

## FRIGALIMENT IMPORTING CO. v. B.N.S. INTERNATIONAL SALES CORP.

U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

190 F. Supp. 116 (1960)

## OPINION: FRIENDLY

The issue is, what is chicken? Plaintiff says 'chicken' means a young chicken, suitable for broiling and frying. Defendant says 'chicken' means any bird of that genus that meets contract specifications on weight and quality, including what it calls 'stewing chicken' and plaintiff pejoratively terms 'fowl'. Dictionaries give both meanings, as well as some others not relevant here. To support its, plaintiff sends a number of volleys over the net; defendant essays to return them and adds a few serves of its own....

The action is for breach of the warranty that goods sold shall correspond to the description, New York Personal Property Law, McKinney's Consol. Laws, c. 41, § 95. Two contracts are in suit. In the first, dated May 2, 1957, defendant, a New York sales corporation, confirmed the sale to plaintiff, a Swiss corporation, of:

US Fresh Frozen Chicken, Grade A, Government Inspected,  
 Eviscerated, 2 ½ –3 lbs. and 1 ½ –2 lbs. each  
 all chicken individually wrapped in cryovac, packed in secured  
 fiber cartons or wooden boxes suitable for export  
 75,000 lbs. 2 ½-3 lbs.....@\$33.00  
 25,000 lbs. 1 ½-2 lbs.....@\$36.50  
 per 100 lbs. FAS New York scheduled May 10, 1957...

The second contract, also dated May 2, 1957, was identical save that only 50,000 lbs. of the heavier 'chicken' were called for, the price of the smaller birds was \$37 per 100 lbs., and shipment was scheduled for May 30.... When the initial shipment arrived in Switzerland, plaintiff found, on May 28, that the 2 1/2-3 lbs. birds were not young chicken suitable for broiling and frying but stewing chicken or 'fowl'; indeed, many of the cartons and bags plainly so indicated. Protests ensued. Nevertheless, shipment under the second contract was made on May 29, the 2 1/2-3 lbs. birds again being stewing chicken. Defendant stopped the transportation of these at Rotterdam. This action followed....

Since the word 'chicken' standing alone is ambiguous, I turn first to see whether the contract itself offers any aid to its interpretation. Plaintiff says the 1 1/2-2 lbs. birds necessarily had to be young chickens since the older birds do not come in that size, hence the 2 1/2-3 lbs. birds must likewise be young. This is unpersuasive – a contract for 'apples' of two different sizes could be filled with different kinds of apples even though only one species came in both sizes. Defendant notes that the contract called not simply for chicken but for 'US Fresh Frozen Chicken, Grade A, Government Inspected.' It says the contract thereby incorporated by reference the Department of Agriculture's regulations, which favor its interpretation; I shall return to this after reviewing plaintiff's other contentions.

The first hinges on an exchange of cablegrams which preceded execution of the formal contracts.... Plaintiff stresses that, although these and subsequent cables between plaintiff and defendant, which laid the basis for the additional quantities under the first and for all of the second contract, were predominantly in German, they used the English

word 'chicken'; it claims this was done because it understood 'chicken' meant young chicken whereas the German word, 'Huhn,' included both 'Brathuhn' (broilers) and 'Suppenhuhn' (stewing chicken), and that defendant, whose officers were thoroughly conversant with German, should have realized this....

Plaintiff's next contention is that there was a definite trade usage that 'chicken' meant 'young chicken.' ....Plaintiff endeavored to establish such a usage by the testimony of three witnesses and certain other evidence. Strasser, resident buyer in New York for a large chain of Swiss cooperatives, testified that 'on chicken I would definitely understand a broiler.' However, the force of this testimony was considerably weakened by the fact that in his own transactions the witness, a careful businessman, protected himself by using 'broiler' when that was what he wanted and 'fowl' when he wished older birds.... Niesielowski, an officer of one of the companies that had furnished the stewing chicken to defendant, testified that 'chicken' meant 'the male species of the poultry industry. That could be a broiler, a fryer or a roaster', but not a stewing chicken; however, he also testified that upon receiving defendant's inquiry for 'chickens', he asked whether the desire was for 'fowl or frying chickens' and, in fact, supplied fowl, although taking the precaution of asking defendant, a day or two after plaintiff's acceptance of the contracts in suit, to change its confirmation of its order from 'chickens,' as defendant had originally prepared it, to 'stewing chickens.' Dates, an employee of Urner-Barry Company, which publishes a daily market report on the poultry trade, gave it as his view that the trade meaning of 'chicken' was 'broilers and fryers.' In addition to this opinion testimony, plaintiff relied on the fact that the Urner-Barry service, the Journal of Commerce, and Weinberg Bros. & Co. of Chicago, a large supplier of poultry,

published quotations in a manner which, in one way or another, distinguish between 'chicken,' comprising broilers, fryers and certain other categories, and 'fowl,' which, Bauer acknowledged, included stewing chickens. This material would be impressive if there were nothing to the contrary. However, there was, as will now be seen.

Defendant's witness Weininger, who operates a chicken eviscerating plant in New Jersey, testified 'Chicken is everything except a goose, a duck, and a turkey. Everything is a chicken, but then you have to say, you have to specify which category you want or that you are talking about.' Its witness Fox said that in the trade 'chicken' would encompass all the various classifications. Sadina, who conducts a food inspection service, testified that he would consider any bird coming within the classes of 'chicken' in the Department of Agriculture's regulations to be a chicken. The specifications approved by the General Services Administration include fowl as well as broilers and fryers under the classification 'chickens.' Statistics of the Institute of American Poultry Industries use the phrases 'Young chickens' and 'Mature chickens,' under the general heading 'Total chickens.' and the Department of Agriculture's daily and weekly price reports avoid use of the word 'chicken' without specification.... Defendant argues, as previously noted, that the contract incorporated these regulations by reference. Plaintiff answers that the contract provision related simply to grade and Government inspection and did not incorporate the Government definition of 'chicken,' and also that the definition in the Regulations is ignored in the trade....

Defendant makes a further argument based on the impossibility of its obtaining broilers and fryers at the 33 cents price offered by plaintiff for the 2 1/2-3 lbs. birds. There is no substantial dispute that, in late April, 1957, the price for 2 1/2-3 lbs. broilers

was between 35 and 37 cents per pound, and that when defendant entered into the contracts, it was well aware of this and intended to fill them by supplying fowl in these weights.... It is scarcely an answer to say, as plaintiff does in its brief, that the 33 cents price offered by the 2 1/2-3 lbs. 'chickens' was closer to the prevailing 35 cents price for broilers than to the 30 cents at which defendant procured fowl. Plaintiff must have expected defendant to make some profit – certainly it could not have expected defendant deliberately to incur a loss.

Finally, defendant relies on conduct by the plaintiff after the first shipment had been received.... Defendant argues that if plaintiff was sincere in thinking it was entitled to young chickens, plaintiff would not have allowed the shipment under the second contract to go forward, since the distinction between broilers and chickens drawn in defendant's cablegram must have made it clear that the larger birds would not be broilers. However, plaintiff answers that the cables show plaintiff was insisting on delivery of young chickens and that defendant shipped old ones at its peril. .... Defendant points out also that plaintiff proceeded to deliver some of the larger birds in Europe, describing them as 'poulets'; defendant argues that it was only when plaintiff's customers complained about this that plaintiff developed the idea that 'chicken' meant 'young chicken.' There is little force in this in view of plaintiff's immediate and consistent protests.

When all the evidence is reviewed, it is clear that defendant believed it could comply with the contracts by delivering stewing chicken in the 2 1/2-3 lbs. size. Defendant's subjective intent would not be significant if this did not coincide with an objective meaning of 'chicken.' Here it did coincide with one of the dictionary meanings,

with the definition in the Department of Agriculture Regulations to which the contract made at least oblique reference, with at least some usage in the trade, with the realities of the market, and with what plaintiff's spokesman had said. Plaintiff asserts it to be equally plain that plaintiff's own subjective intent was to obtain broilers and fryers; the only evidence against this is the material as to market prices and this may not have been sufficiently brought home. In any event it is unnecessary to determine that issue. For plaintiff has the burden of showing that 'chicken' was used in the narrower rather than in the broader sense, and this it has not sustained.

This opinion constitutes the Court's findings of fact and conclusions of law. Judgment shall be entered dismissing the complaint with costs.