IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C. P. No. 1194/86

3/7

MEDIUM PRIORITY

NZLR

BETWEEN CLIFFORD JOHN HENSHAW
of Auckland,
Company Director

Plaintiff

A N D DAVID C. JESSOP
of Placid Lodge, Sands Road,
Waiuku, Studmaster

A N D GRAHAM C. BROWN
of Malcolm's Building,
166 Kitchener Road, Milford,
Chartered Accountant

LR 270

Hearing: 30, 31 March
1, 2, 27, 28, 29, 30 April
1, 11, 12 May 1987

Counsel: P.T. Finnigan for Plaintiff
A.R. Galbraith for First Defendant
A.A. Lusk and N.P. Dench for Second Defendant

Judgment: 30 June 1987

JUDGMENT OF WALLACE J.

In this action the Plaintiff claims damages from the First Defendant for breach of an alleged contract for the sale of a stallion named Vance Hanover. The Statement of Claim alleges that an oral agreement for sale of the stallion was repudiated by the First Defendant. As alternative causes of action the Statement of Claim also alleges wrongful termination and repudiation of an option to purchase the stallion (though the allegations relating

to the option were ultimately abandoned). The Statement of Claim also contains an allegation that the First Defendant affirmed the contract. Finally, there is an allegation that the Second Defendant induced a breach of the Plaintiff's contract with the First Defendant. The First and Second Defendants deny liability for all the causes of action.

By agreement between the parties the action proceeded to trial on liability alone, with all issues as relating to damages being reserved for later determination. The damages claimed by the Plaintiff amount to $2, 500,000 (representing the difference between the alleged market value of the stallion at the date of issue of the proceedings and the price the Plaintiff agreed to pay) plus further substantial but unspecified sums for loss of income from service fees.

The trial of the action extended over a number of days and the evidence discloses various contradictory or confusing features. For the sake of clarity I propose first to summarise the sequence of events in chronological order. I will also endeavour to indicate when important evidence is in dispute. Thereafter, the crucial aspects of the evidence can be considered in relation to the appropriate legal principles and the parties' conflicting contentions as to what took place. In relation to the evidence I also record that the parties produced an agreed volume of admissible documents.

The Plaintiff is a businessman who also has an involvement with standardbred blood stock. He gave evidence that in or about 1984 he saw the opportunity to establish a standardbred stud farm in the Auckland area. He subsequently made enquiries about purchasing an existing stud farm. His attention was also attracted to Vance Hanover, whose progeny were establishing a good record.

The Plaintiff formed the view that the service fees being charged for Vance Hanover were too low. He discussed his views with Mr Alistair Cox, who was a harness manufacturer and a blood stock agent in a small way. Mr Cox also knew the First Defendant, Mr Jessop, who was the owner of Vance Hanover, and in February 1985 the Plaintiff asked Mr Cox to approach the First Defendant to offer to buy the stallion. The Plaintiff stated that his instruction to Mr Cox was to make an initial offer of $500,000 with authority to go to $1 million as a maximum. That evidence was confirmed by Mr Cox, who was called on behalf of the Plaintiff. He stated that he advised the Plaintiff that he thought the horse could be bought for $500,000 to $750,000 and that his authority from the Plaintiff was to offer $750,000, but if necessary to go to $1 million. The Plaintiff stated that he instructed Mr Cox not to tell the First Defendant who was the potential buyer. The Plaintiff claimed there was no specific reason for that instruction. Mr Cox confirmed that he did not mention the Plaintiff's name to the First Defendant at the initial meetings. Mr Cox, however, gave conflicting evidence as to why he did not do so. When cross-examined by Mr Galbraith he agreed that he was under instructions not to reveal the Plaintiff's name, but when cross-examined by Mr Lusk he said he could not recall the Plaintiff telling him to keep the Plaintiff's name out of it.

Mr Cox eventually made contact with the First Defendant at a race meeting at Alexandra Park. This was in all probability on Saturday 9 March 1985. Mr Cox said that at that meeting he approached the First Defendant and asked if Vance Hanover was for sale. To this the First Defendant responded that he had been approached the previous year by a person from Queensland with an offer of $500,000 and that he had turned down that offer. Mr Cox then asked whether the First Defendant would take $600,000 and he said he would not. Mr Cox then said would he take $750,000 and again the answer was in the negative. Mr Cox stated that he then enquired whether the First Defendant would take $1 million for the horse, to which the reply was "if I can get

a million dollars I would sell the horse". In response to that Mr Cox said that he "would get back to my people and convey the message to them and then get back to Dave (the First Defendant), probably on the Wednesday night".

The First Defendant's evidence concerning the conversation on 9 March differed from Mr Cox's in several important respects. In the first place, the First Defendant made it clear that the conversation extended over a considerable period of time, in all probability while they watched two races which were approximately 30 minutes apart. According to the First Defendant the conversation covered not only the price (the First Defendant said he told Mr Cox that he would be interested in selling at a million dollars) but also the question of free returns (which he said would have to be taken care of in some form) and the First Defendant's tax liability in respect of which he said they would have to come to some arrangements because the stallion had been written down in the books so that the First Defendant would have a major tax liability on an outright sale. He added that he was aware how sales of horses were treated for tax purposes and that Mr Cox had suggested one possible way of dealing with the problem. The First Defendant also stated that he enquired from Mr Cox whether he was buying the stallion for himself, to which Mr Cox responded that he represented Auckland businessmen. When asked to name any of the businessmen Mr Cox said that he was not at liberty to do so, but did mention that he was one of the group. The First Defendant stated that the identity of the possible purchasers was of interest to him.

Mr Cox's evidence concerning subsequent events was that on the following Monday morning he saw the Plaintiff and reported the discussion to him, whereupon the Plaintiff said "we had better buy the horse, go back and see him (the First Defendant) on the Wednesday and give him a deposit". In his cross-examination Mr Cox said he thought he was to pay a nominal figure to secure the horse and was not given an instruction about the precise amount. The Plaintiff's

version of events differed slightly. He thought that Mr Cox spoke to him on the Tuesday and that he instructed Mr Cox to pay a minimum deposit to the First Defendant to secure the deal. The Plaintiff said he suggested that the deposit should be $1,000 if possible.

As arranged, Mr Cox reapproached the First Defendant on the evening of Wednesday 13 March 1985, again at Alexandra Park. Mr Cox gave evidence that he sat down beside Mr Jessop at the race meeting and said "my people are willing to buy the horse at a million dollars and to secure him have asked me to give a deposit of $1,000 to show their good faith". To this the First Defendant, according to Mr Cox, responded that he did not need the money and that his word was his bond. However, Mr Cox pressed the First Defendant to take the cheque, saying that his people wished to give a deposit because that was the way they operated to show good faith. Mr Cox also stated that, although he spoke of "my people", he was acting only for the Plaintiff. According to Mr Cox, it was after taking the cheque that the First Defendant for the first time raised the question of tax, saying that he had a small problem and that he would have to pay a lot of tax on the million dollars. Mr Cox stated the First Defendant explained that he had only paid a small amount for the stallion with the value also having subsequently been written down and that he would probably have to pay 66 cents in the dollar as tax. To this Mr Cox responded that he was sure his people would be only too willing to help the First Defendant in minimising the tax. According to Mr Cox, the First Defendant also enquired where the horse was to stand and was told by Mr Cox that it would be in the North Island, most probably in the Auckland area. Mr Cox said that the discussion terminated on the basis that he would get back to the First Defendant to try to arrange a meeting, probably not the next week as his client might be away, but the following week.

The First Defendant's version of the conversation on the 13th again differs in some significant respects from

that of Mr Cox. In his evidence in chief the First Defendant stated:

> "Mr Cox said he had been back to his people and told them that we could do business at a million dollars. He indicated to me that they were going to have a meeting and try to put this thing together. He told me that he had a cheque which was his own for a thousand dollars. I said to him what is the cheque for? He said to me it is a goodwill cheque for a thousand dollars to show you that we are serious about buying Vance Hanover. I said to him I don't need your cheque. I said my word is my bond, I will not enter into negotiations with this horse while you are trying to put a deal together."

When pressed, however, to take the cheque the First Defendant did so.

The First Defendant initially said that there was no discussion of tax at the meeting on 13 March, but in cross-examination he agreed that one of the matters concluded with Mr Cox at that meeting was that the tax question would be discussed at the next meeting.

It seems clear that the second meeting was briefer than the first. The First Defendant said that, while there was discussion in general terms regarding the next season's bookings, no agreement was reached as to what should be done in relation to them. He also said that free returns were not discussed that night, nor was there any discussion about when payment would be made for the horse. Likewise insurance and the fertility of the horse were not discussed. The First Defendant said that the only discussion about when the deal would actually take place was that the purchasers would want the stallion for the1985/86 season.

Finally in relation to the 13 March meeting, it should be recorded that the First Defendant in cross-examination stated that the word "deposit" was never used and reiterated that in relation to the cheque Mr Cox used the word "goodwill". He also agreed in cross-examination that Mr Cox said to him before he took the cheque that if the deal went ahead the $1,000 would be a bit extra that would compensate the First Defendant for the advertising brochures which would be wasted (though Mr Cox in his cross-examination denied making that suggestion).

Following the second discussion with the First Defendant, Mr Cox duly reported back to the Plaintiff. According to the Plaintiff's evidence Mr Cox said to him "we have Vance Hanover, Dave took the cheque". Mr Cox also told the Plaintiff that the First Defendant could have a lot of tax to pay on selling the horse, to which the Plaintiff responded that they should talk to the First Defendant about that because it might be beneficial for their funding. For his part the First Defendant contacted the Second Defendant, who was a chartered accountant and a friend, to discuss the tax question. The First Defendant was not certain whether he contacted the Second Defendant before or after the second meeting, but the Second Defendant gave evidence that it was before.

Although, as the above recital of the facts indicates, there is considerable dispute as to what precisely was said at the first two meetings, there then followed an even more conflicting and confusing sequence of events which extended over a considerable period of time. Mr Cox gave evidence that when he reported back to the Plaintiff after the 13 March meeting the Plaintiff indicated that they had better start looking for a place to stand Vance Hanover. In response to this Mr Cox suggested that they should talk to Mr Mike Butler as he was the best stud master available and was looking to start a stud of his own. A meeting was accordingly arranged between the

Plaintiff, Mr Cox and Mr Butler. This apparently was on the following Sunday night, 17 March. At that meeting Mr Butler mentioned that he had a partner, Mr O'Connor, with whom he was looking for a stud farm. It was, therefore, agreed that the following Sunday (or Sunday week) a further meeting would be held between the three, but this time also involving Mr O'Connor. At that meeting the formation of a partnership was allegedly discussed with the Plaintiff and Mr Cox supplying the stallion and Mr Butler and Mr O'Connor supplying the stud farm.

Steps were also taken to arrange the meeting which was to follow the discussion between Mr Cox and the First Defendant on 13 March. This meeting took place at Placid Lodge, the First Defendant's farm at Waiuku. There is some uncertainty about the date of the meeting, but it appears it was either 26 or 27 March, with the likely date being Tuesday 26. Those present were the Plaintiff, Mr Cox, Mr Butler, the First Defendant and the Second Defendant who was introduced as an accountant, tax adviser and friend of the First Defendant (though it was made clear that he was not the First Defendant's accountant). According to the Plaintiff, the Second Defendant was at the meeting in an advisory capacity for the First Defendant on whose behalf he indicated that the sale of Vance Hanover was only part of a total problem for the First Defendant for whom "things had not been done right at the start". It is clear from the totality of the evidence that quite a number of matters were discussed at the meeting. For example, Mr Cox mentioned stud fees being discussed and the reason for Mr Butler's involvement. Mr Butler mentioned discussing the availability of a property on which to stand Vance Hanover, the stallion's potential and the way the stallion was to be promoted, as well as the stud fees. The First Defendant confirmed the range of matters discussed and also added that he indicated 1 May was the day by which the deal would need to be completed. The date of 1 May was confirmed by the Second Defendant, but disputed by the Plaintiff who said the date of 1 May was not mentioned and that the Second Defendant had suggested any deal would have to take

place after 31 May. The Plaintiff's version of the dates may to some extent be confirmed by the note he made of a subsequent telephone cpnversation with the Second Defendant where the words "after 31st May" appear (exhibit 1 document 5). The First Defendant also mentioned discussion of free returns, advance bookings, insurance and the place where the stallion was to stand. Likewise the Second Defendant indicated discussion of a range of matters.

Two particular issues were mentioned by all the witnesses, the first being the First Defendant's tax problem and what could be done about it, and the second being a statement made by the First Defendant in the course of the meeting. All the witnesses for the Plaintiff who were present at the meeting claimed that the First Defendant, in the context of discussion about the tax problem, said words to the effect "anyway fellas it doesn't matter whatever happens the horse is yours". The Plaintiff and his witnesses placed repeated stress on that remark, alleging that it amounted to an affirmation or confirmation of the sale. On the other hand, the First Defendant said the remark he made was in a different context. He stated that what he said arose out of a discussion concerning the stud fee after the Plaintiff had said that the stud fee which he and his associates were proposing was $2,000. The First Defendant stated that he responded by saying that he had already had brochures printed and had also stated at a Stud Masters' meeting that the stud fee would be $1500 and that he thought that was the fee the stallion should be stood at. When Mr Butler responded that this was too cheap and that the fee should be $3,000, the Second Defendant stated he replied "I said okay fellas that will be your worry if the horse is yours". The First Defendant claimed that the remark had since been taken out of context, and, while admitting in cross-examination that he had used words to the effect alleged by the Plaintiff's witnesses, repeated that they had been taken out of context. In re-examination the First Defendant also agreed that he used the words alleged or similar words. It should also be noted that the First Defendant's counsel did not

specifically put to the Plaintiff's witnesses that the words were used in a different context. Finally, it should be mentioned that the Second Defendant also placed the remark in the context of a discussion about stud fees, saying that the First Defendant reacted to the discussion by saying that "that would be their problem if they got the horse, that it would not be his problem, but he did make the point that he had been in the industry for many years that he would like to keep faith with those people".

It is clear that the meeting at Placid Lodge ended on the basis that there would be further discussions. As a result there were several communications between the Plaintiff and the Second Defendant. Although the sequence of events is not entirely clear it seems that the Second Defendant and the Plaintiff spoke by telephone on two occasions on the morning of Saturday 30 March following the mid week meeting at Placid Lodge. According to the Plaintiff the Second Defendant suggested various methods of paying for the stallion. The Plaintiff made some notes of he first telephone conversation and subsequently, as a result of the conversation, made a number of notes of his own. The Plaintiff claimed that it was in the course of these conversations that the Second Defendant stated that any deal would have to take place after 31 May (at one point in his evidence the Plaintiff also referred to "prior to" 31 May).

Later on Saturday 30 March the Plaintiff left Auckland to go to Christchurch to a meeting which had been arranged with a Mr McArdle of Nevele R Lodge, Mr McArdle's partner Mr Francis, Mr Cox and Mr O'Connor. The purpose of the meeting was to ascertain whether Mr McArdle and Mr Francis were interested in becoming involved in a stud operation relating to Vance Hanover. After returning from Christchurch, the Plaintiff gave further consideration to the Second Defendant's proposals for the method of payment for the horse and then made arrangements to meet the Second Defendant. Mr Cox was also present at that meeting, which was at the Second Defendant's offices in Milford.

According to the Second Defendant's evidence this was quite a long meeting, lasting two to three hours.

It appears that after the meeting in the Second Defendant's office, which took place shortly before Easter, there were several further telephone discussions, one or two occasions when the Second Defendant called at the Plaintiff's factory to discuss the issues and one further meeting at the Second Defendant's offices at Milford. The Second Defendant's evidence was to the effect that all the meetings and discussions centred around two problems, the first being the tax question and the second being that he required to be satisfied the Plaintiff and his associates could by 1 May place themselves in a position where they could definitely settle the payment of the stallion at some future date. Probably at the final meeting in the Second Defendant's office he made the suggestion that the Plaintiff and his associates, instead of purchasing a stud property, would be wise to consider leasing one. In that context the Second Defendant mentioned that he had a lease of a 300 acre property at Waiau Pa which was terminating in July 1985, and that because he acted for the owners it might be possible to arrange a lease of the property to the Plaintiff's group. The upshot of that suggestion was an arrangement for the parties to meet at the Waiau Pa property on 11 April, with Mr Cox and Mr Butler also being present and with Mr O'Connor being invited to arrive sometime after the others. It was apparently a deliberate decision on the Plaintiff's part to have Mr O'Connor come at a later stage. He believed that Mr O'Connor would not be very receptive to the lease arrangements and also that he had been critical of the Second Defendant. Before Mr O'Connor arrived the parties discussed the situation. As a result the Plaintiff's group concluded that they were prepared to make arrangements to stand Vance Hanover through a company in which the Second Defendant had a one-third interest and the others a two-third interest. That proposal was discussed while the Second Defendant was out of the room endeavouring to make a cup of tea or coffee, but he was told of it when he returned.

Thereafter, however, Mr O'Connor arrived. All the witnesses indicated that he was not in the slightest interested in the proposal and expressed himself in no uncertain terms. For his part the Plaintiff as a result of the meeting became most disenchanted with Mr O'Connor and gave evidence that he was not thereafter prepared to be involved in any arrangements with Mr O'Connor. According to the Plaintiff, it was left for the Second Defendant to get back in touch with the Plaintiff on the basis that something suitable could be arranged, but leaving Mr O'Connor out of the deal. The Second Defendant on the other hand stated that he could not recall that understanding, and indeed was under the impression from Mr O'Connor's remarks that any further involvement on his (the Second Defendant's) part was unwelcome.

Thereafter, the evidence discloses a lengthy period during which the Plaintiff was largely quiescent. Others, however, took up the running. About a week to ten days after the meeting at Waiau Pa, Mr Cox saw the First Defendant who told him that he had had an enquiry concerning Vance Hanover from two prominent owners, Messrs Meale and Hunter, who controlled the stallion Smooth Fella. According to Mr Cox the First Defendant told him that in response to the enquiry he had stated that the horse was already sold "as he did not want Mr Meale and Mr Hunter to have the best two stallions in New Zealand". On the other hand the First Defendant claimed that he told Mr Cox he had informed Messrs Meale and Hunter that he was "negotiating" the sale of the horse.

It appears that, subsequent to that discussion, Mr O'Connor approached Mr Cox to ask if he felt he could talk to the First Defendant to calm the situation and help finalise a deal. Mr O'Connor then took Mr Cox to see the First Defendant at Placid Lodge. Mr Cox said the Plaintiff was unaware of this approach, he having previously made it clear that he was not happy to deal with Mr O'Connor. Mr Cox stated that in going to see the First Defendant with Mr O'Connor he was probably acting contrary to the Plaintiff's

wishes. According to Mr Cox's evidence he and Mr O'Connor went to see the First Defendant at Placid Lodge on 18 April 1985. Mr Cox claimed that at the meeting Mr O'Connor proposed a lease arrangement for Vance Hanover with a right of purchase and the meeting ended on the basis that Mr O'Connor would get an agreement drawn up. Mr Cox stated that the First Defendant also indicated he wished to see the property where the stallion was to stand, it being proposed that this would be at Clevedon. On the other hand, the First Defendant firmly denied any meeting at his property, stating that his recollection was that Mr Cox asked him to come to Papakura to a wool shed at Clevedon and to meet Mr O'Connor there, in order to inspect the Clevedon property.

According to Mr Cox the meeting at the Clevedon property took place on Saturday April 20, Mr Cox, the First Defendant and Mr O'Connor being present. Mr Cox stated that after looking over the property the parties held a discussion and Mr O'Connor handed a document to the First Defendant. In that document the Plaintiff, Mr Cox, Mr Butler and Mr O'Connor were named as purchasers and interim lessees of the stallion. Mr Cox stated, however, that the document had been prepared only on the instructions of Mr O'Connor and that to his knowledge the Plaintiff had neither been aware of the existence of the document nor given any authority for its preparation. Mr Cox further stated that after looking over the document the First Defendant said "it looked okay apart from dotting the i's and crossing the t's" and that he would get his lawyers to look at it. According to Mr Cox, the First Defendant then said to Mr O'Connor "you have a deal" and shook hands with him.

Once again, however, the Second Defendant gave a different version of the meeting. He indicated that his wife was present and that the purpose of the meeting was to show him and his wife where the group intended to stand Vance Hanover if they were successful in closing the deal on the property and also on the stallion. As a consequence

the First Defendant looked over the property with the others and then indicated that it would take a big effort and untold money to establish the property as an up-market stud. He said that Mr O'Connor, however, responded that he was confident of being able to do so, was now in charge of everything and that any deals that were going to be done over Vance Hanover were to be handled by him. Mr O'Connor then produced the lease document without any prior discussion about it. The First Defendant stated that he was taken aback that they had a document. He raised some queries about it and indicated that he would take it to Waiuku to hand to his solicitor, to his accountant and to the Second Defendant. He said that at that stage Mr O'Connor got "pretty upset" that he would not sign the agreement and the meeting ended on that note.

That meeting may have been the catalyst for the next development which took place on or about 24 April 1985. On that date the First Defendant called at Mr Cox's place of business and left with his wife a brown sealed envelope asking her to give it to her husband who at that time was not on the premises. Mrs Cox did not mention the matter to her husband until the next morning and he then, without opening the envelope, telephoned Mr O'Connor to inform him that the envelope had been left by the First Defendant and that he thought there might be money inside. Mr O'Connor asked Mr Cox to take the envelope to Mr O'Connor's solicitor for him to open the envelope. This Mr Cox did. The solicitor then opened the envelope and found that it contained $1,000 in notes. There then followed correspondence between the solicitor, Mr Kingston, and the First Defendant's solicitors in which the latter, among other things, suggested that Mr Kingston's clients should tender the purchase price if they seriously contended there was an agreement.

There was also a further meeting between Mr O'Connor, Mr Cox and the First Defendant at Placid Lodge. Mr Cox stated that on 5 May he and Mr O'Connor went to see the First Defendant, with Mr O'Connor indicating to the

First Defendant that he wanted to pay for the Clevedon property that day and was accordingly enquiring about the situation concerning Vance Hanover. According to Mr Cox the First Defendant responded that his lawyers and accountants were looking at an overall plan for Vance Lodge and Vance Hanover with the possibility of setting up a trust. Mr Cox said that the First Defendant did not, however, at that stage indicate any deal was off. According to the First Defendant, who could not place a date on the meeting, Mr O'Connor was pressing him to sign the lease saying that he only had one more day to complete the deal on the Clevedon property and that he needed the agreement for Vance Hanover completed by that date. The First Defendant also stated that he had several telephone contacts with Mr O'Connor during this period, mainly between the two meetings. He said these conversations began on a pleasant basis but, when he made it clear that he was not interested in signing the document as it stood, matters concluded on the basis that Mr O'Connor was going to sue him. He said this only made him all the clearer that he could not do business with Mr O'Connor, so he instructed his solicitors to write to Mr O'Connor's solicitor advising that negotiations over Vance Hanover were at an end.

Thereafter, Mr Kingston, was further consulted on behalf of the prospective purchasers, leading ultimately to a meeting with Mr Temm QC which apparently took place on 8 July 1985. Apart from the lawyers, Mr O'Connor, Mr Cox, Mr Butler and the Plaintiff were present. The Plaintiff had been invited to attend the meeting by Mr Cox. According to the Plaintiff he was told that the purpose of the meeting was to discuss Vance Hanover. However, he found that Mr O'Connor was "ruling the roost" and that what he (the Plaintiff) said was pushed aside as being irrelevant, at which point he lost interest and did not take any further part in the meeting.

On 19 September 1985 proceedings (but not the present proceedings) were issued against the First

Defendant under A. No. 1167/85 in the name of Mr Cox, Mr O'Connor, Mr Butler and the Plaintiff. The Plaintiff stated that he was never told that those proceedings were being issued and that he gave no authority for them to be issued in his name. The proceedings alleged as a first cause of action an option obtained by Mr Cox on 13 March 1985 on behalf of the four named Plaintiffs, which option was verbally exercised on 21 March 1985 at Placid Lodge, and as a second cause of action an oral agreement made by Mr Cox and Mr O'Connor, as agents for the four Plaintiffs, with the First Defendant on 18 April 1985 at Placid Lodge. Mr Kingston, who was called to give evidence on behalf of the Plaintiff, stated that he had no doubt whatsoever about his authority to act on behalf of all four Plaintiffs in A No 1167/85 (he having signed a declaration to that effect at the time the proceedings were issued). He, however, also stated that the Plaintiff did not on any occasion say to him in as many words "issue the writ". Mr Kingston also gave evidence that he had been instructed to form a company named Harness World Bloodstock Limited which was to acquire any interest which his clients had in Vance Hanover. Later, control of that company passed to another company which eventually instructed him to take no further action in regard to the writ.

To complete the factual saga concerning Vance Hanover it is necessary to return to the period around the end of April and early May 1985. It appears from a diary note made by the First Defendant's solicitor that on 30 April he telephoned Mr Kingston to advise him that the First Defendant did not wish to proceed further on the matter. The diary note accordingly throws doubt on Mr Cox's recollection that the final meeting between him, Mr O'Connor and the First Defendant took place on 5 May. It would seem that the meeting was probably earlier. Be that as it may, the subsequent developments, according to the evidence of the Second Defendant, were that the First Defendant approached him around 10 May to enquire whether the property at Waiau Pa could be established as a stud farm at which Vance Hanover could stand for the next

season. In response to this approach the Second Defendant said that he did not have "that sort of money" but that it might be possible for him to interest some business associates in Singapore. There then followed various negotiations which eventually led to the establishment of a stud at Waiau Pa, with the property being renamed Vance Lodge and a Mr Trevor Payne being appointed as stud master. It was also agreed that the Second Defendant would take a lease of Vance Hanover, apparently with the intention that this would be a temporary arrangement to be replaced by a long term arrangement in one year's time. The lease was dated 21st June 1985. A document called a guarantee was also signed at a later date. According to the Second Defendant's evidence the object of the guarantee was to protect the First Defendant's interests while a long term arrangement was negotiated. It appears clear that the aim of the lease and the so called guarantee was to ensure that tax was not payable in the same way as would have happened on an outright sale. It is the events leading up to the lease to the Second Defendant which the Plaintiff relies upon in support of the inducement to breach of contract cause of action.

In early 1986 the Second Defendant received an approach from a Mr Pavlovich who was interested in buying Vance Hanover. Discussions then took place which resulted in an agreement to sub-lease Vance Hanover to a company controlled by Mr Pavlovich. According to the Second Defendant's evidence the objective of the arrangements with Mr Pavlovich was to ensure that the First Defendant received a figure of not less than $950,000 after tax. The Second Defendant maintained in his evidence that there was no scheme for the evasion of tax, but simply a transfer of tax from the First Defendant to the Second Defendant and his associates.

It was only when the Plaintiff learned of the sub-lease to Mr Pavlovich's company (Great Northern Thoroughbreds Limited), that his lengthy period of quiescence ended. He then consulted solicitors who on 4

April 1986 wrote to the Defendants to give notice that the Plaintiff would be issuing proceedings seeking specific performance and damages. The present proceedings were issued on 26 September 1986 and thereafter both Defendants filed Statements of Defence denying liability. Due to illness on the part of the First Defendant the action was given a priority fixture and interlocutories were only completed immediately prior to trial. During the course of trial the First Defendant sought and obtained leave to file an Amended Statement of Defence alleging estoppel and laches. It should also be recorded that during the course of the trial counsel for the the Second Defendant moved for a nonsuit or in the alternative judgment for the Second Defendant. For the reasons given in my oral ruling on 1 May 1987 I required the Second Defendant to elect whether or not he wished to adduce evidence. Counsel for the Second Defendant then advised that his client wished to give evidence and the application for nonsuit was accordingly reserved for later determination.

I have set out the evidence in some detail because in my view a clear statement of all the various developments and conflicts is essential to the proper determination of the claim.

I propose to first consider the Plaintiff's claim against the First Defendant. Counsel for the Plaintiff in his final submissions placed the claim first on the basis of a breach of an "open" contract made on 13 March 1985 through the agency of Mr Cox, and secondly on the basis that, if a contract was not made on 13 March 1985, one was accepted at the meeting at Placid Lodge on 26 March 1985 when the First Defendant allegedly used words to the effect "anyway fellas it doesn't matter whatever happens the horse is yours". As an alternative, Plaintiff's counsel contended that the words amounted to an affirmation or an admission by the First Defendant that a contract had been made on 13 March.

Plaintiff's counsel also made submissions concerning agency and the right of the Plaintiff as an undisclosed principal to enforce the contract. Those submissions were not disputed by counsel for the Defendants and I accordingly do not refer further to those issues.

In relation to the law, Plaintiff's counsel submitted than an open contract requires certainty or ascertainment of parties, subject matter and price. In support of that proposition he referred to Perry v Suffields Ltd [1916] 2CH 187, Storer v Manchester City Council [1974] 3 All ER 824, Harvey v Pratt [1965] 1 WLR 1025 and Williams on Vendor and Purchaser (3rd Ed) Vol 1 page 16. The core of the submission of Plaintiff's counsel was that by 13 March 1985 there existed an open contract and that any subsequent conduct could not constitute an abandonment or variation of the contract unless the parties agreed to it. He further submitted that if the date for possession and payment was not discussed, a reasonable date should be implied and that failure to agree a date does not mean that there was no contract unless the parties intended the date to be a term which they had not yet agreed. Plaintiff's counsel stressed that in his submission any discussions concerning the First Defendant's tax problem were merely subsequent negotiations which, if successfully concluded, could have led to a variation of the contract.

In response to those submissions, counsel for the First Defendant contended that the parties simply never reached agreement on the terms of a contract, that references to an open contract did not assist the Plaintiff and that in any event the concept of open contract was limited to land law cases (in relation to which counsel referred to Halsbury 4th Ed. Vol 9 para 232 N7 and Hinde McMorland and Sim para 10.002).

For my part I do not find reference to a concept of open contract particularly helpful in relation to the sale of a horse. It appears to me that the case turns on

the well known rules concerning formation of contract. The issue is simply whether or not the parties reached agreement and in that regard the basic question is one of fact. It is possible for parties to intend to contract and to conclude an agreement on the barest terms (leaving any other terms to be implied by law) in which event any subsequent discussions or negotiations are only indicative of an attempt to reach a mutually agreed variation. On the other hand the parties may intend only to contract once agreement has been reached on many matters (or all the details). The relevant principles are, for example, succinctly stated in Chitty on Contracts (25th Edition) at para 103 where it is said:

> "Parties may reach agreement on broad matters of principle, but leave important points unsettled so that their agreement is incomplete.....On the other hand, an agreement may be complete although it is not worked out in meticulous detail.....Even an agreement for sale of land dealing only with the barest essentials may be regarded as complete if that was the clear intention of the parties. Thus in Perry v Suffields Ltd an offer to sell a public house with vacant possession for L7,000 was accepted without qualification. It was held that there was a complete contract even though many important points, eg the date for completion and the question of paying a deposit, were left open."

I consider the law is also clear that the question whether or not a contract has been concluded is to be determined objectively: see eg Storer v Manchester City Council (ante) at 828 per Lord Denning MR. It is also to be determined in the factual matrix surrounding the parties' dealings: See Prenn v Simmonds [1971] 1 WLR 1381 at 1383 per Wilberforce LJ.

In relation to the law I should also mention the conflicting decisions as to whether the Court may have regard to subsequent conduct as an aid to construction of a

contract. These are discussed in the judgment of Eichelbaum J. in Hill v National Bank of New Zealand Ltd [1985] 1NZLR 736 at page 739. As is there noted the New Zealand Court of Appeal has twice left the matter open. The decision in Mears v Safecar Security Limited [1982] 2All ER 865 is, however, authority for the view that the cases which disapprove resort to evidence of subsequent conduct are not applicable when the Court is endeavouring to determine or construe the terms of an oral agreement: see also Ferguson v Dawson & Partners (Contractors) Ltd [1976] 3 All ER 817. Accordingly, Eichelbaum J. concluded in Hill v National Bank of New Zealand Ltd that it is permissible to look to subsequent conduct for the purpose of seeing whether it supports the existence of an oral term. Similarly, it may be permissible to consider subsequent conduct in order to determine whether an oral contract has been made. There are, for example, some statements in Wickman Machine Tool Sales Ltd v L Schuler AG [1974] AC 235 which can be taken as limiting the scope of the decision to the construction of written contracts. As, however, I will shortly indicate, I am able in the present case to reach a concluded view as to whether or not an oral contract exists without making reference to subsequent conduct. I also consider that the evidence concerning subsequent conduct supports the conclusion which I have reached independently of that evidence.

For completeness I also record that it is clear the Court may imply a term if it is first established that there is a concluded contract and subject to the requirements which the law imposes: see Devonport Borough Council v Robbins [1979] 1 NZLR 1 which in turn refers to the criteria laid down in B.P. Refinery (Westernport) Pty Limited v Shire of Hastings (1978) 52 ALJR 20.

Before setting out my views concerning the existence or otherwise of a contract it is important in this case, where there are disputes as to the facts, that I should record my views as to credibility. Counsel for the Plaintiff strongly contended that the Defendants could not

be believed on the crucial issues. Counsel for both Defendants contended likewise concerning the Plaintiff and his witnesses. For my part I formed the impression that in this Court, as distinct from what may have been said, for example, by Mr Cox to Mr Kingston, all the principal witnesses were on most occasions endeavouring to tell the truth, though their recollections may have been imperfect. The key differences sometimes concern the precise words used or the interpretation of statements or events and the context in which they took place. To a large extent those differences can be put down to the way in which parties tend to colour events or to recollect them selectively as time passes, so that they fit in with the version which they wish to see adopted. Although I think none of the witnesses was entirely free from those tendencies, I am of the view that the First and Second Defendants were less inclined to colour events or recollect them selectively than the Plaintiff, Mr Cox and Mr Butler. As I later indicate in relation to the several occasions where there is a direct conflict of evidence, I prefer the evidence of the First and Second Defendants, in part because of an assessment that their credibility is better and in part because their evidence appears to me to be objectively more likely. I think I must also, in relation to those aspects of Mr Cox's evidence which are in dispute, incline against accepting his evidence where it conflicts with what he previously said to Mr Kingston. I also mention that Plaintiff's counsel placed some emphasis on an alleged inconsistency between what the Second Defendant said in evidence and what he said to Mr Pavlovich concerning the break down of arrangements with the Plaintiff. In my view. however, that evidence is too indirect to be given any substantial weight.

I should also record that in the course of the trial a good deal of evidence was given which was either hearsay or of an indirect nature. No objection was taken to the evidence and, indeed, questions of admissibility raise somewhat difficult issues in a case such as this. I record, however, that I have not placed reliance on

evidence which seemed to me to be of a hearsay or somewhat "filtered" nature.

On the basis of the legal principles and authorities to which I have previously referred and the above findings as to credibility I am of the view that the evidence does not establish that the parties reached a concluded agreement. I would add that this is the view which I had formed at the end of the evidence. I have since read all the authorities relied upon by the Plaintiff's counsel. In my opinion they only fortify the view which I had formed at the conclusion of the evidence.

My reasons for reaching the above conclusion are as follow. It is clear that no agreement was made at the first meeting on 9 March. It should, however, be kept in mind that the 9 March meeting was longer than the subsequent meeting on 13 March and that quite a range of matters were discussed at the first meeting. On the balance of probabilities I think it likely that the First Defendant raised the question of tax at the first meeting, though I do not consider it to be crucial whether tax was brought up then or only at the second meeting. In view, however, of the obvious importance of the tax question it seems much more likely that the First Defendant would, as he claims, have raised it at the outset. This is also consistent with the Second Defendant's evidence as to when the First Defendant first spoke to him about the tax situation (though the Second Defendant's evidence is not conclusive on the point because he also referred to the First Defendant contacting him about the tax problem after the second meeting).

The second meeting was clearly shorter, and in my view the totality of the evidence, especially when viewed in the whole matrix of facts, indicates that what happened is that both at the first and second meetings the First Defendant made it clear that he was prepared in principle to agree to a sale at $1 million, provided all the

necessary details could be satisfactorily resolved. I fully accept that it is possible to sell a horse with only the barest essentials being agreed and that this on occasions happens. Indeed, the First Defendant agreed in cross-examination that on occasions horses are sold on a shake of the hand and he also accepted that he subsequently entered into a "loose" arrangement with the Second Defendant as his trusted friend and adviser. But the question is whether on the facts, viewed objectively, the First Defendant entered into such a bare arrangement with Mr Cox as agent for the Plaintiff. In my view the weight of evidence points the other way.

Mr Finnigan contended that the tax question was an afterthought on the part of the Second Defendant which could not be resolved because the Plaintiff refused to countenance any proposals which were not "clean". I consider, however, it is almost inconceivable that the First Defendant would have agreed without resolving the tax question. If the proceeds of the sale were fully taxable it made an enormous difference to the sum the First Defendant would receive from the sale, with approximately two-thirds of the price likely to disappear in tax. The First Defendant appeared to me to be a sensible person who, as he said, would not overlook the tax situation and would well appreciate the implications for him while thinking it desirable to leave the resolution of the problem to an expert adviser.

Similarly, I think it likely that the First Defendant would not have agreed to a sale unless the question of free returns had been resolved. This was important to him both financially (because there was the likelihood of a considerable number of free returns in respect of which he had contractual obligations) and also in relation to his standing in the industry. It is significant that the question of free returns was resolved (on the basis of an oral understanding) when the First Defendant entered into the subsequent arrangements with the Second Defendant.

In addition, and quite apart to the above two matters which were of crucial importance, there were a series of other matters which required resolution, eg when payment was to be made and possession given, fertility and the need for a veterinary certificate, what would happen to clients who had already made bookings, and further access by the First Defendant's mares to the stallion (for which reason the First Defendant was interested to know whether the stallion would still be in the North Island). The First Defendant was also at least interested to know who were the purchasers.

Mr Cox in cross-examination conceded that a number of the above matters were raised at one or other of the first two meetings. Moreover, he said in evidence that he told the First Defendant on the question of tax that "I am sure my people will be only too willing to help him in minimising his tax" and he also clearly indicated that the subject would be further discussed. It was also common ground between Mr Cox and the First Defendant that the meeting of March 13 concluded on the basis that Mr Cox was to arrange a further meeting at which other matters were to be discussed. In cross-examination Mr Cox accepted that many matters remained for discussion; and the evidence establishes that many were in fact subsequently discussed. Possibly also some weight should be given to the fact that Mr Cox consistently told the First Defendant that he was acting for a number of people. Thus he spoke of "my people" and "a group of businessmen". All the evidence seems consistent with the meetings of 9 and 13 March being preliminary inquiries by Mr Cox to ascertain whether the stallion was for sale and at what price, he being aware that the Plaintiff was in the process of assembling a group of businessmen to participate in the venture. On that basis it was necessary to know whether the horse was likely to be available. It also seems strange that Mr Cox should have spoken of a "group of businessmen" if he was not in fact representing several people, and Mr Cox was unable in

cross-examination to explain why he had referred to a group when he was only acting for the Plaintiff.

While, therefore, it is legally possible to have a situation where the parties agree to sell on the barest or minimum terms leaving other terms to be implied, I do not consider that, viewed objectively in the light of the evidence, that is what happened in the present case. I have no doubt that the First Defendant indicated willingness to sell in principle. He in all probability thought $1 million was a good price and was willing to sell for that reason and for the reason that the stud operation was becoming a burden to him. He may also for a considerable time have thought that a sale was very likely to take place. But I do not consider that the evidence establishes that agreement was reached. Rather, I think that the parties remained in a negotiating situation, though both sides believed that a sale was likely to eventuate.

As against the above view of the evidence the Plaintiff's counsel, Mr Finnigan, strongly contended that there were a number of contrary indications. I have dealt with some of Mr Finnigan's contentions in the previous paragraphs, but there are others to which I should now refer. In the first place, Mr Finnigan placed reliance on the tendering and acceptance of the cheque for $1,000 on 13 March. He submitted that the cheque was clearly tendered and accepted as a deposit and was evidence that a contract was concluded on 13 March. In that regard Mr Finnigan also pointed to the contemporaneous description of the payment as a deposit (on Mr Cox's cheque butt).

I consider, however, that the evidence concerning the deposit is equivocal. On the balance of probabilities I would not be prepared to find that the word "deposit" was used in the discussion between Mr Cox and the First Defendant. The First Defendant said that Mr Cox described the payment as a "good-will cheque to show you that we are serious about buying Vance Hanover", to which the First

Defendant responded that "I will not enter into negotiations with this horse while you are trying to put a deal together". There is also the evidence from the First Defendant, denied by Mr Cox, that reference was made to the payment being a bit extra to compensate the First Defendant for the advertising brochures which would be wasted (whereas one would expect a deposit to be deducted from purchase price). Bearing in mind the small size of the alleged deposit in relation to the purchase price (and not overlooking that horses are from time to time sold without any deposit) I think that the First Defendant's version of events concerning the payment is the more likely one, ie that it was given and accepted on the basis that it was a good-will gesture and to show that Mr Cox and "the people" he represented were serious about negotiations. In my view the First Defendant would have sought a much more substantial deposit if it was intended to be an earnest of performance and security for the whole contract to be forfeited if there was default. Nor, if it was a true deposit, is it likely that the First Defendant would have been reluctant to take it (as both agree that he was). Rather he would have been likely to press for a larger sum.

Mr Finnigan also placed reliance on the "anyway fellas it doesn't matter, whatever happens the horse is yours" statement allegedly made by the First Defendant at the meeting at Placid Lodge on 26 March. Mr Finnigan referred to the remark as an affirmation, not in the sense of affirming a contract and thereby losing rights, but in the sense of an admission of the existence of a contract. On that basis the remark can at best be evidence that a contract was made on 13 March. However, Mr Finnigan also suggested that it could be an acceptance of a contract on 26 March. The latter suggestion is, in my view, quite inconsistent with the whole tenor of discussions at the meeting of 26 March, where various issues were canvassed without being resolved, and there is no evidence to support the making of a contract on that date. As to the submission that the remark was evidence of a contract at the earlier date of 13 March, I take the view that the

remark became something seized upon by the Plaintiff and his witnesses, but taken out of context. It is unfortunate that the First Defendant's counsel did not cross-examine the Plaintiff or his witnesses on the context in which the remark was made, but I consider it is more likely that the statement was made in the context the First Defendant alleges, ie concerning the likely stud fee and relating to the situation if the contract was successfully negotiated. As at 26 March, in my view, all the parties thought that a contract was highly likely to eventuate and discussions proceeded on that basis (as is, for example, confirmed by the Second Defendant). Set in that context I take the view that the First Defendant's remark, in whatever form it was made, does not evidence a contract on 13 March. Rather it was an indication, possibly on a rather expansive basis, that the prospective purchasers would have to deal with any problems resulting from the higher stud fee if a contract was concluded.

Finally in relation to Mr Finnigan's submissions I should mention that he placed some reliance on the statement allegedly later made by the First Defendant to Mr Cox that he had told Messrs Meale and Hunter that the horse was sold. As noted earlier, there is a conflict of evidence concerning what was said and in any event in the context of all the on-going negotiations I do not think that any significant weight can be placed on the statement.

Standing back from the matter and endeavouring to view the conflicting evidence as objectively as possible, I am compelled to the conclusion that a contract has not been established. I also consider that conclusion is further strengthened if the Court is able to take into account the subsequent conduct of the parties. In particular the Plaintiff's conduct is strangely inconsistent with a belief that a contract had been made on his behalf on 13 March. At no stage before the Plaintiff instructed solicitors in April 1986 (virtually a year after the crucial events) did he ever assert sole ownership of the stallion. After the Waiau Pa meeting on 11 April he became aware, through Mr

Cox, that Mr O'Connor was negotiating to buy the stallion, but he did not then assert sole ownership (even when he was present at the meeting in the chambers of Mr Temm QC). Similarly, he did not take any steps when he learned in about June 1985 that the Second Defendant was standing the stallion at Waiau Pa. Nor did the Plaintiff take any steps to seek possession or tender the money when the date by which he expected to take possession was reached. Making full allowance for the fact that he knew the First Defendant was unwell and that he had a "guts full" of the whole matter, his conduct is still inconsistent with a belief that he was entitled to purchase the stallion. Likewise Mr Cox's conduct in his dealings with Mr O'Connor and Mr Kingston is inconsistent with a belief on his part that he had made a contract to purchase the stallion on behalf of the Plaintiff.

In reaching the conclusion that the evidence does not establish a contract I have not made specific reference to the burden of proof. Had, however, I been left in any doubt, I would have considered that the burden of proof told heavily against the Plaintiff. In the conflicting and confusing circumstances of this case I do not consider it would be justifiable to make a finding in the Plaintiff's favour, particularly bearing in mind that this was a large commercial transaction in respect of which a series of matters were likely to need to be resolved before a contract was concluded, and where parties who intend to make a firm contract are likely to need to place their arrangement in writing. The Plaintiff's case was forcefully argued by Mr Finnigan and I am left with some sympathy for the Plaintiff who may have received less than reasonable consideration from some of his associates. I am, however, satisfied that he is not able to establish the existence of a contract on the balance of probabilities.

Finally on the question of liability I also mention that, had I thought there was a contract, I would have found considerable difficulty in implying some of the terms necessary to give the contract business efficacy. In

that respect I particularly refer to the date of possession and payment. Applying the tests laid down in B.P. Refinery (Westernport) Limited (ante) I would have found it difficult to determine what was the obvious settlement date. There appears to me to be considerable doubt whether the parties, or an objective observer, would have considered a particular date to be obvious.

On the view which I have taken of the evidence it is unnecessary for me to deal with the two other defences of estoppel and laches advanced by the First Defendant. Similarly, since the claim against the Second Defendant depends on the existence of a prior contract, it is not necessary for me to deal with the allegation of inducement to breach of contract or the application for a nonsuit made on behalf of the Second Defendant. In fairness to the Second Defendant I think, however, I should record that had there been a contract I would not have been prepared to hold that the Second Defendant had induced a breach of it. There is no direct evidence of inducement and I would not have been prepared to draw the inferences for which Plaintiff's counsel contended. On the other hand, I am not thereby indicating that the arrangements made between the First and Second Defendants were legitimate for tax purposes. I could not reach any conclusion on that without more detailed evidence as to the course of events.

In view of the fact that the Plaintiff's claim has not succeeded the First and Second Defendants are entitled to costs. Counsel may be able to agree costs, but in case they cannot I should reserve that question. There will accordingly be judgment for the Defendants with all questions of costs being reserved.

J. H. Wallace J.

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