85/132

13th December, 1985

Alena Zdena McKinley, nee Iospisil

- v -

Linda de la Haye, nee Le Marquand

The Plaintiff Mrs. A.Z. McKinley has, since December 1982, carried on inter alia the business of a dealer's yard at Woodtown Stud, nr. Bideford in Devon. She purchased this stud from Mr. & Mrs. Peter Leando. Mrs. Leando is the younger sister of the Defendant. In February 1983, whilst waiting for the sale of the Woodtown Stud to be finalised, Mrs. Leando was there quite frequently and, as an act of goodwill, rang her sister, Mrs. L. de la Haye, the Defendant, in Jersey to enquire whether she knew of anyone in the Island who might be interested in purchasing poinies. The Defendant and Mrs. Leando claim that two ponies, Drof Debbo and Storm were for sale; but what is certain is that the Defendant mentioned that Mrs. R. Le Louarn was looking for a palomino pony. Shortly afterwards, photographs of such a pony, Broadgate Chameel, were sent over to the Defendant. Mrs. Le Louarn, who told the Court that she had known the Defendant for some 16 or 17 years, saw the photographs at the beginning of March 1983, liked the look of the pony, and, because she was working, paid the Defendant's air fare to go over to visit the Plaintiff, which she did later that month or in early April.

During this visit it is clear that some form of business arrangement was discussed between the Plaintiff and the Defendant. The Plaintiff claims that there was a verbal agency agreement, under the terms of which the Defendant agreed to sell in Jersey as the Plaintiff's agent ponies and various other types of equestrian equipment at prices fixed by the Plaintiff; and that as a mark of good faith she gave a pony, Tawstock Miss Minnette, into the possession of the Defendant until her commissions amounted to £526, that is, the value of the pony delivered in Jersey, after which the ownership of the pony would be transferred and further commissions would be paid in cash. This the Defendant denies and claims that there was no agency but that in return for (a) finding buyers for 2 ponies, namely Broadgate Chameel and Drof Debbo together with a horse

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box and (b) obtaining a reduction of £200 in the asking price of Miss A. Carré's pony Crème Caramel, upon which the Plaintiff would buy the pony, she, the Defendant, would be given Tawstock Miss Minette outright. Following this meeting there were a series of transactions between the parties which we will describe later.

It is common ground that there is no evidence in writing of either agreement. The Plaintiff says the agreement was never written; whilst it is equally clear from the Defendants evidence that the payment which she claims she was to receive was, equally, made verbally.

In spite of both sides amending (with the leave of the Court) their pleadings during the course of the hearing, the production of a new witness at a late stage and the introduction of tape recordings as evidence (which were played in open Court), neither side referred the Court to any statement as to the law applicable in these circumstances.

In our view, the principles of law which are applicable in the present case may be stated as being as follows:-

"Bowstead on Agency 14th Edition,"

"Article 3 - The relationship of principal and agent may be constitute
- (a) by agreement, whether contractual or not, between principal and agent, which may be express, or implied from the conduct or situation of the parties;"

and again at Article 9

"Agreement between principal and agent may be implied in a case where each has conducted himself toward the other in such a way that it is reasonable for that other to infer from that conduct to the agency relationship."

These principles were further discussed in Garnac Grain Co. v. H.M. Gaure & Fairclough Ltd & Bunge Corporation (1967) 2 AER 353 where @ 358 Lord Pearson made the following comment:-

"The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it, as in Re Megevand, Ex p Delhasse (7). The consent must, however, have been given

by each of them, either expressly or by implication from their words and conduct. Primarily one looks to what they said and did at the time of the alleged creation of the agency. Earlier words and conduct may afford evidence of a course of dealing in existence at that time and may be taken into account more generally as historical background. Later words and conduct may have some bearing, though likely to be less important."

It will therefore be necessary to review not only the evidence relating to the first meeting but also, in the circumstances of this case, the later words and conduct of the parties.

Much of what took place at the first meeting is common ground. The Defendant arrived at the Airport, was met by her sister Mrs. Leando, saw the ponies briefly that night and came back the following monring. It is again common ground that the Defendant was shewn Broadgate Chameel and liked her; and according to Mrs. Leando said she thought she could persuade Mrs. Le Louarn to buy her. The sale price was £650.

Other ponies were shewn by the Plaintiff to the Defendant. One of these was Drof Debbo, a small pony ridden by the Plaintiff's youngest daughter. During the morning a further pony, Tawstock Miss Minette was mentioned, as the Defendant either wanted or was interested in one for her daughter Melissa. This pony was subsequently purchased for £350 by the Plaintiff and the Defendants daughter came over in due course to try her out.

It is at this point that the evidence of the Defendant and that of her sister Mrs. Leado conflict with that of the Plaintiff. The Defendant states that after returning from seeing Tawstock Miss Minette there was a discussion in the Plaintiff's caravan at the Woodtown Stud, and that up to that point no business arrangements had been discussed. The Defendant went on to say that after an enquiry as to whether Mrs. Le Louarn would buy Broadgate Chameel the Plaintiff asked her if she could find some people to introduce her to in Jersey or to give her a contact in the Island because she was looking for an outlet in the Island. Her intentions were that she would have liked to sell a green horse box in the Island for £500 as well as Broadgate Chameel for £650 and Drof Debbo for £350 (subject to

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the Defendant's daughter being able to ride her); the Plaintiff further asked whether there was a suitable jumping pony in Jersey, to which the Defendant replied that she knew of Creme Caramel, whose asking price was £1,000. The Defendant claimed that the Plaintiff, who felt this price was too high, offered her an agreement that if she could induce the owner of Creme Caramel to reduce the price to £800, sell Drof Debbo or introduce the Plaintiff to a buyer and find a buyer for the horse box, and, as we understand, Broadgate Chameel, then subject to her daughter Melissa being able to ride the pony, she would receive Tawstock Miss Minette as payment for her part in the deal. This version is, by and large, confirmed by Mrs. Leando.

The Plaintiff's version is quite other on the essential point of the agreement. Her recollection is that the discussions lasted over a longer period of time, both at her home and at Mrs. Leando's property. Under cross examination, she was quite positive that both rates and agency were discussed between the Defendant and herself; that she was prepared to hand over Tawstock Miss Minette, a pony that the Defendant wanted, into her care and control until she had achieved commissions, at 10% of sales, which amounted to the value of the pony, delivered, that is, the figure of £350 at the date of the discussion plus the shipping cost of £150 and the brucellosis test of £26, both of which latter figures were known at the time of the shipment. When strongly pressed in cross examination by Mr. Pallot, she was adamant that the Defendant was looking for customers as she, the Plaintiff, wished to have sales before animals left the mainland as otherwise she would have been charged livery on every horse; and that the Defendant was her agent to sell her horses at her prices on a 10% commission basis. She also added that she would have paid the same commission for any horses which she bought from Jersey. Finally, she claimed she wanted £600 for the horsebox.

It appears to the Court that the Defendant is claiming that for having flown to England, at Mrs. Le Louarn's expense, to look at a pony whose purchase was, by the time of her return a near if not an absolute certainty at £650; for asking Miss Carre if she would accept

£200 less for her pony reducing its price to £800; and for finding or attempting to find purchasers for Drof Debbo @ £350 and for the horsebox @ either £500 or £600 she was to receive a pony worth £526. The Defendant when asked whether on her version the Plaintiff after an acquaintance of 1½ days was generous replied simply "I thought it was generous"; and, later "It seemed a good deal at the time". The Defendant did not attempt to shew any commercial advantage in this to the Plaintiff, who had just bought a stud described by Mrs. Leando as unviable, and it is indeed difficult to see how she could have done so.

This meeting was, as we said, the preliminary to certain further dealings in which the parties were involved, and in the particular circumstances of the case the Court is of the opinion that it should take these into account as shewing not only the conduct of the parties following this first meeting, but in allowing the Court to assess the weight of their evidence.

It is quite clear that on the 25th April 1983, the Plaintiff brought over Broadgate Chameel, who travelled badly, Drof Debbo and Tawstock Miss Minette in the horsebox which, it will be recalled, was for sale. The horsebox returned to England almost at once, but came back to Jersey soon afterwards and was sold, apparently to a Mrs. Goodsir.

It will be necessary to follow the careers of Drof Debbo and the horsebox to see how the agreement reached in Bidefod was implemented by the parties.

Drof Debbo was left, late on the night of her arrival, at Mrs. Le Louarn's property, not surprisingly as Broadgate Chameel had travelled so badly that she needed the attention of a veterinary surgeon. Mrs. Le Louarn claimed that during a conversation following the arrival of the three ponies the Plaintiff told her that she was asking £350 for Drof Debbo. The Plaintiff, who acknowledged that a buyer had to be found, was quite firm in her denial that the ponies were to be at livery with Mrs. Le Louarn, stating that she believed that Drof Debbo was to go down to the Defendant's farm when a loose box was ready. She left the Island

a few days later.

Dref Debbo however remained at Mrs. Le Louarn's yard for several weeks. The Defendant and Mrs. Le Louarn claimed that there was a clause in the Defendant's lease which prevented her keeping any horse ay livery there and that the Plaintiff knew this. Mrs. Le Louarn further claimed that she had made attempts to sell the pony and that she had understood that the Defendant had done so as well: the Defendant confirmed that she had indeed been "asking around".

The exact circumstances of the purchase of the pony are far from clear. The pony arrived on the 25th April, and Mrs. Le Louarn charged five weeks livery at £9 per week, that is up to the 30th May. At about the end of that period, and although it was the Defendants daughter who jumped her at two shows, it was Mrs. Le Louarn who stated that she had decided to buy the pony before the first show weekend and that she so advised the Defendant as well as the Plaintiff. Her explanation was that she had decided to buy the pony, but that on the Thursday or Friday before the first weekend show, after she had decided on the purchase, Drof Debbo either ran away or made off with her son who refused to ride her at the show. She continued to charge livery after the date she states she had bought the pony. The Defendant whose view of the matter was that she only had to obtain £350 for the pony admitted that she may have, as the Plaintiff claims, advised the Plaintiff that the pony had been sold for £350. Certainly Mrs. Le Louarn advised the Defendant of the purchase though she claims also to have advised the Plaintiff. The Plaintiff states that, in due course she received a cheque from Mrs. Le Louarn shewing deductions of £76.90. This statement, typed out when Mrs. Le Louarn as she said decided to purchase Drof Debbo was dated the 2nd June, that is on the Friday preceding the 2nd weekend, not preceding the first weekend. This discrepancy, Mrs. Le Louarn sought to explain by saying she had to wait for a duplicate invoice for the newspaper advertisement. She admitted that although she had charged £15 for a set of shoes, these had not been fitted.

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According to the evidence of Mrs. E. Perchard, she bought Drof Debbo on the 4th June, having heard of it through her riding school. She stated that having heard of the pony, she arranged to see it ridden at her riding school; that the pony was brought up by the Defendant whose daughter rode it, and that having had it vetted she decided to buy the pony which was to be and was ridden by the Defendant's daughter at the second day of the show after which she (Mrs. Perchard) would buy her, which she did on the ground, making out her cheque for £450 in favour of Mrs. Le Louarn. The question of the payee i.e. whether it should be Mrs. Le Louarn or the Defendant was discussed she says at some length.

The sale of the horsebox has the same pattern. To start with, there is a discrepancy in the price which was to be asked. The Plaintiff claims that she was asking £600 for it and that the Defendant and Mrs. Le Louarn had found a purchaser at £550. There is a strong conflict of evidence as to whether the Defendant played any part in the transaction. Both the Defendant and Mrs. Le Louarn are at one on this point, but what is apparent is that all the financial transactions relative to this were dealt with between the Plaintiff and Mrs. Le Louarn direct. The Plaintiff received a cheque for £200 from a Mrs. Ann Goodsir as a deposit, and paid Mrs. Le Louarn £100 in cash for her to pass to a Mr. D. May from whom she had bought, as she thought, a pony named Burnside Belinda for £450 (though Mrs. Le Louarn claimed that she had bought the pony to sell on the 28th April, that is, the day before he was shipped) leaving the balance of £350 to be paid (to Mr. May) from what she understood to be the remainder owing by Mrs. Goodsir. She was not questioned on her assertion.

However, it became clear that in fact Mrs. Goodsir bought the box for £700 subject to its safe return from England. Mrs. Le Louarn who received the log book on the return of the horsebox, did not, she said buy the horsebox, but said that she would stand the price of the box. Her explanation of the discrepancy of price was that she was dealing out with the black pony, Burnside Belinda, which was priced at £450; no explanation was advanced by Mrs. Le Louarn as to why, she, Mrs.

Le Louarn, paid the Plaintiff £50 more than Mrs. Le Louarn stated the Plaintiff required for the box, though £50 less than the Plaintiff claimed she wanted. There is one aspect however of this transaction which is abundantly clear to the Court, namely that the Plaintiff received £150 less than Mrs. Goodsir paid for the box.

The trap and pony harness which came back with the horsebox when it was returned to the Island was delivered to the Defendant's yard, and there it was when Mrs. Le Louarn made an offer for it and bought it.

The last series of transactions which are relevant to the issue before the Court concern a second consignment of horses or ponies brought over by the Plaintiff in July 1983.

Subsequent to the transactions detailed above, the Defendant states that she telephoned the Plaintiff at the request of Mrs. Le Louarn who was looking for a pony for her daughter. At the same time the Defendant's sister, Mrs. A. de St. Paer, spoke to the Plaintiff as she (Mrs. de St. Paer) was looking to sell her pony Windsor Boy. Later Mrs. de St. Paer accompanied her sister to see the Plaintiff in England. The Defendant states that this resulted from a conversation with the Plaintiff when the latter asked if she knew anyone who wanted to buy horses as she was prepared to bring over ponies for the Defendant to sell; and that the Plaintiff offered to pay her air fare if she had a look at the other ponies in her yard, that is, other than a pony Bushmere Seren Bach in which Mrs. Le Louarn was interested and subsequently bought. The Defendants reason for going over thus, she says, was that she enjoyed going, that Mrs. Le Louarn was looking for a pony and that the Plaintiff wished to sell them, to which she added as a rider that her sister Mrs. de St. Paer wished to buy another horse.

On the 18th July 1983, the Plaintiff brought over the second consignment of horses. One of the ponies which came over was Bushmere Seren Bach (for £400) and another was an animal named Trigger. The Plaintiff whilst she was over went to see Mrs. de St. Paer's pony Windsor Boy and that afternoon met Mrs. de St. Paer in town and agreed

to buy him for £800. Mrs. de St. Paer, who claimed that her sister had no part in the transaction, made out a paper by which in our view she undertook to receive payment when the Plaintiff had sold two other horses, one of which was Trigger. There has we understand been some dispute between the Plaintiff and the Defendant regarding Windsor Boy, but this is not part of the issue between the parties and we make no finding on it. The relevance of the sale of Windsor Boy arises in our view out of the circumstances surrounding the sale of Trigger.

The Plaintiff, when she discussed prices with the Defendant wished to sell Trigger for £500. What happened to Trigger was described by the Defendant. Having it would seem, prospective purchasers in view, the Defendant let these purchasers have the pony on trial advising them that the price would be £750 if they liked him. She saw no need to tell the Plaintiff that they would pay £750. They liked him and paid £750. The Defendant did not feel any need either to advise or to account to the Plaintiff, claiming that as she wanted £500 only, it was none of her business. When asked when and whether she had bought the pony, the Defendant's answers were evasive and unsatisfactory. She agreed that she had not bought the pony for £500 but opined that as soon as he had left England he was sold to her as a guarantee for Windsor Boy, so that once he arrived in Jersey she was his owner.

Having received the purchase price, then without any authority from the Plaintiff, she paid the £500 to Mrs. de St. Paer, whose agreement it will be recalled stipulated that she would be paid on the sale of 2 ponies, only one of whom had at this point been sold. The Defendant and others claim that the Defendant offered to ask for the money back when the Plaintiff came over on a subsequent visit; but the upshot was that on that occasion the Plaintiff had to borrow £100 from the Defendant's husband to get home.

The last episode came when the Plaintiff released 2 ponies from a field of which the Defendant had the use.

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Having heard the evidence at very considerable length, and taken note of the various transactions, the Court has had no difficulty in coming to a conclusion in the present case. The Court has no hesitation, in any material case where it conflicts, in accepting the evidence of the Plaintiff in preference to that of the Defendant. Apart from that, the Court does not find the claim of the Defendant to be credible when she claims that she was to receive Tawstock Miss Minnette as an outright payment for the first series of transactions. Broadgate Chameel was virtually sold; there were Drof Debbo and a horsebox to be sold; and it seems clear that the Plaintiff would not purchase Creme Caramel for more than £800. A gift of the value of Tawstock Miss Minette, standing the Plaintiff in at £526, would in our view be quite out of proportion, and, indeed likely to leave the Plaintiff with a loss or something near it. In our opinion, the Plaintiff with what its vendor described as an unviable property, and introduced to the Defendant by Mrs. Leando, who stated that she wished to help her, did indeed hope to improve her business by having the Defendant act as her agent, and was prepared to place Tawstock Miss Minette in her control until she had achieved a certain level of business.

The Court's finding as to the weight of the evidence and the initial arrangement between the parties is, in our view, amply confirmed both by the series of transactions outlined above, and by the conduct of the parties throughout.

We therefore find that, as pleaded in the Ordre de Justice, there was a verbal agency agreement between the Plaintiff and the Defendant and that the agreed commission was at 10% and that this covered all the various dealings outlined above, except for the sale of the horsebox to which we will advert below.

> "Every Agent (v. Bowstead op. cit. Article 42 @ p. 115):
> acting for reward is bound to exercise such skill, care and diligence in the performance of his undertaking as is usual or necessary in or for the ordinary or proper conduct of the profession or business in which he is employed, or is reasonably necessary for the proper performance of the duties undertaken by him."

Further, that "Whether an agent has exercised the required degree of care and skill is a question of fact (op. cit. Art. 42 p. 125).

On this point, the Court has no hesitation in finding that the Defendant has failed in her duties, not least with Drof Debbo.

Again, "An Agent (op.cit. Art. 49, p. 145) may not use his position as agent to acquire for himself a benefit (i.e. a secret profit) from a third party. The agent must account to his principal for any benefi so obtained."

Art. 51 @ p. 153 reads:-

"Subject to the provisions of Article 76, every agent who holds or receives money to the use of his principal is bound to pay over or account for that money at the request of his principal, notwithstandin claims made by third persons, even if the money has been received in respect of a void or illegal transaction."

It is these principles that the Court proposes to apply in assessing the damages payable to the Plaintiff.

Before doing so however, we should say, first that by a late amendment to his Ordre de Justice, to which the Defendant assented, the Plaintiff's claim is not now for the return of Tawstock Miss Minette, but for her cost, delivered to the Plaintiff, that is £526: and second, that in view of the dispute concerning Windsor Boy we propose to make no order as to the liability of the parties to each other (if any) in respect of this transaction.

We therefore find the defendants liability in respect of the various transactions to be as follows:-

Tawstock Miss Minette.

The ownership of this pony did not pass to the Defendant in 1983 and she will therefore pay to the Plaintiff under this head £526.00

There will however be certain deductions from this sum on account of the commissions to which the agent must be entitled and for which an allowance must be made to the agent for her skill and labour in securing that profit and also for her personal expenses in acquiring it.

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			£526.00
First, the Defendant is allowed commission @			
10% on Broadgate Chameel		£65.00	
The Plaintiff agreed a commission on the			
purchase of Creme Caramel		£80.00	145.00
			381.00

Drof Debbo.

The price which the Plaintiff ought to have			
received was		450.00	
less commission	£45.00		
less advert	16.90		
less the deduction which ought to			
be made for her keep.	45.00	106.90	
of which the Plaintiff has		343.10	
received only		273.10	70.00
			451.00

There will be in respect of Bushmere Seren Bach,		
a commission payable to the Defendant of	40.00	
There will be neither commission nor an		
accounting between the Defendant and the		
Plaintiff in respect of the horse box, as		
there is insufficient evidence in our view		
to shew that the Defendant was the causa		
causans of this transaction.		
There will be a commission on the sale of		
the trap and harness	22.50	
There will be a commission on the purchase		
of the pony Burnside Belinda	45.00	107.50
		343.50

Trigger.

The Defendant has in our view made a secret profit, for which she must account; furthermore, she had no business to pay over

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		£343.50
over any monies arising from the sale to anyone other than the Plaintiff. She will therefore on this head pay over	£750.00	
but will deduct nonetheless a commission of	75.00	675.00
		£ 1018.50

The Plaintiff is entitled to interest on this sum and we award simple interest @ 10% per annum to run from the 1st August 1983.