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Everywhere a Cluck-Cluck: Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.

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*Everywhere a Cluck-Cluck: Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.**

MICHAEL P. MALLOY[†]

1. Introduction

Whenever I teach a *contracts* course and reach the subject of contract interpretation, I am tempted to place *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*¹ on the desk, wind it up like one of those little plastic chicks you get during the holidays, and just let it run. The case would whirr and cluck-cluck through a range of issues, imparting knowledge and understanding to my students in a methodical, clear, and effective manner. Of how many cases (or class discussions) can one honestly make such a claim? The opinion by Circuit Judge Henry J. Friendly² is well written, incredibly thorough, witty, and probably one of the most helpful guides to the use of extrinsic sources imaginable. These qualities earn the case my vote as “best contracts case.”

2. Case Summary

For those only casually acquainted with edible birds, *Frigaliment* begins its analysis of the dispute between the parties with a startling question:

The issue is, what is chicken? Plaintiff says ‘chicken’^[3] 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

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¹ 190 F. Supp. 116 (S.D.N.Y. 1960).

² Shortly before this case, Judge Friendly left private practice and was appointed to the Second Circuit. He volunteered, given his limited past trial court experience, to sit as a district court judge in the *Frigaliment* case. DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 60, 81, 315 (2012). Is it possible that great judges make for great cases?

³ Here, and consistently throughout the opinion, Judge Friendly uses single quotation marks. I do not know why, but I would like to think that he realized that the opinion was worthy of quotation—in double quotation marks—with his own internal quotation marks already preadjusted to singles. Commentators almost uniformly miss this usage and will use double quotation marks when repeating this passage in an indented quotation. See, e.g., Aaron D. Goldstein, *The Public Meaning Rule: Reconciling Meaning, Intent, and Contract Interpretation*, 53 SANTA CLARA L. REV. 73, 110 (2013) (misplacing Friendly’s single quotation marks with doubles in direct, indented quotation).

plaintiff pejoratively terms ‘fowl.’ Dictionaries give both meanings, as well as some others not relevant here.⁴

In *Frigalment*, the purchaser of fresh, frozen “chicken” brought an action against the seller for breach of warranty. The purchaser said that it had wanted chickens suitable for broiling and frying, and that was what the contract required. The district court reviewed the text of the contract and applied a variety of extrinsic sources to determine what the term “chicken” meant. The court held that the purchaser had failed to sustain its burden of proving that the word “chicken,” as used in the contract, referred only to broilers and fryers and did not include stewing chickens.

In reaching this result, *Frigalment* considers, in succession, a variety of interpretive sources. First, of course, there is the language of the contract itself. “Since the word ‘chicken’ standing alone is ambiguous, I turn first to see whether the contract itself offers any aid to its interpretation.”⁵ Second, Judge Friendly considers trade usage and other sources of extrinsic evidence. Is it possible “that there was a definite trade usage that ‘chicken’ meant ‘young chicken’”?⁶ We would need to know more about common practices in the trade.⁷ Third, if the transaction occurred within an identifiable regulatory context, it is possible “that the contract incorporated [the Department of Agriculture’s] regulations by reference,”⁸ which might help explain the meaning and effect of the term. Fourth, the structure and pricing of the relevant market might suggest what the term “chicken” would mean in the context of their contract.⁹ Finally, the conduct of the parties during the operation of the contract--what the UCC would call the course of performance¹⁰--might reveal, by inference from their behavior, what the parties thought the term meant in the contract that they were carrying out.¹¹ Reviewing the results of each of these sources of contract interpretation, Judge Friendly concludes that the plaintiff had failed to carry its burden to demonstrate “that ‘chicken’ was used in the narrower rather than in the broader sense.”¹²

⁴ *Frigalment*, 190 F. Supp. at 117.

⁵ *Id.* at 118.

⁶ *Id.* at 119.

⁷ *Cf. id.* at 119-29 (discussing evidence from which relevant trade usage might be established terms).

⁸ *Id.* at 120.

⁹ *Id.*

¹⁰ See U.C.C. § 1-303(a) (AM. LAW INST. & UNIF. LAW COMM’N 2001) (defining “course of performance” to mean “a sequence of conduct between the parties to a particular transaction” under specified circumstances involving “repeated occasions for performance”).

¹¹ *Frigalment*, 190 F. Supp. at 120-121.

¹² *Id.* at 121.

3. Conclusion

The heart of the decision is the identification and analysis of pertinent sources of extrinsic evidence on the meaning of the contract term in contention. One must remember that this case arose before enactment of the UCC. Currently, what sources might we look to?¹³ The UCC gives us a compact set of interpretive rules, none of which are inconsistent with *Frigaliment*.¹⁴ However, post-UCC cases continue to recognize that extrinsic sources that aid in interpretation are broader than those identified in section 1-303 of the UCC,¹⁵ and they continue to cite *Frigaliment* and similar cases as pertinent authority. Certainly in a commercial case like *Frigaliment*, part of the defining context would be the market structure for products with particular commercial and consumer applications, and that is still likely to be so in contemporary cases.¹⁶ *Frigaliment* remains a case cited with authority¹⁷ and affection¹⁸ today.

¹³ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 202 (AM. LAW INST. 1981) (providing interpretive rules).

¹⁴ See U.C.C. § 1-303 (AM. LAW INST. & UNIF. LAW. COMM'N 2017) (defining course of performance, course of dealing, and usage of trade, thus setting their parameters); *id.* § 2-202 (allowing for the use of these sources to “explain[] or supplement[]” written contract terms).

¹⁵ Courts and commentators have sometimes been criticized for departing from UCC terminology in this regard. See, e.g., David G. Epstein, Adam L. Tate, & William Yaris, *Fifty: Shades of Grey--Uncertainty About Extrinsic Evidence and Parol Evidence After All These UCC Years*, 45 ARIZ. ST. L.J. 925, 926-27 (2013) (“Too often, the reported opinions in post-UCC cases that involve a dispute over interpreting a term in or adding terms to a written contract for the sale of goods do not use the language of the UCC. Instead, attorneys and judges use (and misuse) the terms ‘extrinsic evidence,’ ‘parol evidence,’ and the ‘parol evidence rule,’ rather than the language of Article 2.”). However, I fail to see how such flexibility in terminology has led to misapplication of the applicable legal principles or that—for example—*Frigaliment* would have reached a materially different result if it had been a UCC case. In any event, one cannot give much weight to anyone who alludes to E. L. James’s 2011 erotic romance novel in the title of a scholarly article, or, for that matter, in a footnote in an otherwise refreshing analysis of *Frigaliment*.

¹⁶ See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996) (applying UCC provisions and looking to market structure and pricing in analyzing the contract at issue). *But cf.* Malloy on *ProCD* p. 999 (arguing that *ProCD* is the worst contracts case, on other grounds).

¹⁷ See, e.g., *Rossi v. N.Y. City Dept. of Parks and Recreation*, 8 N.Y.S.3d 25, 33 (N.Y. App. Div. 2015) (citing *Frigaliment*, considering the definition of “goods”).

¹⁸ See, e.g., *Royal Am. Mgmt, Inc. v. WCA Waste Corp.*, 154 F. Supp. 3d 1278, 1280 (N.D. Fla. 2016) (citing *Frigaliment*, considering “a more difficult question: did the chicken or the egg come first?”).