

1977/7

IN THE ROYAL COURT OF JERSEY
(INFERIOR NUMBER)

BETWEEN

WILLIAM DOWSON TAYLOR

PLAINTIFF

AND

JOHN MARTIN FITZPATRICK

DEFENDANT

JUDGMENT

Adv. V. Vibert, for the plaintiff.

Adv. L.M. Gould, for the defendant.

JUDGMENT:

The issue in this action is simple to state, if not to decide. It is, was a legally enforceable agreement reached between the plaintiff and the defendant, on the telephone between Jersey and Cyprus, on the 1st April, 1977? The agreement, if such it was, related to the sale by the defendant to the plaintiff of all his shares in the Moorings Hotel Limited and Nelson Court Limited. It had been overlooked at the time that in fact, Mrs. Florence Edith Fitzpatrick, then the defendant's wife, had 10 £1.00 shares in the Moorings Hotel Limited, the defendant having the remaining 210 shares. In the course of the hearing we were told that if there had been a contract concluded between the parties some cash allowance could have been made for Mrs. Fitzpatrick's shares. Indeed Mr. Taylor said that he would be happy for her to keep them. They need not trouble us further.

In outline the sequence of events was as follows. In the spring of 1977, Mr. Fitzpatrick decided to sell the Moorings Hotel, Gorey Pier. The fact that Nelson Court was included as well is not material to the argument in this case. He was moved to do so because Mr. Mirto Sappe, his manager of the Moorings, who had been the main spring of the hotel for many years, had decided to leave and had given one year's notice in February, 1976. The sale was not advertised, but not surprisingly in a small community like Gorey, soon became common knowledge in the area. The plaintiff is a hotelier who owns, among other business the Dolphin Hotel, also on Gorey Pier. He knew of the proposed sale, but took no action until shortly before the 1st April, 1977. Mr. Taylor's total assets exceed considerably those of Mr. Fitzpatrick whose shares in the two companies, comprised in his own words the bulk of his assets ("by a long chalk"). Sometime before the 22nd March, on which date Mr. Fitzpatrick left for a holiday in Cyprus, Mr. George Gotthard, an estate agent, introduced the defendant to a Mr. Millington whose evidence we think should have been before us. There were a number of meetings and discussions but no final agreement had been reached before Mr. Fitzpatrick left Jersey. There is some dispute as to the state of the negotiations at that time and the effect of them on the defendant's mind. According to Mr. Sappe, Mr. Millington

did not make up his mind to buy the Moorings until the 25th March, that is to say three days after Mr. Fitzpatrick had left, a fact obviously not known to Mr. Fitzpatrick when he left.

A day or so before the 1st April, Mr. Taylor sent his General Manager, Mr. Renzo Martin, to spy out the land, so to speak, at the Moorings from Mr. Sappe with whom he was friendly. He learnt that Mr. Fitzpatrick's asking price was £260,000. We say this because Mr. Sappe was sure that as he knew Mr. Fitzpatrick's minimum price was £250,000 nett and if he had told Mr. Martin a figure and he agreed that he may have done so, it would have been in excess of £250,000. On the morning of the 1st April, Mr. Taylor and Mr. Martin sallied forth to the Moorings. Mr. Taylor wanted Mr. Sappe to telephone to Mr. Fitzpatrick in Cyprus, Mr. Sappe did so - Mr. Fitzpatrick was out. Later at about 2.30 p.m. Mr. Taylor tried again. This time Mr. Fitzpatrick was in his hotel. Mr. Taylor spoke to Mr. Fitzpatrick; we shall return to this conversation later. He says that Mr. Sappe was present throughout, but in cross examination Mr. Taylor admitted that Mr. Sappe might have left the room for a short time. Mr. Sappe says that after obtaining the number for Mr. Taylor he walked out of the office from which the call was being made; he did this out of politeness as it was not his business. We accept his evidence on this point. Shortly afterwards Mr. Sappe was called back by Mr. Taylor who appeared to be very excited, saying something like "I've got it! I've got it!" Mr. Sappe spoke to Mr. Fitzpatrick; at the same time Mr. Taylor began to write out a cheque for £260,000. It is dated the 31st March, and the payee's name is left blank. Mr. Fitzpatrick enquired from Mr. Sappe if Mr. Taylor was drunk and if he was writing out a cheque for the full amount. Mr. Sappe was noncommittal about the first enquiry and after looking at the cheque confirmed that it was in fact for £260,000. Mr. Sappe was told by Mr. Fitzpatrick to put it in the safe and did so, and Mr. Taylor asked him to say nothing about the deal. The manager of Mr. Taylor, Mr. Renzo Martin, was not present on that occasion. Notwithstanding Mr. Taylor's admonition, Mr. Sappe told the head waiter of the Moorings what had happened. As in the case of Mr. Millington we should have heard what he had to say. Later that day Mr. Sappe telephoned to Mr. Gothard, we shall return to this conversation later. Still later in the evening Mr. Sappe and his head waiter went for a drink at the Dolphin Hotel. There Mr. Sappe left the impression with Mr. Silvestri, the manager of the hotel, and to a lesser extent with a by-stander - a Mr. P. Tabb,

that the Moorings had been sold to Mr. Taylor. On Sunday the 3rd April, Mr. Fitzpatrick returned to Jersey and Mr. Sappe reported to him. On Monday, the 4th April, Mr. Taylor telephoned to Mr. Fitzpatrick to ask to see him to conclude matters. He was put off until the following day at 11.00 a.m. and then, after Mr. Fitzpatrick had looked at his diary, to noon. On the following day, Tuesday the 5th April, Mr. Millington met Mr. Fitzpatrick for a working breakfast, which had been arranged the day before by Mr. Gothard, anxious no doubt not to lose his commission. A bargain was struck at £273,000 gross plus the stock at valuation. Later Mr. Fitzpatrick telephoned to Mr. Taylor and told him what had taken place. Mr. Taylor contacted his lawyer. Correspondence then ensued between Mr. Vibert, on behalf of Mr. Taylor, and Messrs. Galsworthy and Stones on behalf of Mr. Fitzpatrick and the cheque was returned to Mr. Vibert with a letter of the 7th April, from Messrs. Galsworthy and Stones.

Inevitably, this resumé leaves a number of questions unanswered. Having found that Mr. Sappe was not present for all the time when Mr. Taylor and Mr. Fitzpatrick spoke together on the 1st April, 1977, we have to look at the whole of the circumstances surrounding the conversation, and the events before and after in order to assist us to decide which of the two versions of the conversation is the more probable.

We start by saying that the conversation could be interpreted in four ways:- (1) An unequivocal agreement, understood as such on both sides, to buy and sell (2) An unequivocal agreement, understood on both sides, not to buy or sell (3) A belief in one party's mind, the plaintiff's, that an unequivocal agreement had been reached to buy and a belief in the defendant's mind that an unequivocal agreement had not been reached and (4) An equivocal position somewhere between all the above three.

To succeed the plaintiff must satisfy us on a balance of probabilities that the first interpretation is the right one. It would not be enough if we found the true position to be the third interpretation; the parties would not be ad idem but indeed at cross purposes. We do agree with Mr. Vibert that if a reasonable man were to have understood Mr. Fitzpatrick to have sold the shares, although he did not so understand the position, mistaken though he would be he would still be bound because if the terms of the offer and acceptance were so ambiguous as to make it possible to point to one or other of the interpretations as being the more probable the Court must necessarily hold that no

contract was created.

Mr. Taylor's recollection of the conversation with Mr. Fitzpatrick is this:- He said to Mr. Fitzpatrick that he understood that Mr. Fitzpatrick was going to meet some people and sell the Moorings to them. He was interested and suggested that it be kept in the family and offered the asking price of £260,000. Mr. Fitzpatrick then asked if that was for everything - Mr. Taylor referred to the Wine Cellar and offered the price clear with stock at valuation - he said that Mr. Fitzpatrick accepted these terms. Mr. Fitzpatrick asked if payment would be made all in one piece - Mr. Taylor said that it could be and started to write out a cheque. Mr. Sappe told Mr. Fitzpatrick that Mr. Taylor was doing this and for the whole amount, Mr. Taylor said that he gave the cheque to Mr. Sappe and told Mr. Sappe that if he wanted to stay on at the hotel he could think it over. Both then went to the hotel bar and Mr. Taylor had a beer. He said that he was in no doubt that Mr. Fitzpatrick had accepted his offer. As regards the discrepancy on the date of the cheque Mr. Taylor said that he seldom remembered dates. He later made arrangements with his bank manager to clear the cheque.

Mr. Fitzpatrick said that at the time of the call to Cyprus - it was 4.00 p.m. in that country - he was in his bedroom where he had gone to change. He took the call on his bed; the connection was good. Mr. Sappe told him that Mr. Taylor wished to speak to him. Mr. Taylor's first words were "Let's keep it in the family, Jack". Mr. Fitzpatrick had a good idea what he had meant but asked him what he was talking about. Mr. Taylor said that he wanted to buy the Moorings. Mr. Fitzpatrick said that it was 4.00 p.m., he was in bed, he would be back in Jersey in 48 hours and would put it off till then. Mr. Taylor replied that he was writing out the cheque then. Mr. Fitzpatrick asked what the cheque was for and was told that it was for £260,000. He said that it was the first time that he had heard that figure mentioned. It was not true that £260,000 was the price; that figure would have been £13,000 to £15,000 less than what he had been expecting to get. We should add that no accounts were produced to us so that any submissions based on putative figures about the nett value of the Moorings are unsubstantiated and meaningless. For Mr. Fitzpatrick a difference of £13,000 to £15,000 was a lot of money because as we have already mentioned the Moorings and Nelson Court were his main assets. Mr. Fitzpatrick continued by asking Mr. Taylor if he had that sort of money Mr. Taylor confirmed that he was writing out the cheque. Mr. Fitzpatrick said that he was not going to discuss it over the phone and would be back in 48 hours. He then spoke to Mr. Sappe who

said that Mr. Taylor was writing out the cheque. He asked Mr. Sappe if Mr. Taylor had been drinking and Mr. Sappe said that he would not like to say. Mr. Fitzpatrick could not remember what he told Mr. Sappe about the cheque except he said that, with hind-sight, he probably told him to put it in the safe. Mr. Sappe said that Mr. Taylor then shook his hand; he co-operated out of politeness. Mr. Taylor denied doing so in examination in chief but admitted in cross-examination that he might have done. We accept Mr. Sappe's evidence that Mr. Taylor was excited when he called him back into the room. If Mr. Taylor really believed that he had bought the Moorings he had good cause to be pleased. He may well have wanted to shake Mr. Sappe's hand. We have not heard from either Mr. Taylor or Mr. Fitzpatrick the exact words which Mr. Fitzpatrick is reported to have said when accepting Mr. Taylor's offer.

There has been a suggestion that Mr. Taylor acted improperly in attempting to buy the Moorings over the head, so to speak, of Mr. Millington. We do not think that this is a valid criticism, both parties are business men and unless Mr. Taylor knew, or believed, that Mr. Fitzpatrick had concluded an agreement with Mr. Millington, and there is no evidence to suggest this, there was nothing to stop him in attempting to obtain the Moorings and Nelson Court by making what he thought was a better offer. What was the position then before Mr. Fitzpatrick had left the Island between him and Mr. Millington? Mr. Fitzpatrick said that he was pretty certain there had been a deal, but on the other hand Mr. Millington was still waiting for the clearance of certain funds from West Africa. They had reached a figure, or discussed a figure, of about £275,000. Mr. Sappe knew that Mr. Fitzpatrick had in mind something in the region of £300,000, but in cross-examination Mr. Fitzpatrick admitted that before he went to Cyprus he would not like to say that there had been an offer. If Mr. Millington had offered £270,000 before he left he would have accepted. Lots of figures have been talked about. We think that this is the nub of the matter. Mr. Fitzpatrick was vague about the exact state of play with Mr. Millington, but he said that even if Mr. Millington had gone to see him in Cyprus, and made the same offer as Mr. Taylor, he would have got the same answer as he had given to Mr. Taylor.

It was not until the 25th March, as we have said, that according to Mr. Sappe Mr. Millington visited the Moorings. He asked if he should tell the staff about the proposed sale, but Mr. Sappe thought that that would be premature. It does not appear to us that

Mr. Fitzpatrick was committed fully to Mr. Millington before he left the island. Nevertheless there was no doubt that Mr. Millington was extremely interested in the premises. Mr. Fitzpatrick, we believe, and quite reasonably so, wanted the best price that he could obtain. When Mr. Taylor made his offer on the telephone it maybe inferred reasonably that Mr. Fitzpatrick had not forgotten about Mr. Millington. Is it likely that he would have accepted Mr. Taylor's offer without mature consideration and although he was not as assured in his testimony as Mr. Taylor we did not gather the impression that Mr. Fitzpatrick would accept lightly an offer for the shares in his companies without considering the offer most carefully. There was no suggestion that he was in a financial position where he was obliged to sell, although he admitted that Mr. Taylor might have thought that a bargain had been struck.

Mr. Gothard said that before Mr. Fitzpatrick went away, the parties had been talking about the figure of nett £250,000. The liabilities were in the region of £23,000. This part of his evidence, at any rate, supports the recollection of Mr. Fitzpatrick. As regards the telephone call from Mr. Sappe to Mr. Gothard on the 1st April, 1977, it is quite probable that at first Mr. Gothard gathered the information from Mr. Sappe, who was very voluble, that indeed the Moorings had been sold, but that would not be surprising if Mr. Sappe had gathered that same impression from Mr. Taylor's behaviour. Quite naturally Mr. Gothard was concerned. He acted fast and brought Mr. Millington and Mr. Fitzpatrick face to face on the following Tuesday morning, when as we have already said, an agreement was reached between them.

A stringent cross-examination, was directed quite properly, to shaking Mr. Gothard's credit, to suggest that he knew from Mr. Sappe as a result of that telephone conversation, that the Moorings had been sold, and we have to say that his evidence on this point was clearly equivocal. But even if we accept that he was indeed told by Mr. Sappe that the Moorings had been sold, he was only being told what Mr. Sappe already believed from his own impression when he had seen Mr. Taylor in an excited mood leaving the room saying "I've got it! I've got it!"

What was the position of Mr. Fitzpatrick on his return to Jersey on the Sunday? He heard what had happened from Mr. Sappe. He had Mr. Taylor's cheque in the safe. While he had been away Mr. Sappe had acted as a good servant should do in what he believed to be in his master's best interest. He had shown Mr. Millington over the Hotel, discussed figures with his accountant, and put Mr. Taylor in touch with Mr. Fitzpatrick. It was quite natural for him to let

Mr. Gothard know the events of the early part of the 1st April, 1977, and we found nothing sinister in Mr. Sappe's telephone call to Mr. Gothard.

Mr. Vibert suggested that Mr. Taylor's offer was used quite wrongly as a stepping stone to increase Mr. Millington's offer. We think Mr. Fitzpatrick frankly described the true position when he said that Mr. Taylor's offer was in effect a second string to his bow. If the negotiations of Mr. Millington had failed on the Tuesday he could have got in touch again with Mr. Taylor. And it is a far cry from saying that to find that when he was discussing the sale on the Tuesday with Mr. Millington he was already to his knowledge under an obligation to Mr. Taylor. Mr. Vibert elicited from Mr. Fitzpatrick that he did not recall Mr. Taylor telephoning to him on the Monday, the 4th April, and he did not regard the telephone call to him as an approach.

In a letter to Mr. Vibert of the 7th April, Messrs. Galsworthy and Stones said, presumably on instructions from Mr. Fitzpatrick, that Mr. Taylor had made no approach to Mr. Fitzpatrick since the telephone conversation of the 1st April. We accept that Mr. Fitzpatrick had overlooked the telephone call from Mr. Taylor.

The plaintiff sets up a contract. On him falls the burden of proof on the balance of probabilities. Mr. Taylor may well have thought that he had concluded a bargain - in the example 3 we have given above - but we are not satisfied that in fact he had. We find on the balance of probabilities he has failed to discharge the burden of proof and the action is therefore dismissed with costs.