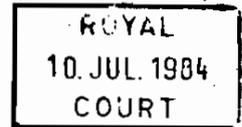


Unreported

1984/18



Before: Sir Frank Ereaud, Bailiff.
Jurat G.N. Simon
Jurat P.G. Baker

Between
Prator Limited, Plaintiff.
and
Ernest Stanley Hales, First Defendant
and
Hilda Hales, nee Frost, Second Defendant

Advocate P. de C. Mourant for the Plaintiff
Advocate C.M.B. Thacker for the Defendants

The Plaintiff carries on the business of estate agents in Jersey. The Defendants were at the relevant time the beneficial owners of Machine Tools (C.I.) Limited, which in turn was the beneficial owner of Rozel Hotels Limited, which in turn owned Le Couperon de Rozel and Lodge Cottage, St. Martin, and the hotel business conducted thereon. The Defendants were at the relevant time also the beneficial owners of Magasin de Rozel Limited, which then owned The Moorings, Rozel. On 8th April, 1983, the Defendants sold the whole of the issued share capital in the two companies Rozel Hotels Limited and Magasin de Rozel Limited to Mr. Peter Bowden for a consideration of £650,000.

The Plaintiff now claims that by an oral agreement made in or about the month of February 1983 between David Bryan Pulley, acting on behalf of the Plaintiff, and the First Defendant, acting on behalf of the Defendants and Machine Tools (C.I.) Limited, it was agreed that in consideration of the Plaintiff introducing a purchaser to the Defendants to buy from them their respective interests in the two companies mentioned above, and the underlying assets of those companies, the Defendants would pay the Plaintiff a fee in accordance with the scale of the Association of Jersey Auctioneers and Estate Agents, namely two per cent of the sale price. The Plaintiff further claims that in pursuance of that agreement Mr. Pulley introduced Mr. Bowden to the Defendants and was the effective cause of the above-mentioned sale to him. The Plaintiff therefore now

actions the Defendants for its fee of £13,000 in accordance with the said scale.

The Defendants admit that Mr. Pulley introduced Mr. Bowden to them, but deny that they had ever agreed to appoint Mr. Pulley as their agent, or to pay him any fee as claimed, and they further deny that Mr. Pulley was in any event the effective cause of the afore-mentioned sale to Mr. Bowden.

In order to succeed in its action the Plaintiff must prove:

1. that the Defendants agreed to appoint Mr. Pulley as their agent for the purpose of selling Le Couperon de Rozel and Lodge Cottage (which we hereinafter call "the hotel") and The Moorings;
2. that the introduction by Mr. Pulley of Mr. Bowden to the Defendants was the effective cause of the sale; and
3. that the Defendants agreed to pay Mr. Pulley a fee in accordance with the scale referred to.

Because there is a very substantial conflict of evidence between the witnesses for the Plaintiff and the Defendants, and because there are also some inconsistencies in the respective evidence of the witnesses for the Plaintiff, it is necessary to summarise the evidence of each witness.

One of the few matters agreed is that in December 1982 the Defendants decided to sell the hotel and advertised it in The Times (of London) of 2nd December, but without mentioning its name. Instead, the advertisement carried the telephone number of Mr. Hales' office business in England. Mr. Pulley, who was looking for a hotel for a client, telephoned the number on the day that the advertisement appeared in order to identify the property. He spoke to Mr. Hales who told him the name of the hotel. According to Mr. Pulley, there was no further conversation and, because his client was not interested in the hotel, he did nothing further.

Continuing with the evidence of Mr. Pulley, at the end of January or beginning of February, 1983, he received a telephone call from Mr. David Pennington, another estate agent in Jersey. Mr. Pennington said

that he was seeking a hotel for an applicant (who was in fact Mr. Bowden, although his name was not then disclosed) and he was telephoning to inquire whether Mr. Pulley knew of a suitable property for sale.

We interpose at this stage to say that we heard evidence from Mr. Pulley and Mr. Pennington as to certain customs of the estate agent profession. A person seeking to buy a particular type of property may sometimes retain an estate agent to search for one, on the basis that he will pay a scale fee if the agent is successful, and may also pay a fee for the work done even if the agent is not successful. In such case the inquirer is referred to as a client.

Often, however, a person seeking to buy a particular type of property does not retain a specific estate agent but personally inquires at a number of offices. In such case he is referred to as an applicant, and is not liable to pay any fee to the estate agent who finds him a suitable property. The agent must look to the seller for his fee.

In either case, if an estate agent who is approached by a potential buyer has no suitable property on his books, he will usually approach another estate agent to inquire whether he is agent for such a property. If a sale results, it is a custom of the profession that the commission is shared equally between the two agents.

Mr. Pennington told us that he had suggested to Mr. Bowden that he might like to retain him to seek a suitable hotel on a fee basis, but Mr. Bowden had declined. Mr. Bowden was, therefore, an applicant and not a client, and in the event of Mr. Pennington finding him a hotel he would not owe him any commission. Mr. Bowden confirmed to us that he was not liable to pay Mr. Pennington any commission. Mr. Pennington had no suitable hotel on his books, and he therefore telephoned Mr. Pulley to see if he had one. If a sale were to result he would expect to share the commission payable to Mr. Pulley by the vendor, and it was not disputed that if the Plaintiff were to win this action one half of the commission claimed would be paid to Mr. Pennington.

On receipt of Mr. Pennington's inquiry, Mr. Pulley remembered that the hotel had been for sale in December and said that he knew of a property which had been offered for sale two months previously and might be suitable. He did not, however, tell Mr. Pennington the name of the hotel, because he did not know if it was still for sale and, even if it were, he was not, of course, the agent for it at that time.

According to Mr. Pulley, he then telephoned Mr. Hales at the number given in the original advertisement to inquire if the hotel was still for sale. Mr. Hales replied to the effect that since December he had engaged a good Manager and therefore the hotel had been withdrawn from the market, but on the other hand he would be prepared to sell it if the price was right. Mr. Pulley then said if he was able to effect a sale he would expect a fee from him, to which Mr. Hales replied: "Of course, old man, I understand."

In examination in chief, Mr. Pulley told us that he was sure that he mentioned that his fee would be 2% of the sale price in accordance with the scale of the Estate Agents and Valuers Association, but in cross-examination he agreed that he could not be absolutely sure that he had mentioned 2% or referred to the scale, although he was adamant that he had mentioned that he would require a fee and that this was agreed.

Satisfied that he had secured the agreement of Mr. Hales to act as his agent in the sale of the hotel, Mr. Pulley then telephoned Mr. Pennington to give him the name of the hotel and to say that it was for sale. Mr. Pulley told us that he would never have passed on the name of the hotel unless Mr. Hales had agreed to pay him his fee.

Again according to Mr. Pulley, Mr. Pennington then asked if the hotel contained living accommodation for the proprietor, because the applicant required substantial living accommodation. Mr. Pulley did not know, and so later the same day he telephoned Mr. Hales to inquire. In fact the hotel has no private accommodation, but the Defendants owned The Moorings which adjoins the hotel and was then empty, and Mr. Hales stated that there was a house next to the hotel which could

be included in the sale. Mr. Pulley informed Mr. Pennington accordingly.

Mr. Pennington was called as a witness for the Plaintiff. His account of this stage in the history of the matter differed in certain respects from that of Mr. Pulley. He told us that he had shown Mr. Bowden, who was then resident in England, several hotels in Jersey, but none was suitable. Mr. Bowden later telephoned to say that his wife liked the Rozel area and had been shown a hotel in that area, which however was not suitable. It was then that Mr. Pennington spoke to Mr. Pulley who replied that he had a "client" with a hotel for sale at Rozel and named the hotel. Mr. Bowden required substantial private accommodation and Mr. Pennington thought that he must have made this clear at the beginning, because otherwise there would have been no point in pursuing^{See} the matter with Mr. Pulley.

Mr. Pennington was at first uncertain about the date of this conversation with Mr. Pulley. He thought that it might have been March or April, but later said that it was within a week before the occasion when Mr. Bowden came to Jersey and was shown round the hotel. There is no dispute that that was on the 17th February. Mr. Bowden, who was also called as a witness for the Plaintiff, told us that Mr. Pennington first told him that the hotel was for sale on 14th February. We accept this, and we think it therefore follows that the inquiry which Mr. Pennington made of Mr. Pulley, and which, according to Mr. Pulley, led to his making two telephone calls to Mr. Hales, took place within two or three days before 14th February, because we cannot believe that Mr. Pennington would have wasted much time in communicating the name of the hotel to Mr. Bowden, once he had received it from Mr. Pulley. It therefore also follows that we think that Mr. Pulley's evidence as to the date when these particular events took place, that is to say, late January or very early February, is incorrect.

Mr. Bowden came to Jersey, on about 16th February, to see the hotel, and on Friday, 17th February, he, Mr. Pennington and Mr. Pulley met for

lunch at a public house in St. Helier. Mr. Pulley telephoned Mrs. Hales at the defendants' Jersey home, (Matci House, Trinity), to ask if they could take Mr. Bowden round the hotel. Mr. Pulley understood that Mrs. Hales telephoned her husband in England, who agreed provided that the three men first picked Mrs. Hales up at her home. This they did, and according to Mr. Pulley, they first visited The Moorings and then the hotel itself. Mr. Bowden was very interested in the properties. They returned to the defendants' house, where Mrs. Hales telephoned her husband, Mr. Pulley had a brief conversation with him and handed the telephone over to Mr. Bowden, who had a long conversation with Mr. Hales. Mr. Pulley understood that the asking price at that time was £500,000 for the hotel and £250,000 for The Moorings, but he had the impression that Mr. Bowden could not or would not pay that price and no agreement was then reached on price. However, following that call Mr. Hales came to Jersey the next day and a total price of £650,000 was agreed for both properties by direct negotiation between Mr. Hales and Mr. Bowden. Neither Mr. Pulley nor Mr. Pennington was involved in these negotiations on price, which, according to Mr. Bowden, were completed in one evening. That settlement was subject to negotiations with the Housing Committee, because The Moorings was classified as a J. property for housing qualification purposes, and Mr. Bowden had no such housing qualification. The Committee eventually agreed to allow Mr. Bowden to buy both properties and to live in The Moorings, but neither Mr. Pulley nor Mr. Pennington was involved in these negotiations.

On the 18th February, 1983, (the day after the visit to the hotel) Mr. Pulley wrote to Mr. Hales at his Jersey address as follows:

"Reference: Le Couperon Hotel & The Moorings, Rozel

Dear Mr. Hales,

Further to the visit yesterday with Mr. Bowden to the above and your subsequent telephone conversation with him I can confirm his interest in purchasing both properties, subject to a satisfactory price being agreed and the permission of the housing committee being granted for he and

his family to occupy the Moorings.

I understand that you are having a meeting this evening, which I will not be able to attend due to a prior engagement. However, if you wish to contact me my telephone number at home is 42541 and I will be available at any time to suit, whilst you are in the island.

As previously discussed and verbally agreed, my firms fee in the event of a sale being affected are in accordance with the Jersey Auctioneers and Estate Agents Association scale of professional charges namely 2% of the purchase figure and payable at the time of completion.

I trust the negotiations will reach a successful conclusion and I assure you of my best attention at all times."

Mr. Pulley told us that the third paragraph of this letter referred to the telephone conversation with Mr. Hales, which we have previously described. He received no reply to this letter.

On the 21st February, having heard that the parties had agreed on a price, he wrote to Mr. Hales again. The following is an extract:

"Reference: Le Couperon Hotel & The Moorings Rozel.

I understand from Mr. Peter Bowden that an offer of £650,000 has been agreed for the sale of the above subject, of course, to contract and the approval of the Housing Committee for Mr. Bowden to occupy the Moorings. I will be pleased to receive your confirmation of acceptance of the offer and at the same time will you please let me have the name of the Advocate acting on your behalf to enable instructions to be given to him.

Mr. Bowden as you know is anxious for an early completion and if there is anything I can do on your behalf to expedite matters please contact me at any time."

He received no reply to that letter.

On the 3rd March, having learned that Advocate Thacker was acting for Mr. & Mrs. Hales, he wrote to Advocate Thacker as follows:

"Reference: Le Couperon Hotel & The Moorings Rozel.

I understand a preliminary agreement is being prepared for the sale of the above properties, each being in separate companies.

We have been acting on behalf of our mutual client Mr. Hales and I enclose copies of our previous correspondence with him.

If we can be of any further assistance please do not hesitate to contact us.

We trust this sale will proceed smoothly and assure you of our best attention at all times."

He received no reply to that letter.

On the 10th March, Mr. Pulley wrote again to Mr. Hales to indicate that he knew that negotiations with the Housing Department were proceeding satisfactorily, and on the 22nd March he wrote to Advocate Thacker to ask for an acknowledgment of his previous letter, but he received no reply to either letter.

Mr. Bowden was concerned to see the fire certificate relating to the hotel and therefore, on the 30th March, Mr. Pulley twice telephoned Mr. Hales' office in England and also on the same date wrote to Mr. Hales asking for the certificate.

On the 5th April, Mr. Pulley sent the plaintiff's account for £13,000 to Mr. Hales, and a copy to Advocate Thacker. That drew a reply from Advocate Thacker, dated 18th April, in these terms -

"Le Couperon Hotel and The Moorings, Rozel.

Mr. E.S. Hales has now given me instructions on your account of 5th April, 1983.

I understand from Mr. Hales that your approach to him in connection with the sale of Le Couperon Hotel was made on behalf of the buyer, Mr. Bowden. Mr. Hales further informs me that the transaction involving The Moorings was not a matter in which you were involved as Mr. Bowden himself raised the question of that property with Mr. Hales.

In the circumstances it does not seem that any payment is due but Mr. Hales is grateful that your intervention on behalf of Mr. Bowden has resulted in the sale of Le Couperon Hotel. He would be prepared to make a payment to you, entirely on an ex gratia basis, of £1,500 provided of course that the statement of 5th April, 1983 is withdrawn."

On receipt of that letter, Mr. Pulley telephoned Mr. Hales who agreed that he was entitled to a fee but not the amount claimed. Mr. Hales offered him £1,500, and when he refused increased the amount to £1,600. Mr. Pulley refused that sum also. Notwithstanding that, a week later Mr. Pulley received a letter from Advocate Thacker, dated the 25th April, in the following terms -

"I tender our cheque in the sum of £1,600 which I understand, from a conversation with Mr. Hales, you have decided to accept as an ex gratia payment.

It is understood that your bill has been withdrawn and the cheque is, of course, tendered on this assumption."

On receipt of that letter, Mr. Pulley consulted his lawyer, who wrote on behalf of the Plaintiff to Advocate Thacker to claim the commission of £13,000. Mr. Hales continued to instruct his lawyer that Mr. Pulley had agreed to accept an ex-gratia payment of £1,600, and in due course the Plaintiff instituted this action.

We have already referred to certain parts of the evidence of Mr. Pennington, and it is only necessary to repeat here that that witness confirmed firstly, that he came to know that the hotel was for sale entirely through Mr. Pulley, and secondly, that Mr. Bowden was an applicant and not a client and was not, therefore, liable to pay him any commission.

Mr. Bowden told us that he and his wife were seeking a hotel, together with superior living accommodation. Mr. Pennington had previously shown them properties, but none were suitable. On the 14th February he telephoned Mr. Bowden and told him that the hotel was for sale. This was the first notification they had had and they were very interested as they had seen the hotel in the Bergerac television series. Mr. Bowden was due to come to Jersey on the 17th February and he asked for a visit to the hotel to be arranged. On that date he was introduced to Mr. Pulley and he viewed both the hotel and The Moorings in the company of Mrs. Hales, Mr. Pulley and Mr. Pennington. Afterwards, at the Defendants' home he spoke on the telephone to Mr. Hales and said that he was

interested. There was some reference to price, but nothing was agreed. However, Mr. Hales came to Jersey within a day or two expressly to negotiate with Mr. Bowden, and at a meeting at the Grand Hotel they agreed a price of £450,000 for the hotel and £200,000 for The Moorings, subject to negotiating successfully with the Housing Department.

Mr. Bowden told us that at that meeting Mr. Hales mentioned that he (Mr. Hales) was liable to pay his agent a substantial sum, but that he did not see why he should pay the agent the full fee because the agent had done very little work, and he mentioned a payment of £800 to settle the matter. Mr. Bowden said that he got the impression that Mr. Hales raised this question as a negotiating ploy, because he (Mr. Bowden) was trying to drive a hard bargain. At no time did Mr. Hales suggest that he (Mr. Bowden) was liable to pay any fee.

As we have said, the evidence of Mr. Hales was almost a complete contradiction of the testimony of Mr. Pulley, and in two important respects of that of Mr. Bowden also.

According to Mr. Hales, Mr. Pulley telephoned him twice in December 1982. On the first occasion it was to inquire the name of the hotel advertised in The Times. Mr. Hales told him, but asked his wife to find out who he was, and she ascertained that he was an estate agent. A week later Mr. Pulley telephoned him again and on being told that the hotel was still for sale asked Mr. Hales if he could act as agent for him. Mr. Hales said a firm no and the call ended.

The next communication from Mr. Pulley was on 16th February, when he tried to speak to Mr. Hales on the telephone but Mr. Hales was not available. On being later told by his Secretary of the call (and, we assume, the subject of it) Mr. Hales telephoned his wife and they agreed that Mr. Bowden could be shown the hotel. Mr. Hales explained to us that although they had wanted to sell the hotel in December, they had not received any satisfactory replies and they had, therefore, decided to withdraw it from the market and operate it during the 1983 season.

To that end they had secured an excellent Manager whom they were anxious not to lose should a possible sale not materialise. Although they had contemplated selling the hotel, they had not considered selling The Moorings, which was physically quite separate from the hotel.

After Mr. Bowden had seen the hotel (and, so he claimed, The Moorings), the party returned to the Defendants' house at Trinity. First, Mrs. Hales telephoned her husband and they agreed that Mr. Bowden could buy both the hotel and The Moorings subject to agreeing a price. Mr. Bowden then spoke to Mr. Hales who told him that the asking price of the hotel was £500,000 and of The Moorings £250,000. (Mr. Hales told us that the asking price of The Moorings was fixed on the spur of the moment, as he had not previously considered selling that property). Mr. Bowden did not agree to that price, but at a meeting with Mr. Bowden a day or two later a total price of £650,000 was agreed, subject to housing consent.

As we have said, Mr. Hales contradicted the evidence of Mr. Bowden in two important respects. Firstly, he claimed that it was Mr. Bowden who raised the question of agents' fees, and not he himself. He had no reason to do so, as he had no agent and did not like agents - in his own words, he "avoided them like the plague". He claimed, however, that Mr. Bowden told him that he (Mr. Bowden) had to pay Mr. Pennington either £500 or £800 as agent's commission. Mr. Hales felt that Mr. Bowden raised this as a matter to be taken into account in negotiating the price for the property. He further told us that he considered that the amount of the commission mentioned by Mr. Bowden did not seem much, especially as it might have to be split between the two estate agents, and he therefore told Mr. Bowden that he would be prepared to give them a present of £1,000.

The second contradiction occurred when Mr. Hales told us that Mr. Bowden informed him that he and his wife had seen the hotel on television and had decided to ask Mr. Pennington to ascertain if it was for sale.

Mr. Hales agreed in cross-examination that he had not told his counsel of this allegation, and as a result it was not expressly put to Mr. Bowden in cross-examination.

Mr. Hales agreed that he had received Mr. Pulley's letter of the 18th February, in which the scale of fee being claimed was mentioned. Asked why he had not replied to it, he agreed that with hindsight he should have done, but at the time he felt that the letter was ridiculous because he had never agreed to Mr. Pulley being his agent, indeed he regarded him as helping Mr. Bowden, and in any event he was very busy. For similar reasons he did not reply to Mr. Pulley's subsequent letters. However, on 30th March Mr. Pulley telephoned him and for the first time made a direct oral request for a commission. Mr. Hales told him that he was not his agent and that his claim was ridiculous, but he did say that he might give him something in recognition of the introduction of Mr. Bowden. On receipt of Mr. Pulley's account for commission in early April, Mr. Hales instructed his lawyer to write the letter dated 18th April, offering £1,500. Following that letter, Mr. Pulley telephoned him and after some haggling agreed (according to Mr. Hales) to accept an ex-gratia payment of £1,600, and this led to the forwarding of the cheque.

Mrs. Hales corroborated her husband's evidence in certain respects. She said that after unsuccessfully advertising the hotel in December they succeeded in engaging a competent Manager and so decided to withdraw it from the market and conduct it during the 1983 season.

On the 17th February, at lunch time, Mr. Pulley telephoned her out of the blue and asked if the hotel was for sale. She said that it was not because she did not want to upset the Manager. However, having telephoned her husband she rang Mr. Pulley back and told him he could see the hotel in her company. He brought two men with him, one of whom was introduced to her as Mr. Bowden.

Whilst in the hotel she told Mr. Bowden that there was no living accommodation in the hotel and that they had plans to extend into

The Moorings. Mr. Bowden replied that he wanted living accommodation and asked to see The Moorings. She told him that it was a J. property and not for sale, but nevertheless she showed him round the house.

On return to her home she telephoned her husband and they agreed that they might sell both the hotel and The Moorings if the price was right and if Mr. Bowden could obtain housing consent. No firm price was mentioned then.

Late that same afternoon the afore-mentioned letter, dated 18th February, and addressed by Mr. Pulley to Mr. Hales, was pushed through the letter-box of her home. She was shocked by the reference to a 2% commission, not only because of the size of the commission but also because at that time there was no sign of a sale. She telephoned Mr. Hales, who was equally shocked and assured her that he had never agreed to appoint Mr. Pulley as his agent or to pay any fee, and he had never heard of the Association mentioned in the letter. She was too busy to reply to the letter.

During the discussion between Mr. Bowden and her husband in Jersey she heard Mr. Bowden say that he had to pay Mr. Pennington £500.

Mrs. Hales agreed that they would never have sold the hotel to Mr. Bowden but for the introduction effected by Mr. Pulley, but that did not apply to The Moorings. Up to 17th February they had had no intention of selling it. It was empty, and if they had not been able to incorporate it in the hotel they would probably have let it. There was no mention of a need for owner's accommodation before Mr. Bowden visited the hotel, and even when she showed him The Moorings she had no intention of selling it to him. She took him round it only because he was interested in the house.

Finally, Mrs. Hales said that neither she nor her husband had ever contemplated appointing an agent.

As we have stated earlier, the Plaintiff must prove three matters in order to succeed in its action, and we now deal with each of them in turn. The first issue is whether the Defendants agreed to appoint Mr. Pulley as their agent for the purpose of selling the hotel and The Moorings.

The Plaintiff relies upon Mr. Pulley's account of his telephone conversation with Mr. Hales, during which, so he claims, Mr. Pulley said that he would expect a fee if he were able to effect a sale, and Mr. Hales agreed. Mr. Hales agrees that there was a telephone conversation in which Mr. Pulley asked if he could act as his agent, but claims that he emphatically refused. There is no other direct evidence, and so the issue must be decided by our view of their respective evidence and by inferences to be drawn from other evidence.

Mr. Hales told us that he avoided agents "like the plague", and the advertisement in The Times is consistent with that view. It is, of course, not disputed that the approach came from Mr. Pulley (and not from the Defendants), but that is irrelevant if Mr. Hales agreed to Mr. Pulley's proposal.

Mr. Pulley's letter to Mr. Hales of 18th February is entirely consistent with the crux of Mr. Pulley's version of events, although it is not, of course, independent evidence of that version. What we do find significant is the failure of Mr. Hales to reply at once to that letter, rejecting any suggestion of there being a contractual relationship between them. On his own evidence, Mr. Hales knew that Mr. Pulley had previously asked to act as his agent. Mr. Hales is a business man. We would have expected him, by letter or telephone, to have reacted instantly. He did not do so (nor to subsequent letters), and we find his explanations for his omission to act unconvincing.

On the other hand, we consider that the fact that Mr. Pulley gave Mr. Pennington the name of the hotel is consistent with his having reached an agreement to receive a fee if a sale resulted. He said that he would not otherwise have disclosed this information, and we find that credible. Mr. Hales suggested that Mr. Pulley was really

acting for Mr. Bowden, and that brings us to a consideration of the evidence of Mr. Pennington and Mr. Bowden.

In the first place, we have not overlooked what appear to be contradictions between the evidence of Mr. Pulley and Mr. Pennington, both as to date and, more importantly, as to whether there was initially only one telephone conversation between them or whether there were two. We agree that if Mr. Pennington's memory is accurate, and there was only one conversation, then it would seem that Mr. Pulley was saying that the defendants were his clients when in fact they were not.

That, of course, would be very prejudicial to the Plaintiff's case. On the other hand, this inconsistency can be looked at in another way. It was suggested on behalf of the defence that the two men were in league, since it is not disputed that Mr. Pennington will receive half of any amount recovered by the Plaintiff. If they really are in league in any sinister sense, then it is perhaps remarkable that they clearly made no effort to synchronise their evidence on this point. That helps us to regard them as witnesses seeking to tell the truth to the best of their ability and memory.

We consider the evidence of Mr. Bowden to be very significant. If he is telling the truth, then Mr. Hales knew, at the time of the direct negotiations, that he was liable to pay the substantial fee of an agent. That would entirely support Mr. Pulley's version of events. As we have already pointed out, Mr. Hales gave a directly contrary account of the conversation, and went on to allege that Mr. Bowden was not an independent witness, since he would have to pay Mr. Pennington a commission if the Plaintiff lost this action.

Ultimately, when the Court is confronted as here with such a direct conflict of evidence, it is substantially a question of whom one believes and which is the version more likely to be true. On a balance of probabilities we find, when we consider the whole of the evidence (including that of Mrs. Hales), that Mr. Pulley has satisfied us that Mr. Hales agreed during the telephone conversation that if Mr. Pulley could find

a purchaser then he would be entitled to a fee, in other words, that Mr. Hales agreed that Mr. Pulley would be his agent for the purpose of the sale, and thus agreed to a contractual relationship between them of principal and agent.

It was agreed, by the Defendants that even if there was an agreement between Mr. Pulley and Mr. Hales it related only to the hotel and not to The Moorings. As we have described, Mr. Pulley's evidence was that during his second telephone call with Mr. Hales, the latter agreed to include The Moorings in a sale of the hotel. Both Mr. Pennington and Mr. Bowden said that substantial living accommodation was essential and that when they visited the hotel they knew that a house was also available.

The Defendants denied this. They said that The Moorings was not for sale in December (it is true that it is not mentioned in The Times advertisement), not in February, and it was only when Mr. Bowden raised the question of living accommodation during his visit to the hotel that Mrs. Hales knew that he was interested in the house. We find her evidence about the visit rather strange. Although she insisted to Mr. Bowden that The Moorings was not for sale, she nevertheless, while standing in a corridor of the hotel, described the plans of herself and her husband to seek to incorporate the house into the hotel. Furthermore, while still maintaining that the house was not for sale, she nevertheless showed him over it.

We are satisfied that the contractual relationship between Mr. Pulley and Mr. Hales related to both the hotel and The Moorings.

We must next answer the second question: was Mr. Pulley the effective cause of the sale of the hotel and of The Moorings to Mr. Bowden?

Chitty on Contracts (25th Edition), para. 2312 states -

"Subject to any express terms to the contrary, where the agency contract provides that the agent earns his remuneration upon bringing about a certain transaction, he is not entitled to such remuneration unless he is the effective cause of the transaction being brought about."

Whether in any particular case the agent is the effective cause depends upon the particular facts.

Counsel for the Defendants argued that Mr. Pulley was not the effective cause of the sale of either property. He was prepared to concede that the sale of the hotel (but not of The Moorings) resulted from the introduction effected by Mr. Pulley, but an introduction by itself was not enough. Even if he were the agent, Mr. Pulley was never informed of the asking price. At the time of the introduction there was no firm asking price and up to the time that Mr. Pulley ceased to be involved there were no clear terms upon which the properties were being offered for sale. An asking price was disclosed to Mr. Bowden in the telephone conversation immediately after the visit to the hotel, but nothing was settled then. Further direct negotiations took place between the parties which led to an agreed price, but a sale was still subject to negotiations with the Housing Department. It could not be said therefore, that Mr. Pulley had introduced a purchaser "ready, able and willing to purchase".

As to the facts, Mr. Pulley did not say that he was told the asking price during the telephone conversation when, as we have found, a contractual relationship was established, but Mr. Pennington said that initially he would have wanted to know the price. The asking price of the hotel was, of course, stated in the advertisement. Mr. Pulley told us that when he spoke briefly to Mr. Hales after the visit to the hotel, an asking price of £750,000 for both properties was mentioned. Mr. Bowden told us that during his telephone conversation with Mr. Hales there was "no offer and acceptance although I may have made a suggestion". We have taken that to mean that Mr. Bowden expressed

interest in the properties, that Mr. Hales mentioned an asking figure, and that Mr. Bowden felt it was too high and may have mentioned a lower price. It is not disputed that the parties met a day or two later and negotiated an agreed price (which was lower than the original asking price). That settlement was conditional upon successful negotiations with the Housing Department. Mr. Pulley (and Mr. Pennington) was at all times ready to assist in both sets of negotiations, but was not called upon to do so. The part played by Mr. Pulley was therefore, through no fault of his, limited to effecting the introductions.

In arguing that Mr. Pulley was not the effective cause of the sale, counsel for the Defendants relied on the English case of *Jack Windle Limited -v- Brierley* (1952) 1 All E.R. 398. As was noted by the Jersey Court of Appeal in *Channel Hotels and Properties Limited and W.G. Parrish* (1975) J.J. 279, at p. 288, that case was decided on its special facts. Before the final sale took place the agent's instructions were withdrawn, the withdrawal of the instructions had been accepted, the final sale was at a reduced price and a substantial part of the reduced price was left outstanding on mortgage of the property sold. We therefore do not find that case relevant.

Para. 2312 of Chitty states: "The agent need not, however, be the immediate cause of the transaction, provided that there is sufficient connection between his act and the ultimate transaction". There is then cited the case of *Green -v- Bartlett* (1863) 14 C.B. (N.S.) 681, in which the facts were that an auctioneer was instructed to sell the island of Herm by auction or otherwise, but the island failed to reach the reserve price at the auction. A potential buyer then asked the auctioneer for the name of the owner and, upon receiving it, purchased the island directly from him. It was held that the auctioneer was entitled to his commission.

It is immaterial that Mr. Bowden could not afford to pay the asking price or considered it to be too high, or both. It very often happens that a potential buyer cannot afford the asking price, or can afford

it but thinks it too high. That does not prevent him from being a person ready, able and willing to purchase if, after further negotiations on price, a sale results.

Equally, it is immaterial that Mr. Bowden and Mr. Hales decided to negotiate direct without the help of Mr. Pulley. A vendor cannot avoid paying commission to the person whom he has appointed his agent and who has introduced the eventual purchaser by the expedient of ignoring him and negotiating directly with the purchaser, provided of course that the eventual sale is sufficiently closely connected with the introduction.

We have no doubt at all that the introduction by Mr. Pulley led directly to the sale. As is quite usual, negotiations were necessary to agree a price and to obtain Housing Committee consent, but the sale which finally resulted was basically the very transaction which was envisaged when the introduction was effected. We therefore find that Mr. Pulley was the effective cause of the sale.

We now arrive at the third and final question: did Mr. Hales agree to pay Mr. Pulley the scale of fee now claimed, or can such an agreement be implied; and if not, what fee is payable?

The general principles governing the right of an agent to receive remuneration from his principal are stated in Halsbury's Laws of England (Fourth Edition), Vol. 1, at (inter alia) para. 799, from which we take the following extracts -

"An agent has no right to receive remuneration from his principal unless there be a contract, express or implied, to that effect. Where the parties have made an express contract for the remuneration, the amount of remuneration and the conditions under which it will become payable must be ascertained by reference to the terms of that contract.....

In the absence of an express contract on the subject, a contract to pay reasonable remuneration may be implied from the circumstances of the case. In awarding such remuneration the Court may have regard to previous negotiations between the parties or trade custom ...

The mere fact of employment of a professional agent itself raises the presumption of a contract to remunerate him, the amount of the remuneration and the conditions of its payment being ascertainable from the usages of his profession."

We begin by saying that there is no doubt that Mr. Pulley is legally entitled to be paid a fee, because we have accepted that a contractual relationship was established by the telephone call already referred to and that Mr. Hales agreed to pay his fee if he found a buyer. Furthermore, both Mr. and Mrs. Hales gave evidence that following Mr. Pulley's first telephone call Mrs. Hales verified that Mr. Pulley was an estate agent, and therefore the Defendants knew that they were dealing with an estate agent. It follows that not only is Mr. Pulley entitled to a fee, but that there is a presumption that the amount of that fee is to be ascertained from the usages of the estate agent's profession.

The Plaintiff is not a member of the Jersey Auctioneers and Estate Agents Association, but nevertheless it charges the scale of charges adopted by that Association, namely, 2% of the purchase figure. Mr. Pulley believed that he had mentioned that scale and percentage to Mr. Hales, but in cross-examination he very frankly conceded that he could not be sure whether he had. We must therefore proceed on the basis that he may not have done so. What then is the position?

We have already decided that Mr. Hales agreed to pay a fee to Mr. Pulley, whom he knew to be an estate agent, if he found him a buyer. Nothing was said by either side at the time as to what that fee would be. Mr. Hales is a business man. He may not like estate agents, but he must reasonably be presumed to know that an estate

agent, being a professional man, has a scale of charges. If he was in doubt as to what that scale was, he could have asked. In the event, any doubt was soon removed when Mr. Hales received Mr. Pulley's letter of the 18th February. He did not query, or even acknowledge, that letter, for reasons which we have already found were unconvincing. Mrs. Hales said that she was shocked by the scale of fee mentioned, especially as no sale was then in sight, and Mr. Hales said that he thought the scale was ridiculous, but neither queried it with Mr. Pulley. We are satisfied that the scale is the normal one charged by estate agents.

It was claimed by Mr. Hales that Mr. Pulley had later agreed to accept the sum of £1,600 as an ex-gratia payment in settlement of his claim for £13,000, and it is of course true that Mr. Hales conveyed that information to his lawyer. However, Mr. Pulley denied that he had ever agreed to accept this much lesser sum, and, on our findings of fact, we cannot see any reason why he should have done. Certainly his subsequent conduct in consulting his lawyer, who then wrote a letter threatening legal proceedings if the original claim were not paid, is inconsistent with an acceptance of an ex-gratia payment. We are satisfied that Mr. Pulley did not agree to accept £1,600 or any sum less than that which he was claiming.

Our conclusion is that the plaintiff is entitled to the amount of the commission which it is claiming, either because Mr. Pulley did mention the scale in the telephone conversation and it was agreed, or, if he did not, because that scale can be implied as being in accordance with the usages of the estate agents' profession, there being no sufficient evidence to rebut the presumption to which we have referred.

We therefore give judgment in favour of the Plaintiff.