave a post dated cheque for £10,000, this was dated only two days ahead and there is no reason offered on behalf of the plaintiff why this should have been so. That cheque was subsequently dishonoured and has never been paid. It is clear from this evidence which I accept as truthful that the Defendant knew he owed money, but the question really is, how much?

The defendant denies that he ever got any accounts. He says he paid what he thought was owing and that he telephoned on many occasions to get a copy of this account but it was never sent to him. He says his wife kept his books and that all these were lost when renovations of his home took place. He says that he always sent his own transport to the

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docks at Derry for loads which he had agreed to take.

I do not accept the defendant's evidence. He was evasive and unconvincing and his evidence in many instances was disproved by other evidence. It is incorrect that independent hauliers were never employed. Invoice 210 which is admitted was delivered to the defendant by an independent haulier. Invoice 142 has been established as signed for by Dooley who was not asked to deny his signature. If there had been no arrangements to deliver to Dunne in Dublin he could not have admitted invoice 95. If his documents were lost, it is surprising that the letter of the 4th of July 1980 and the invoice books which stopped at the material entries were available.

I am satisfied that agreements for loads of potatoes were made between the plaintiff and the defendant in accordance with what is set out in the plaintiff's potato book, and also that those loads to which invoice numbers 142 and 190 relate were delivered. The most difficult question is to determine whether I can find proof sufficient to impose an onus on the defendant to disprove in relation to any of the deliveries alleged to have been made to Dunne. If the defendant has no records at all of these transactions other than the delivery books and letter which he has produced, it might have been anticipated that his defence would have been

to put the plaintiff on proof of its claim. He did not do so. Instead he chose to admit some loads and deny others. This suggests records or access to information from the drivers concerned. Whatever the position, when he admitted invoices 81 and 95, he could have been in no doubt but that Bartlett was alleged to have made the deliveries and in no doubt that both were made to Dunne. The copy invoice in relation to 95 makes this claim clear in relation to that load. The explanation is that he sold two loads to Bartlett and thought it was these two. This could not have been correct. Bartlett says that he paid £5,800.00 for the two loads, a gross under-price on invoices 81 and 95 and an under-payment of £100 on the two loads finally admitted. Further in support of the plaintiff, Bartlett admitted in evidence that he could have delivered loads to Dunne on the 11th of June and the 13th of June, the dates of invoices 81 and 95 respectively. This evidence is sufficient prima facie proof in relation to these loads. The delivery dockets produced do not negative this evidence. One of those is dated the 11th of June but could not have been delivered by Dooley on that date since he took no load between the 9th of June and the 14th of June. None of the dockets is dated the 13th of June.

Of the remaining five loads alleged to have been made to Dunne there is

no evidence to suggest that the lorry drivers who signed for them actually delivered them to Dunne.

The price of the 16 loads admitted and the 4 which I find proved to have been delivered amounts to £63,050.00 and the amount to be credited is £45,342.02p which leaves a balance of £17,707.98p.

Henry Barron
12/10/84