

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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BARRY MCGURGAN

Plaintiff;

-v-

CHRISTOPHER CAIRNS AND CONNOR DEVINE

Defendants.

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**WEATHERUP I**

[1] This is the story of Nellie Grew. On 29 August 2008 the plaintiff was driving a motor vehicle and horsebox at Curr Road, Beragh, County Tyrone, when he was in collision with a motor vehicle owned and driven by the defendants. The horsebox contained a 4 year old mare named Nellie Grew and she was being taken to Down Royal Racecourse for her first race. Nellie Grew sustained injuries in the collision as a result of which she had to be destroyed. Liability is admitted by the defendants. The claim concerns the value of Nellie Grew. Mr D Fee QC and Mr Fahy appeared for the plaintiff and Mr M Maxwell appeared for the defendants.

[2] The plaintiff claims £35,000 as the market value of Nellie Grew, together with the consequential loss of veterinary fees and removal costs, which together I will call destruction costs, in a total of £220.00. Alternatively the plaintiff claims £8,000, being the purchase price of the mare, together with consequential losses which extend not only to the destruction costs but to insurance payments, training fees and racing fees, totalling an additional £12,000.

[3] On the other hand the defendants contend that the appropriate compensation is the market value of the mare which the defendants assess as having been in the range of £2,000 to £5,000, together with the destruction costs at £220.00.

[4] The plaintiff represents a syndicate which describes itself as 'Runs on Red' and there were five members of that syndicate namely the plaintiff, his brother Gerry, his uncle Bobby, his father James (senior) and a Peter Quinn.

[5] Nellie Grew was entered for sale at Tattersalls in 2007 for €2,500 and was unsold. She was then sold for €2,200 in August 2007 to James McGurgan (junior), a brother of the plaintiff. At that time the mare was unbroken and therefore had not run. She was subsequently sold to Mark O'Hare of O'Hare Racing at Banbridge, a jockey, horse breaker, trainer and farrier, for £3,500 in September 2007 and further sold to the syndicate for £8,000 in October 2007. The defendants questioned this last sale and the value accorded to the mare at that time.

[6] Mark O'Hare was the breaker and trainer of Nellie Grew up to February 2008. Barry Potts of Barry Potts Racing of Donemana became the trainer from March 2008 up to the death of the mare in August 2008.

[7] Mark O'Hare's evidence was that when broken some horses flourish and grow and this was how Nellie Grew developed. Mr O'Hare had the mare for four months and she was described as a fine filly, she had an easy way of going, she found climbing the hill on a gallop to be easy and she showed speed. Mr O'Hare thought that she showed more speed than was demanded at Point to Point races and he suggested that a licensed trainer should be engaged to prepare Nellie Grew for the racecourse as Mr O'Hare was not qualified to do so. Accordingly the training of Nellie Grew was transferred to Barry Potts.

[8] Mr Potts evidence was that in 2007 he had 18 horses at training. One particular horse named Cybersnow he considered to be potentially his best horse. Cybersnow was owned by James Ferry from Donegal and Mr Potts had bought Cybersnow for Mr Ferry as a three year old colt in July 2007 for 21,000 guineas. He also bought for Mr Ferry another colt called Brabazon for 35,000 guineas at around the same time. Mr Potts described Nellie Grew as not fully finished when she came to him in March 2008 but she was said to have had an amazingly long stride and that she made Cybersnow and Brabazon look very ordinary. Nellie Grew was carrying Mr Potts, which meant she was carrying two stones extra weight, and was beating the two colts by 10 or 12 lengths on the training runs. Mr Potts stated that on the track Nellie Grew would have had the added advantage of less weight with the mares' allowance. It was stated that Nellie Grew galloped well but her jumping needed work. Mr Potts stated that she became good, by which he meant that his training improved her jumping.

[9] Mr Potts was impressed by Nellie Grew and reported this to James Ferry, who then came to a training area at Magheralin to see the mare gallop with Cybersnow. The evidence of Mr Potts was that Nellie Grew, ridden by Mr Potts, beat Cybersnow on the training run. This led Mr Ferry to make an offer for Nellie Grew of €35,000. This offer was conveyed by Mr Potts to the syndicate although Mr Potts recommended that the offer should not be accepted. His evidence was that the syndicate thought that the mare could be worth more and they refused the offer. The syndicate wanted Nellie Grew to run on the racetrack and win her first couple of races, at which point the syndicate and their trainer thought that the mare would be even more valuable.

[10] On the day of the collision Nellie Grew was on her way to Down Royal Racecourse to run her first race. She had earlier been entered for a number of races in Ireland and Scotland but had not run. On 23 June 2008 she was entered for a flat race and declared a runner but balloted out. On 24 June 2008 she was entered for a maiden hurdle and declared a runner and again she was balloted out. As there were excessive numbers of horses being entered for races at that time it was necessary to reduce the number of runners through a ballot to secure a place in the race. If a horse entered a race and was balloted out the system was such that the chances of running in the next race entered were improved.

[11] On 8 July 2008 Nellie Grew was entered for a flat race. It is not clear what happened but she did not run. On 13 July 2008 she was entered for a maiden hurdle and declared a runner and again she did not run for reasons that are not clear. Finally on 29 August 2008 she was entered for the maiden hurdle at Down Royal and of course was a non runner that day because of the collision. The above races were in Ireland and there were also two Scottish entries for Nellie Grew but she did not run in either.

[12] The value of Nellie Grew is to be measured by her market value at the date she was destroyed. McGregor on Damages 18<sup>th</sup> Edition at chapter 32 deals with Torts Affecting Goods: Damage and Destruction. In relation to damage to goods paragraph 32.003 states that the normal measure of damages is the amount by which the value of the goods damaged has been diminished. In relation to destruction of goods paragraph 32.052 states that the normal measure of damages is the market value of the goods destroyed at the time and place of destruction. A comparison is made with the ship collision cases where the owners of the lost ship are entitled to *restitutio in integrum*. This is said to be the leading maxim of Dr Lushington in The Clyde [1856] Swab. 23 and its applicability was not questioned by the defendant the Liesbosch Dredger v. SS Edison [1933] AC 449. Market value is the measure of compensation for the destruction of Nellie Grew. I reject the plaintiff's alternative contention that the loss could be assessed by reference to the purchase price and expenditure incurred.

[13] Two experts gave evidence in relation to market value of Nellie Grew. John Kidd of Ballyash Stud, Banbridge, for the plaintiff, is a member of the Irish Thoroughbred Breeders Association and a former non executive director of Goffs. Ronan Griffin of Goffs Bloodstock Sales Limited for the defendant has been a director of Goffs since 2008 and actively auctioneering for the past 11 years up to this year. Mr Griffin's report indicates the basis of valuation and the key factors that determine value are stated to be age, race record, conformation, which is the structure of the horse, physical condition and pedigree. An additional factor not mentioned in Mr Griffin's report and about which there was dispute is what I will call potential.

[14] The experts were agreed as to the factors listed by Mr Griffin and as to age that Nellie Grew was a 4 years old mare, as to race record, that she had not run, as to conformation, that this was assumed to have been good and as to physical condition, that this too was assumed to have been good. The disputed areas concerned pedigree and potential.

[15] In relation to pedigree, the records for the dam were available and one looks for what is described as 'black type on the page', in other words the extent of bold type on the record reflects the quality of the pedigree through the dam. The page described a bay filly from Ireland born April 12 2004, first produce of Runyon from Ireland the sire and Aberfeldy from GB the dam. The first dam, Aberfelby, had nothing of note on the record. The second dam was Klewraye, described as a winner at 2 years, dam of 7 winners from 9 runners and 12 foals that included Red Blazer, in bold type, to which Mr Kidd referred in his report. The third dam was Kew, in bold type, with 3 wins at 2 years and a sister to Florabunda, in bold type, dam of 7 winners from 10 runners and 12 foals that included Pontal and Wild Fantasy, both in bold type, all referred to by Mr Kidd in his report to mark out the pedigree. The fourth dam was Astrentia with 2 wins at 3 years and dam of 5 winners from 12 runners and 12 foals.

[16] Records were available for the sire Runyon's progeny sales. The horse had a total of 119 foals and registered 2 winners. The foals were born from 2003 when there were 26 up to 2010 when there were but 3. The sales records indicate values from £500 to some £3,500 but there is included a 3 year old in 2007 sold at £8,000.

[17] As far as Mr Kidd was concerned the pedigree was described as good enough but not top drawer. Mr Griffin on the other hand was less impressed and stated that there was a poor dam and the sire was not sought after and had very low progeny sales.

[18] The additional ingredient is potential. The plaintiff's evidence was that Nellie Grew had shown good potential in training and the two trainers who had been involved confirmed that view. Outside the sales ring the plaintiff contends that a horse's potential in training is a factor that is taken into account in the field in

assessing value, even if it might not register as a factor when valuations are being carried out for Goffs sales ring. On the other hand it was contended on behalf of the defendants that one cannot take potential into account as a factor in assessing value, beyond that which appears from the race record. This is said to be because the horse will have been untested, its identity may be open to question, it may be confused with other horses, it may not run at all on the track, it may not be able to run as well on the track, there may be issues about whether the jockeys in training runs are really trying, there will be issues about the weights involved and perhaps hidden weights. Thus there are many untested, untried, unverifiable aspects to the assessment of potential in a training setting. Mr Griffin measured the potential of a horse by reference to the race record, which he stated would produce a regulated and verifiable performance rather than being the outcome of unreliable training runs. However Mr Griffin did concede that on the ground there may be considerations of potential based on training performance that may be taken into account by those buying and selling horses at this level of trading where horses are not going through the sales ring but he stated that this factor could not possibly justify a price being accorded to Nellie Grew of £35,000.

[19] The evidence in relation to Nellie Grew indicated that there had been an offer of some €35,000 made by James Ferry. He described how he had been in horse racing for 15 years and has 16 horses in training and that Mr Potts had bought Cybersnow and Brabazon for his stable. He described how he had gone to Magheralin at Mr Potts invitation and was impressed by Nellie Grew running on that day and that he had offered €35,000. It is the case that initially in his statement he had referred to the comparison with Cybersnow but in his evidence he also make the comparison with Brabazon.

[20] Mr Maxwell for the defendant asked Mr Ferry what colour Nellie Grew was and he said that she was brownish, although she was a bay, but he did remember that she had a white blaze on her face. The reason that Mr Ferry was impressed and prepared to make the offer was stated to be because he trusted Mr Potts and all the concerns expressed by Mr Griffen about the unreliability of unregulated running on the training course were, for him, met by his trust in Mr Potts.

[21] Cybersnow had run in England before he had been bought by Mr Ferry so he had a race record before he was purchased. Brabazon had run from 7 October 2005 but did not have his first win until after being bought by Mr Ferry. He described how he was impressed enough to make the offer of €35,000 by making comparisons with the prices he had paid for the other two horses. Mr Maxwell described any such offer as the whim of a rich man.

[22] Mr Kidd gave evidence about his valuation of Nellie Grew, having provided a valuation in his report by reference to her pedigree and the reports from the trainer about good performance. However in his evidence he made the comparison with a filly of his own that he had had in the same sale as Nellie Grew in 2007 for £2,200.

This filly had not sold but had qualified for a fillies race in Punchestown the following Spring, had come third, had won a prize of €13,000 and in July 2007 had been put on the Point to Point website and sold for £35,000. As pointed out by Mr Maxwell the filly had a race record in that she had come third in a prestigious race at Punchestown. However, Mr Kidd thought that this was a similar story to Nellie Grew and he valued the mare at the same price as he had received for his own filly.

[23] I am satisfied of the sale of Nellie Grew for £2,200 in 2007 and that there were some signs of promise in the mare which prompted a further sale at £3,500. In October 2007 there was evidence of a further sale of the mare for £8,000. When the mare was bought it seems that the previous purchase price of £3,500 had not been paid and so from the proceeds of resale of £8,000 there was paid out the £3,500 to the former owner. I find that a rather curious arrangement, even taking into account as I do that these horse deals are completed informally and in cash in the countryside outside the sales ring.

[24] Out of the £8,000 there was a balance of £4,500 which it was said had been paid in four or five tranches into a bank account. From an examination of the bank records it did not appear that that is actually what happened. I assume that the treatment of the proceeds of sale was in part to conceal from the revenue the money received for the purchase and sale of horses and the real issue in these proceedings is whether or not there actually was a cash sale of £8,000 at that time.

[25] Nellie Grew was insured for £8,000 which is consistent with the stated sale value. She was not insured for a greater sum whenever the syndicate began to believe, as the plaintiff asserts, that she had the potential to be a valuable animal and they were refusing an offer of €35,000. The explanation for not increasing the insurance value was stated to be economic, namely that paying 10% of the value as an insurance premium was a very expensive exercise and that those dealing in this league did not undertake such liabilities but would insure for their actual outlay in the purchase. I am persuaded that that is probably how the insurance position is dealt with and that insurance arrangements are as much of a gamble as the racing of the horses.

[26] I am satisfied on the balance of probabilities that there was a sale at £8,000 despite my curiosity about the manner in which the payment was made to the former owner. Further I am satisfied that there was promise in this mare reflected in the decision that she be moved from Mr O'Hare to Mr Potts for enhanced training. Being taken out of the Point to Point circuit and put into the racetrack circuit reflects, at least on the part of those owning and training Nellie Grew, optimism about her potential, which of course was not reflected in her performance on the track as she never had the opportunity to display her abilities on the track.

[27] I am satisfied that James Ferry did express some interest in the mare at €35,000 in 2008. I am not clear as to how far that expression of interest went. It arose

because Mr Potts the trainer encouraged Mr Ferry, for whom he had bought other horses, to come to the training track and look at Nellie Grew. When the offer was made Mr Potts carried that offer, which he did not think was an offer that should be accepted, to the owners and then suggested to them that it should not be taken. What he said to Mr Ferry about the offer was not disclosed but Mr Potts was in an odd position, encouraging Mr Ferry to bid for the horse but discouraging the owners from accepting the bid. Nevertheless it all suggests that the interest Mr Ferry had in Nellie Grew may not have been as concrete as was suggested. I am satisfied that there were perhaps soundings from Mr Ferry at €35,000 and that this was a highly speculative exercise. The soundings may have been refused by the plaintiff's syndicate who had their eye on a winner and then an increased offer for Nellie Grew. Getting a race win under their belts would have enhanced the value but prior to participation in a race the performance of Nellie Grew on the racetrack was very speculative.

[28] I accept that objective evidence should feature in the assessment of potential as an aspect of market value, that the valuation at £35,000 from Mr Kidd and €35,000 from Mr Ferry were based on comparator horses that had been on the racetrack and had earned their value with a race record. I do not accept that Mr Kidd can base the value of Nellie Grew on a comparison with his own filly, which had a race record and in any event was not relied on as a comparator for the purposes of his report. I prefer Mr Griffin's approach, as modified in evidence, namely that, in addition to the agreed valuation factors set out in his report, a local eye on potential ability for future races on the track and based on training performance may attract some added value.

[29] On that basis I assess the market value of Nellie Grew at the date of her death at £12,000. This figure reflects the added value I accord to the purchase price of £8,000 that I am satisfied was paid in October 2007, to reflect what I accept was an element of untested potential. To that sum will be added the destruction costs of £220. There will be interest at 4% from the date of the Writ on 17 September 2009. Subject to submissions from Mr Fee QC for the plaintiff the costs will be on the County Court scale.