Case No: A3/2002/0270

Neutral Citation Number: [2003] EWCA Civ 68
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LEEDS MERCANTILE COURT
His Honour Judge Behrens

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 6 February 2003

Before :

LORD JUSTICE AULD
LORD JUSTICE CLARKE
and
LORD JUSTICE JONATHAN PARKER

- -

Between :

HABTON FARMS **(an unlimited company)** **- and -** **CHRISTOPHER N NIMMO**	**Claimant/ Respondent** **First Defendant/ Appellant**

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
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Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Timothy Hartley (instructed by **Pearsons & Ward**) for the Respondent
Stephen Howd (instructed by **Lodders**) for the Appellant

- -

Judgment
As Approved by the Court

Lord Justice Clarke:

The Horse

1. This action arises out of a purported contract made on 12 October 1998 for the sale of a thoroughbred racehorse called High Spirits for £70,000. The seller was the claimant and the buyer was said to be either the first or the second defendant. In the event the claimant never received the £70,000 and unfortunately, on 2 December 1998, High Spirits had to be put down while still in the claimant's possession. The action was brought principally in order to recover the £70,000 from the first or second defendants.

The Claim

2. The claimant initially alleged that it had contracted to sell the horse to the first defendant, either as principal or as agent for an undisclosed principal. It later amended the claim to assert in the alternative that the contract was made with the second defendant through his agent the first defendant. The claimant thus claimed the price of £70,000 against the first or second defendant. In the further alternative it claimed damages for breach of warranty of authority against the first defendant if it should be held that the first defendant purported to contract on behalf of the second defendant without the second defendant's authority. The amount of damages claimed was £70,000.

The Judgment

3. On 25 January 2002 His Honour Judge Behrens, sitting in the Leeds Mercantile Court, gave judgment against the first defendant for £70,000. The first defendant now appeals against that judgment pursuant to permission granted by the judge. The judge's conclusions may be summarised as follows:

    i) The first defendant did not enter or purport to enter into any contract with the claimant as a principal.

    ii) On 12 October 1998 the first defendant purported to contract with the claimant as the agent of a named or an unnamed principal. He thus warranted his principal's authority to do so.

    iii) The judge did not decide whether the principal was named or unnamed, but in either event his 'principal' was the second defendant, but the second defendant was not bound by the contract because:

a) the first defendant had no express or implied authority to contract on his behalf;

b) although in some respects the first defendant may have acted as a bloodstock agent for the second defendant, a bloodstock agent does not (without more) have usual authority to buy horses on behalf of his principal;

c) the second defendant did not hold the first defendant out as having such authority so as to clothe him with ostensible authority to buy the horse.

iv) The claimant relied upon the first defendant's warranty of his principal's authority by making the contract.

v) The claimant was in principle entitled to damages for breach of warranty of authority.

vi) The measure of damages was £70,000.

The Facts

4. Before considering the grounds of appeal and the submissions made by Mr Howd on the first defendant's behalf, it is convenient to consider the facts. So far as relevant the judge's findings may be summarised in this way. The claimant is a company limited by guarantee. Its shareholders and directors are Mr Peter Easterby, Mr Peter Easterby's wife and his son Mr Tim Easterby. Mr Peter Easterby and his son are well-known racehorse trainers training from Habton Grange in Malton. In early 1998 Mr Peter Easterby's trainers' licence was transferred to Mr Tim Easterby and Mr Peter Easterby became his son's assistant. As well as training racehorses they were involved in the purchase and sale of horses. At the relevant time in October 1998 it was Mr Peter Easterby who negotiated the sales.

5. The second defendant, Mr Williamson, is a wealthy American who at the time of the trial owned about thirty racehorses. He sometimes buys horses in the United Kingdom. When looking for horses he is assisted by his trainer in Southern California, Ms Gaines. He is also assisted by others including from time to time a bloodstock agent or scout called Mr MacDonald and the first defendant, Mr Christopher Nimmo. The judge held that neither Ms Gaines nor Mr MacDonald or indeed anyone else including the first defendant had the second defendant's authority to buy or to contract to buy horses on his behalf. He accepted the evidence of both the second defendant and Ms Gaines to that effect. They both gave evidence by video link. The judge was impressed by their evidence and formed the view that they were both honest and reliable witnesses. Mr MacDonald did not give evidence and, as I

understand it, none of his various accounts of what happened was put in evidence. It is plain that the judge regarded him as a potentially unreliable source of information.

6. The first defendant accepted in evidence that he knew that every purchase had to have the express authorisation of the second defendant and that neither Mr MacDonald nor Ms Gaines had any authority to buy horses on his behalf without such authority.

7. The first defendant visited Habton Grange to look at High Spirits in June 1998. He also visited Habton Grange again in September 1998, this time with Mr MacDonald and Ms Gaines. The judge considered what was said on both those visits in some detail. Because of difficulties of recollection on the part of the witnesses the judge did not find it easy to reach firm conclusions as to what was said. However, as to the first visit, the judge said that he was not satisfied that the first defendant made it clear that he was acting on behalf of the second defendant and, as to the second visit, the judge said this in paragraph 37 of his judgment:

> "37. I have to confess as being very uncertain as to what happened at this meeting. It seems to me likely that both Mr Peter Easterby and Mr Tim Easterby were present at some time. I think that it is probable that Mr Williamson's name was mentioned at some time in the meeting in that I think it likely that Mr MacDonald and Ms Gaines were introduced as his agent even though neither Mr Peter Easterby nor Mr Tim Easterby now remembers it. I am not however satisfied that it was made clear that all future negotiations for the horse were to be carried out as agent for Mr Williamson. It has to be remembered that there were no negotiations for the purchase of High Spirits at that time. No offers were made or rejected. The principal purpose of the visit was to allow Ms Gaines to view High Spirits to assess him. As she said in evidence – she liked him."

8. The judge held that the negotiations for the purchase of High Spirits took place on the telephone between the September meeting and 12 October 1998. He concluded that the final negotiations were conducted by Mr Peter Easterby. The judge then expressed his conclusions thus in paragraphs 40 to 42:

> "40. In any event neither Mr Peter Easterby nor Mr Nimmo could remember any details of the telephone conversations now. Both of them were satisfied that as a result of the negotiations High Spirits had been sold for £70,000 subject only to a vet's inspection and approval of x-rays in America.
>
> 41. In evidence Mr Nimmo accepted that there was a concluded deal. Nothing was said at that time about it being subject to payment by the ultimate buyer. He said he received authority from Mr MacDonald to proceed.

> 42. Following the final telephone conversation Mr Nimmo sent a fax dated 12th October 1998 to Mr Peter Easterby and Mr Tim Easterby which reads:
>
> > "Further to our conversation of this morning I confirm a net purchase price for the above horse of £70,000, subject to veterinary inspection and approval of x-rays in the USA.
> >
> > I will arrange for Aldridge & Pritchard to vet the horse ASAP."

I interpose to note that that fax was sent on fax paper headed simply 'CN Nimmo'.

9. In paragraph 43 the judge considered the meaning of 'net' in the fax and added in paragraphs 44 to 46:

> "44. On the same day Mr Nimmo faxed Mr MacDonald asking for details where the bill for the vet should be sent and where the x-rays should be sent.
>
> 45. On 13th October 1998 High Spirits was inspected by Mr Ordidge. X-rays were taken and sent to Dr Maher in America. It is common ground that the vet's inspection was satisfactory and that the x-rays had been passed by Dr Maher.
>
> 46. According to Mr Nimmo Mr MacDonald faxed him to inform him of Dr Maher's approval and to request wiring instructions for the purchase price. At about 9.38 am on 19th October 1998 Habton Farms sent details of their bank account to Mr Nimmo."

It is thus plain, as I see it, that the judge held that the first defendant told the claimant that the horse had passed the vet and that the x-rays were OK and asked the claimant to send wiring instructions with regard to payment of the purchase price.

10. Mr MacDonald subsequently prepared a document for the second defendant in which he stated that the asking price for High Spirits was £80,000. The judge described the attitude of the second defendant in this way in paragraph 49:

> "49. After Ms Gaines had received the reports from the vets and Dr Maher she presented the information to Mr Williamson. It may be that Mr MacDonald was there as well. In any event Mr Williamson decided that the horse was too old and (to use the phrase in his witness statement) had "too much mileage". He did not wish to risk purchasing an older animal. He accordingly told both Ms Gaines and Mr MacDonald that he was not interested in High Spirits. ..."

11. The judge's conclusions in this regard are set out in paragraphs 53 and 54:

> "53. Mr Williamson's evidence was corroborated by Ms Gaines. She made the point that she had never understood there to be a sale of High Spirits. She confirmed that Mr Williamson never agreed to buy High Spirits as he thought it too old.
>
> 54. I saw Mr Williamson and Ms Gaines give their evidence over the video link. I have no hesitation in accepting their evidence. Both impressed me as clear and helpful witnesses doing their best to assist the Court. Mr Williamson was clearly concerned that an attempt had been made to get him to sign a false witness statement and also that someone had lodged with the court an affidavit purportedly from him containing a forged signature."

12. On 21 October Mr Peter Easterby's secretary made a note in his diary in these terms "High Spirits goes 2nd - 3rd November", which supports the conclusion that arrangements had been made for the horse to leave at that time. However, on 2 November Mr Peter Easterby himself made a note in his diary reading "ring about High Spirits money – will not leave premises till get paid". It is clear that by 21 October the claimant had been told that the contract was unconditional and that transport arrangements had been made for the horse to be collected on 2 or 3 November. It is also clear that the claimant would not have parted with the horse until payment was made.

13. The judge held in paragraph 79 of his judgment that a concluded contract was made on 12 October which was evidenced by the first defendant's fax of that date. There was much debate at the trial as to whether the first defendant contracted as agent or principal. The judge considered this question in paragraphs 85 to 88 of his judgment. He observed that counsel for the claimant and second defendant both submitted that he contracted as principal. However, he noted that Mr Peter Easterby agreed in evidence that he did not think it likely that a bloodstock agent such as the first defendant would be buying a horse as expensive as High Spirits other than as agent. The judge held in paragraph 88 that the first defendant was acting (by which he must I think have meant purporting to act) as agent for a principal. On that basis Mr Hartley conceded (in my view correctly) that he was not acting as the agent of an undisclosed principal. He was thus either acting as the agent of a named or an unnamed principal. As I read the judgment, the judge did not expressly determine whether the first defendant's principal was named or unnamed, but he held that, as a matter of law, it made no difference. It should perhaps be noted, as the judge did in paragraph 88, that it was not part of the claimant's case that, on the basis that the first defendant purported to make the contract as an agent, he would have been liable on the contract as well as the principal.

14. In the event the horse was not collected by or on behalf of the second defendant, who had refused to buy High Spirits some time after 12 October. The judge held that the precise date when he did so was unclear but that it seemed unlikely that it was as

early as 19 October because that was the date when Habton Farms sent their bank details to the first defendant at his request. The first defendant said in evidence that it was less than a week after 19 October and that he then informed Mr Peter Easterby that the second defendant no longer wanted to buy the horse. Although we have not seen a transcript of the evidence given on behalf of the claimant, it is clear from Mr Peter Easterby's statement that he denied that he was ever told that the second defendant no longer wanted to buy the horse. His evidence was that he was not aware of the second defendant's involvement. It follows that there was a dispute on the evidence as to what Mr Easterby said in response but, whatever was said, the judge held that Mr Easterby did not agree to the cancellation of the contract.

15. It does, however, seem to me that (contrary to Mr Peter Easterby's evidence) the judge found that the first defendant did indeed tell him (and indeed Mr Tim Easterby) that the second defendant had said that he would not go ahead. That appears from the consideration which the judge gave in paragraphs 63 to 68 of his judgment to discussions about High Spirits at the Newmarket Sales, which took place between 26 and 28 October. He expressly held in paragraph 68 that by that time Mr Peter Easterby and Mr Tim Easterby had been told by the first defendant that the second defendant had stated that he would not go ahead.

16. There was some debate at the trial as to whether the horse was offered for sale by the claimant at the Newmarket Sales. However, as I read his judgment, the judge made no finding that the claimant offered High Spirits for sale during the Newmarket Sales. He set out the evidence of a Mr Lynch who said that High Spirits was offered for sale in the presence of Mr Tim Easterby who said nothing to contradict it. However, he also referred to Mr Tim Easterby's evidence that he would not attempt to sell a horse that was already sold. The judge ultimately concluded that the highest it could be put was that High Spirits was still for sale.

17. The judge held in paragraph 69 of his judgment that on about 10 November there was a conversation between Mr Peter Easterby and the first defendant during which the first defendant invited him to send him a solicitor's letter. The judge observed that the first defendant said that this was because he wanted to use it to persuade the Americans to complete the deal, whereas Mr Peter Easterby said that he was going to send a solicitor's letter in any event.

18. On 13 November the claimant's solicitors duly wrote to the first defendant, asserting that it had sold High Spirits "to you", claiming the price of £70,000 together with £200 a week from 12 October in respect of the horse's training and keep, asking for a banker's draft in the sum of £71,000 and threatening to issue either a statutory demand in order to make the first defendant bankrupt or a writ. The letter concluded that on presentation of the banker's draft he should remove the horse to avoid the further costs of keep. So far as I am aware, the first defendant did not reply. In any event the horse remained in the possession of the claimant but at the end of November it contracted peritonitis and had to be put down on 2 December. When the first defendant was informed what had happened he sent a fax saying that it was unfortunate that as agent he was unable to get it sold earlier.

19. The writ was issued on 15 January 1999 naming the first defendant as sole defendant and claiming £85,796.56 in respect of the price of £70,000, plus VAT and the cost of keep. The short statement of claim indorsed on the writ included the averment that the defendant was acting "as Agent not as principal but was Agent for an undisclosed principal". As already stated, the claimant subsequently added the second defendant and on 14 June 2000 it served re-amended particulars of claim which alleged that the contract was made with the first defendant, alternatively that if the first defendant was acting as agent the claimant did not know and was not told for whom he was acting, that it is a custom that an agent acting for a disclosed but unnamed foreign principal is liable on the contract, and/or the first defendant was acting on behalf of the second defendant and/or if (contrary to the claimant's primary case) it was found that the first defendant represented to the claimant that he was acting for the second defendant and if he did not have that authority he was liable for damages for breach of warranty of authority.

The Appeal

20. Mr Howd advances three grounds of appeal, which I shall consider under three headings, namely the nature of the contract made on 12 October, the authority of the first defendant and damages.

Nature of the contract

21. This was originally the subject of the second ground of appeal, but it is convenient to consider it first because its resolution affects the question of the first defendant's authority, which was originally the subject of the first ground of appeal. It involves a consideration of the true nature of the agreement, if any, reached on 12 October 1998. The parties accept the judge's finding that there was a concluded deal made by telephone between Mr Peter Easterby and the first defendant on behalf of the second defendant on 12 October which contained the term set out in the fax quoted in paragraph 42 of the judgment (and set out in paragraph 8 above) which includes:

> "… I confirm a net purchase price for the horse of £70,000, subject to veterinary inspection and approval of x-rays in the USA."

22. It is important to note that Mr Howd does not submit on behalf of the first defendant that the effect of that term was that it was agreed that there was or would be no binding contract between the parties until the condition was lifted. Such an argument might have been advanced on the basis of the standard approach to contracts for the sale of real property expressed to be 'subject to survey'. That approach can perhaps be most clearly seen in a judgment of Megaw J in *Astra Trust Ltd v Adams and Williams* [1969] 1 Lloyd's Rep 81, where the court was considering an agreement for the sale of a yacht 'subject to a satisfactory survey' and where the judge applied the principles in the real property cases.

23. The argument was that there was no contract binding on either party to the 'agreement'; it was as if the agreement expressly said 'subject to contract'. Megaw J's conclusions can be seen from the following passage at page 86:

> "That is the position which, according to authority, exists in relation to sale of real property where the arrangement is made "subject to surveyor's report". The closest case decided in that context is the decision of Mr Justice Rowlatt in *Marks v Board and Others*, (1930) 46 TLR 424. In that case Mr Justice Rowlatt referred to what was called a memorandum of agreement which contained the words "subject to surveyor's report" in connection with the sale of a house. Mr Justice Rowlatt is reported to have said (*ibid* at p 424):
>
> > ... The whole thing was subject to that; it was perfectly well understood in this business with regard to houses that, when a person said that he would buy "subject to surveyor's report", although he agreed everything else, what it meant was that he would not decide whether he would take the house until he had seen what his surveyor said about it, and that he reserved to himself the absolute and undisputed right to say whether he liked the surveyor's report. In short, there was no contract, because the buyer was not yet bound and, therefore, the seller was not bound either.
>
> In this case the wording is different because the word "satisfactory" is included in the arrangement here before the word "survey". It is also suggested that there is a difference as between a sale of land or real property on the one hand and the sale of a ship, being a chattel, on the other hand. In my judgment there is no simple distinction between the two cases. I do not regard the word "satisfactory" here as adding to or subtracting from what would have been the meaning and effect in law in the absence of that word. In my judgment there was here no binding contract; neither side was bound. All that had happened was that there had been certain terms agreed not amounting to a legally binding agreement, but one which could be made a legally binding agreement if Commander Light had not withdrawn his provisional consent to the sale of the vessel before the plaintiffs chose to say: "We have had a satisfactory survey and therefore the sale will now go on".

24. Since neither party to this appeal contends that that approach should be applied to the construction of the term 'subject to veterinary inspection and approval of x-rays in the USA', it is not necessary for us to express a final view upon it. However, it seems to me that this case has underlined the importance of parties stating clearly what they mean by such expressions. It is clear from the passage just quoted that they could have the effect that no binding contract was entered into, although the conclusion expressed in that passage should be contrasted, for example, with the doubts

expressed in this court in *The Merak* [1976] 2 Lloyd's Rep 250 in the context of the then edition of the Norwegian Sale Form.

25. Another possible view of such a term can be seen from the next passage in the judgment of Megaw J which follows that just quoted. It is at page 87 and is as follows:

> "Suppose, however, that I should be wrong in that, and that there is some distinction, either because of the use of the word "satisfactory" or because of some difference between the sale of land on the one hand and the sale of chattels on the other hand: I should nevertheless find it quite impossible to accept the defendants' propositions in this case.
>
> If there was a legally binding contract here at all it was a legally binding contract which contained an implied term, presumably, that the plaintiff company would use all reasonable diligence to have a survey held by, presumably, a competent surveyor, but I cannot read the meaning of the arrangement made between the parties as being anything other than that the survey report was to be effective if, and only if, it was satisfactory to the plaintiffs; in other words, it is quite impossible, in my judgment, to attempt here to apply and kind of objective test to the satisfactoriness or otherwise of the survey or the survey report. I am not impressed by the suggestions that the words that have been used in various letters in the correspondence give any contrary indication. I am confident that if, at the time those letters were being written and received, either of the potential parties to this matter had been asked: "Subject to satisfactory survey – satisfactory to whom?" they would both have answered: "Satisfactory to the plaintiffs who are going to cause the survey to be made and who are going to be the people who will be the purchasers of that ship if there ever comes a contract of sale." It would probably be right as a matter of law to assume that the plaintiffs' satisfaction has to be confined and limited in this way and in this sense, that it must be a *bona fide* dissatisfaction before they can reject the survey as being unsatisfactory.
>
> This is all on the assumption that I am wrong on my first supposition and that there is here a binding contract conditional upon a satisfactory survey. In those circumstances, as I say, the survey is one that has to be satisfactory to the purchaser, the plaintiff company, but there is an implied term that dissatisfaction must be *bona fide*."

26. That is a second possible view of a term of the kind we are considering. It would mean that there was a binding contract on 12 October but that it was subject to a condition precedent, namely that the veterinary inspection and the x-rays should be

satisfactory to the buyer, Mr Williamson. His only obligation with regard to the inspection and x-rays would be to act *bona fide*.

27. A third possible view of the term in this case is the same as the second but on the basis that the condition precedent was that the veterinary inspection and the x-rays should be satisfactory to a vet nominated by the buyer, who in this case is said to have been Dr Maher. The vet's only obligation with regard to the inspection and the x-rays would, as in the second case, be to act *bona fide*.

28. All those views of the term involve a subjective element. A fourth possible view is that the term has no subjective element at all. In this case, there would again be a binding contract on 12 October, but the subject would be lifted when the veterinary inspection and the x-rays were objectively satisfactory.

29. The claimant's pleaded case was that the agreement of 12 October was "conditional upon a report satisfactory to the buyer". In this court Mr Howd submits that that is the correct view of the contract and that the condition would be lifted when that fact was communicated by or on behalf of the buyer to the seller. In short, he submits that this is an example of the second of the above possibilities.

30. The judge considered submissions on the true construction of the condition in paragraphs 81 to 84 of his judgment. In paragraph 81, in my opinion correctly, he rejected a submission made by Mr Dhillon on behalf of the second defendant that the condition was too uncertain to be enforced. In paragraph 84, again in my opinion correctly, he rejected a submission made by Mr Howd, that there was no deal until the buyer had actually paid. In paragraphs 82 and 83 the judge said:

> "82. … The position here is that the veterinary inspection took place on 13th October 1998 and the x-rays were sent to Dr Maher in the US. Both were approved. Mr Nimmo was informed of this and communicated the approval to Habton Farms. The cases cited by Mr Dhillon [notably *Stabilidad Ltd v Stephens & Carter Ltd (No 2)* [1999] 2 All ER (Comm) 651] might have been relevant if there had been no such approval and no communication. It follows in my view that there was no further room for argument over the conditions. They were satisfied.
>
> 83. Mr Dhillon and Mr Howd made a further submission based on Habton Farms pleaded case to the effect the report had to be satisfactory to "the buyer". They make the point that the report was never expressly approved by Mr Williamson. The fax did not mention express approval by the buyer. In my view it was sufficient for the purpose of this case that the vet's report was satisfactory to Dr Maher and that this was communicated to Habton Farms. It is to be noted that when he gave evidence Mr Williamson readily agreed that both the vet's report and the x-rays were in fact satisfactory. He rejected High Spirits because of its age. Thus I reject this submission."

31. It is not perhaps absolutely clear which of the above possibilities the judge was espousing in those paragraphs. It appears to me that he was either adopting the third or the fourth possibility. Thus he was either holding that the agreement of 12 October contained a condition either that the vet's report and x-rays must be satisfactory to Dr Maher or he was holding that the condition was that the report and x-rays must be objectively satisfactory. In either case, it is clear that he held that they were satisfactory and that that fact was communicated to the claimant.

32. On either view of the judgment, Mr Howd submits that he was wrong so to hold, both because such a conclusion is contrary to the claimant's pleaded case, and (to my mind more importantly) on the true construction of the contract. I would accept Mr Howd's submissions in this regard. As already stated, no-one espouses the first of the two possibilities identified by Megaw J. Nor I think would I, for two reasons. First, if the parties had wanted the deal to be 'subject to contract' it would have been easy so to provide. Secondly, it does seem to me that the wording of the fax strongly suggests that it was intended by those who made the deal, not that the contract should be subject to approval by the American buyer, but that it should be subject to veterinary inspection and approval of the x-rays. It is I think implicit in the wording that the vet's inspection and the x-rays should be satisfactory to the buyer because there is nothing in the words to suggest that the approval was to be that of a vet, regardless of the views of the buyer. Nor is their anything in them which suggests that the were to be satisfactory to a particular vet (whether Dr Maher or anyone else) or to a reasonable vet.

33. In my opinion the natural meaning of the words construed in their context is that the vet's inspection and the x-rays were to be satisfactory to the buyer. I would therefore hold that this is an example of the second of the possibilities identified by Megaw J and that the buyer could refuse to proceed provided that he was dissatisfied with the vet's report or x-rays and that that dissatisfaction was *bona fide*. The buyer could of course appoint an agent to determine whether they were satisfactory or not.

34. It also seems to me to be implicit, if not explicit, in the words used that in order to comply with the condition precedent the relevant approval was to be communicated to the claimant: see eg *Stabilidad* at p 660c-e. I would therefore accept Mr Howd's submission and hold that on the true construction of the contract, which came into existence on 12 October, the contract was subject to a condition precedent, namely that the purchase was subject to the buyer approving the vet's report and x-rays and to that approval being communicated to the seller. On the facts, approval of the report and x-rays was communicated to the claimant as seller by the first defendant, who also asked for wiring instructions with regard to payment of the purchase price. Before considering the significance of these conclusions, if any, it is convenient to turn to the second heading, which is the authority of the first defendant.

Authority

35. As stated earlier, the judge held that the first defendant had no actual authority to buy a horse on behalf of the second defendant, without his express authority. The judge further held that neither a trainer not a bloodstock agent has usual or implied

authority to do so and that the second defendant had done nothing to hold the first defendant out as his agent to buy horses on his behalf. He so held in paragraphs 89 to 93, 94 to 97 and 98 to 102 respectively of his judgment. As I understand it, Mr Howd does not challenge those findings.

36. However, he submits that the judge should have held (i) that the first defendant had the actual or ostensible authority of the second defendant, through the second defendant's agent Mr MacDonald, on whose instructions he acted and was accustomed to act, to enter into the kind of conditional contract referred to above and (ii) that he had the ostensible authority of the second defendant to communicate to the claimant on or about 19 October that the conditions were satisfied and to request wiring instructions.

37. In this regard Mr Howd submits that the first defendant plainly had some authority from the second defendant through Mr MacDonald because he could instruct a vet to carry out an inspection. He submits that he also had actual authority to enter into a conditional contract which fell short of a contract of purchase because of the condition precedent. I would however reject those submissions. There is no support in the evidence of the second defendant for the suggestion that he had authorised Mr MacDonald to authorise the first defendant to enter into either a conditional or an unconditional contract for the purchase of a horse. Nor is there any support for the suggestion that Mr Macdonald was authorised to authorise the first defendant to communicate to the claimant that the vet's inspection or x-rays were satisfactory to the second defendant.

38. Equally there is no basis for a conclusion that Mr Williamson represented to the claimant in any way, whether himself or through anyone else that the first defendant had authority either to make any contract for the purchase of a horse, whether conditional or unconditional, or to communicate his approval of any vet's inspection or x-rays to the claimant. The authorities make it clear that such a representation is required: see eg *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 and *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717, especially per Robert Goff LJ in the Court of Appeal at 731-2. at 732. He said at p 731:

> "It appears, from that judgment [ie that of Diplock LJ in *Freeman & Lockyer*], that ostensible authority is created by a representation by the principal to the third party that the agent has the relevant authority; and that the representation, when acted upon by the third party, operates as an estoppel, precluding the principal from asserting that he is not bound."

39. The judge referred extensively to those principles in paragraph 98 of his judgment and in paragraph 100 he identified the argument which I am now considering. He rejected it in paragraph 101, which included the following:

> "1) There is no suggestion that Mr Williamson made any representation at all to Habton Farms either express or

implied. Some form of representation is required if ostensible authority is to succeed.

2) I do not accept the submission that Mr Nimmo (or Mr MacDonald) had authority to enter into even a conditional contract on behalf of Mr Williamson. They required express authority to enter into any contract at all.

3) I do not accept for the reasons given by Goff LJ … that a representation by Mr MacDonald that he was authorised to get wiring instructions could amount to a representation by Mr Williamson. The fact that previous representations had been true does not affect the position here. The previous representations were representations by Mr MacDonald and not by Mr Williamson.

4) … There was nothing in this case to clothe Mr MacDonald with ostensible authority to communicate Mr Williamson's authority to purchase High Spirits."

40. I entirely agree and can see no sensible basis upon which we could reach any other conclusion. In particular, the judge was to my mind entitled to reject the submission that there was any relevant course of dealing which involved any relevant holding out or representation on the part of the second defendant. It follows that the first defendant had no authority to make the conditional contract which he purported to make with the claimant on behalf of the second defendant and no authority to communicate to the claimant that the condition was satisfied or that the purchase was now unconditional.

41. As I see it, it follows from those conclusions that the first defendant warranted his principal's authority in purporting to make the contract on his behalf on 12 October 1998. He did not in fact have that the authority which he warranted and the claimant is not estopped from so asserting. The judge held that the claimant relied upon that warranty in making the agreement on 12 October and the contrary is not, so far as I am aware, argued. The first defendant is therefore in principle liable to the claimant for damages for breach of warranty of authority as the judge held. I turn to damages.

Damages

Causation

42. As already indicated, the judge awarded damages in the total purchase price of £70,000. He held that, if the warranty had been true, the second defendant would have paid the price and that the claimants had therefore been deprived of the price by reason of the breach of warranty. Mr Howd challenges that conclusion. He submits that, in the light of the conclusions stated above, namely that the contract was

conditional upon the second defendant's approval of the vet's report and x-rays and that the only obligation on the buyer was to act *bona fide*, the second defendant could and would have rejected the horse.

43. He submits that, after looking at the vet's report and the x-rays, the second defendant was or would have been entitled not to proceed with the purchase because he considered that the horse was too old and had "too much mileage". Any such decision could not have been attacked as not being *bona fide*. However, assuming that to be so, I would not accept Mr Howd's submission. As Mr Hartley puts it in his skeleton argument, and as the judge held in paragraph 83 (quoted in paragraph 29 above), the vet's report and the x-rays were satisfactory to the second defendant, as they were to Dr Maher who considered them on his behalf. His decision not to buy the horse had nothing to do with the vet's report or the x-rays. He rejected it because of its age.

44. In these circumstances, I would not accept the submission that if the first defendant had had the warranted authority the second defendant would have rejected the horse in any event. It seems to me to be plain, on the judge's findings of fact, that, if the second defendant had in fact authorised the first defendant to make the agreement of 12 October subject to his approval of the vet's report and the x-rays, he would have gone through with the purchase because he took the view that there was nothing in the vet's report or x-rays which suggested that there was anything wrong with the horse. He would have both paid for the horse and taken delivery of it on or before 2 or 3 November.

45. Mr Howd further submits that any loss incurred by the claimant flows, not from a breach of warranty of authority on the part of the first defendant in making the contract, but from a representation of fact that the second defendant had decided to proceed which was either contained in or to be implied from his communication to the claimant that the vet's report and x-rays were satisfactory and his request for wiring instructions. Mr Howd submits that any liability flowing from that representation would not be for damages for breach of warranty of authority but would lie only in tort and would require proof of fraud or negligence.

46. One of the reasons why Mr Howd so submits is that the measure of damages in tort is different from the measure of damages for breach of warranty of authority. In tort the question is what would have happened if the representation had not been made, whereas it is, as I understand it, common ground that the measure of damages for breach of warranty of authority is the contractual measure (or akin to it). The question is thus not, what would have happened if the agent had not warranted the principal's authority, but what would have happened if the agent had in fact had the warranted authority.

47. However, I would not accept Mr Howd's submission. I would accept Mr Hartley's submission that in communicating satisfaction with the report and x-rays and in requesting wiring instructions, the first defendant was simply completing the role which he had first adopted when making the contract. In making the contract he was warranting that he had his principal's authority to do so and in, as it were, lifting the

condition, he was in effect continuing to act in the same capacity and giving the same warranty of authority. Even if that were wrong, I would hold that any recoverable loss sustained by the claimant was caused by the breach of warranty of authority in making the contract. Any subsequent misrepresentation would not break the chain of causation.

48. It follows that the judge was entitled to hold that but for the breach of warranty of authority the claimant would have received the purchase price of £70,000. The crucial question for decision in this appeal is whether that represents the correct measure of damages on the facts found by the judge. Mr Howd submits that it does not.

Measure of damages

49. Mr Howd submits that the correct measure of damages is the difference between the contract price and the market value of the horse on the relevant date, which was either when the breach of warranty was communicated to the claimant at the end of October or when the price would have been paid, say on 2 or 3 November. He submits that on either such date the market value of the horse was the same as the contract price and that it follows that the measure of damages was nil, or perhaps nominal.

50. Mr Howd submits that it follows that the death of the horse a month later is irrelevant. In the alternative he submits that the death of the horse is irrelevant because it was not reasonably foreseeable or within the reasonable contemplation of the parties when the breach occurred that the horse might have to be put down in early December. Put another way, his submission is that the death of the horse was not caused by the breach. It was an extraneous event which was too remote to be taken into account in assessing damages.

51. Mr Howd relies upon the principles stated in chapter 29 of the 16th edition of *McGregor on Damages* and, in particular, on both *Simons v Patchett* (1857) E&B 568 and *In re National Coffee Palace Company ex parte Panmure* (1883) 24 Ch D 367.

52. The general principles can in the first place be seen from these extracts from *McGregor*:

> "1307 One who professes to act as agent for a principal is taken to warrant the existence of his authority in consideration of the representee acting in a matter of business faith on it, and will be liable for damages for breach of contract if that authority does not exist. …
>
> 1308 … This measure [ie of damages] is now established as not that for the tort of deceit, ie restoring the *status quo ante*, but the general contract measure. Lord Esher put the measure for breach of warranty of authority

concisely in *Firbank's Executors v Humphreys* (1886) 18 QBD 54 at 60:

> "The damages under the general rule are arrived at by considering the difference in the position he [the person acting in reliance on the warranty] would have been in had the representation been true and the position he is actually in in consequence of its being untrue."

1309 In this, the commonest case of breach of warranty of authority [ie warranty of authority to contract on the principal's behalf] the basis of the damages is the amount that the plaintiff has lost by being unable, by reason of falsity of the warranty, to sue the alleged principal."

53. If those principles were applied without qualification to the facts here, it might be thought that the claimant could recover the price, namely £70,000, from the first defendant as damages. That is on the basis that if the warranty had been true, the second defendant would have gone through with the contract and paid for the horse or, as it is put in paragraph 1309, the amount which the claimant has lost by being unable, by reason of falsity of the warranty, to sue the second defendant was £70,000.

54. However, to my mind that is not correct because it ignores the fact that at the relevant time (whatever that was), although the claimant did not receive £70,000, it still retained the horse. This is recognised in the next few paragraphs in *McGregor* and explains, perhaps, why the editors do not say in paragraph 1309 (quoted above) that in a case of this kind the claimant is entitled simply to recover the price as damages. The question, as I see it, is what, if any, credit the claimant is bound to give for the value of the horse.

55. The correct approach to that question can, in my opinion, be seen from these further extracts from *McGregor*:

> "1311 Given an enforceable contract had the agent had authority and given a solvent principal, the damages will be based on the measure of damages that the plaintiff could have recovered in an action for breach of contract against the principal had the principal been bound, and this will generally give him damages for the loss of his bargain. The particular measure falls to be judged in accordance with the particular type of contract that the defendant had warranted his authority to negotiate, and illustrations in the cases range over a variety of contract types.
>
> 1312 (1) Where the contract was one of purchase of goods by the plaintiff it was held in *Hughes v Graeme* (1864)

> 33 LJQB 335 that he could recover the value of the goods less the contract price. …
>
> 1313 (2) Where the contract was one of purchase of land by the plaintiff it was held in *Godwin v Francis* (1870) LR 5 CP 295 that he could recover the market value of the land less the contract price …
>
> 1315 (3) All the prior cases involved a plaintiff at the purchasing end of the transaction: it is similar with a sale by the plaintiff. In *Simons v Patchett* …
>
> 1319 These cases all illustrate the recovery from the purported agent of what would have represented only the normal measure of damages in an action against the principal, but such consequential losses as would not, on general principles have been too remote to be recoverable may also be properly included in the damages."

56. In my judgment, those statements correctly state the true legal position. Thus the ordinary measure of damages for breach of warranty of authority in a case of this kind, where the agent warrants the authority of a solvent principal to buy a chattel, is the difference between the contract price and the market value of the chattel at the relevant time. This can be seen from the first case cited by *McGregor* in paragraph 1315, namely *Simons v Patchett*, where (as *McGregor* observes in the passage after that quoted above) the sale was of a ship and where it appeared that the defendant had no authority to buy for his principal, the claimant was held entitled to recover from the defendant the contract price less the lower price at which the claimant had resold, this being taken as the best price obtainable.

57. In the course of his judgment Lord Campbell CJ said at pp 571-2:

> "What then has the plaintiff suffered from this bargain not being binding on Rostron & Co? It is not disputed that, if the bargain had been binding and had not been fulfilled, the plaintiff would have recovered against Rostron & Co damages for not fulfilling the contract; and if they had fulfilled the contract, the plaintiff would have had from them the full price. The loss of the damages therefore which he would have recovered from Rostron & Co is the direct consequence of the breach of the defendant's contract. Viewing the matter in another light, the result is much the same. *It is not to be disputed that, if direct evidence had been given of a fall in the market price of ships between the time of the making of the supposed bargain and the time at which the plaintiff might reasonably resell the ship, that fall in price would be recoverable. Might not the jury reasonably infer such a fall in price from the difference in price actually obtained in this case?* If so, the case would be brought within the general rule

> as to the measure of damages in an action for not accepting goods."

The part of that passage which I have put in italics is quoted in paragraph 1315 of *McGregor*.

58. In the same paragraph, *McGregor* also cites the decision of this court in *ex parte Panmure*, where brokers warranted a principal's authority to buy shares, as authority for the proposition that the normal measure of damages for breach of such a warranty of authority is the same as the normal measure of damages for non-acceptance of goods, namely the contract price less the market value. I would accept Mr Howd's submission that that is correct. The court expressly followed *Godwin v Francis* and *Simons v Patchett* and, although the full contract price was awarded by way of damages, that was because the shares were unsaleable in the market: see per Brett MR at p 372, Cotton LJ at p 374 and Bowen LJ at pp 375-6.

59. The point is I think neatly encapsulated in the following passage from the judgment of the Master of the Rolls at p 372:

> "What then did the company lose? … In this particular case what would they have got by the contract with Mr Lawrence if he had given authority to make it? If he had been insolvent they would not have got a farthing; but he was not insolvent, and therefore in this particular case they would have got £50 from him on the allotment of his shares and they would not have given him anything; it would not have been like an ordinary vendor handing over the goods. They would have only handed over a piece of paper. In return for his £50 in money they would only have given him a phantasy. … The sum of £50 was *prima facie* the measure of damages, and there was nothing to displace it."

It seems to me to be clear from that passage that, if the shares had had a market value at the time that the company would have received the £50, it would have had to give credit for that value.

60. As I see it, the reason why the normal measure of damages in a case of this kind is the difference between the contract price and the market value of the relevant property can be seen from the provisions of section 50(2) and (3) of the Sale of Goods Act 1979, which provide for the measure of damages for non-acceptance in a contract for the sale of goods. By section 50(2) the measure of damages is the estimated loss naturally resulting, in the ordinary course of events, from the buyer's breach of contract. Section 50(3) provides:

> "Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been

accepted or (if no time was fixed for acceptance) at the time of refusal to accept."

Section 51(2) and (3) contains almost identical provisions in respect of damages for non-delivery. Those sections had of course been sections 50 and 51 respectively of the Sale of Goods Act 1893.

61. In my judgment, it follows from the principles to be derived from the decisions in *Simons v Patchett* and *ex parte Panmure* that, if the normal measure of damages is applied on the facts of the instant case, the amount recoverable is no more than nominal damages because at any relevant time the contract price was the same as the market value, namely £70,000. As already stated, no-one has suggested that the market value of High Spirits was less than that at any time until it contracted peritonitis at the end of November. The question therefore arises whether the normal measure of damages should be applied and, if not, why not.

62. I shall return to the possible reasons why the normal measure of damages might not apply on the facts here but, before doing so it may be helpful to consider the ordinary operation of the normal measure of damages. Once it is accepted that the normal measure of damages in this class of case is the contract price less the value of the horse, there is no reason to reduce the value of the horse because the claimant chooses not to sell it. Mr Howd submits that there is no reason to think that the claimant could not have sold the horse if it had wished to do so. Instead it simply decided to keep it. In doing so, it took the risk that something might happen to the horse. It could no doubt have insured against the horse having an accident or, indeed contracting an illness. Although it is of course true that the market for horses like High Spirits is not quite like the market for shares or indeed for some classes of goods, the decision not to sell the horse was, Mr Howd submits, an independent decision which was independent of the breach of warranty.

63. I would accept Mr Howd's submission that, if the decision was indeed independent of the breach of warranty, the death of the horse was irrelevant to the measure of damages. The position would then be analogous to the position discussed by Robert Goff J in *Koch Marine Inc v D'Amica Societa Di Navigazione ARL (The Elena D'Amico)* [1980] 1 Lloyd's Rep 75, where he was considering the measure of damages in a case of premature wrongful repudiation of a time charter by the owners. He held that, if there was an available market for the chartering in of a substitute vessel, the normal measure of damages was the difference between the contract rate of hire for the balance of the charterparty period and the market rate for the chartering in of a substitute vessel for that period: see p 87. He so held on the basis that the position was comparable to the law set out in the Sale of Goods Act 1893. He quoted the provisions of section 51 but also had in mind section 50: see pp 87 and 89. He added, however, that the claimant can recover damages beyond the normal measure if they fall within the principles in *Hadley v Baxendale (1854) 9 Exch 341.*

64. Robert Goff J considered in some detail the relationship between the principles governing mitigation and those governing causation. He quoted at p 89 a passage from the speech of Lord Wrenbury in *Jamal v Moolla Dawood Sons & Co* [1916] 1

AC 175, which was concerned with the breach of a contract for the sale of shares by a buyer, at p 179:

> "… If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises."

Robert Goff J added:

> "So in that situation, generally speaking, the decision not to take advantage of the available market is the independent decision of the innocent party, independent of the wrongdoing which has taken place. It takes place in the context of a pre-existing wrong but it does not, to use Viscount Haldane's expression, "arise out of the transaction"."

65. Robert Goff J stressed (at p 89) that he was speaking of the ordinary case and that there might be cases in which a decision to buy or sell or charter in (as the case might be) was caused by the breach of contract. I will return to that situation below, but Robert Goff J said in effect that in the normal case if a claimant takes a decision, say, not to sell and the market goes down he cannot recover the consequences of the drop in the market. Equally he does not have to give credit for the gain if the market goes up. He added (in the context of a time charter) that it does not matter that his decision is reasonable and taken with a view to mitigating the impact of the legal wrong committed by the shipowners because his decision is taken independently of the wrong.

66. The question is whether those principles apply here, albeit in a somewhat different context. If they do, it matters not whether the decision of the claimant not to sell was reasonable or unreasonable because it would be a decision which (as Robert Goff J put it at p 90) was triggered off by the breach but was not caused by the breach.

67. One view of the facts is that the true cause of the claimant's loss was the death of the horse and that the real question is whether the claimant can recover damages in respect of the loss resulting from its death. If the horse had not become ill and died, the claimant would have continued to own it until it chose to sell it. In that event the profit or loss made on such a sale would be irrelevant to the true measure of damages. On that view of the cause of the claimant's loss, it would only be if the financial consequences of the illness and death were recoverable under the principles in *Hadley v Baxendale* that the first defendant would be liable to pay them by way of damages. Put another way, the financial consequences of the death would not be loss naturally resulting, in the ordinary course of events, from the first defendant's breach of warranty of authority.

68. Before expressing my own view on these questions, it is appropriate to consider why it was that the judge awarded damages of £70,000 and made no allowance for the fact that the claimant retained the horse. As I understand it, he would have accepted Mr Howd's submissions but for his conclusion that under the contract the property and risk would have passed to the buyer before payment and delivery. On that basis the claimant could have maintained an action for the price even if the horse had died before those events had occurred, which would have been on 2 or 3 November 1998, because what the judge called the "risk of unforeseeable loss" would have passed to the buyer.

69. I have not found this an easy part of the case. It therefore seems to me to be appropriate to set out the relevant paragraphs in the judge's judgment. I refer first to paragraphs 108 to 110, which are in these terms:

> "108. Mr Howd submits that the measure of damages is the difference between purchase price and the value of High Spirits at the date of the breach. It was agreed that High Spirits was a valuable horse and that £70,000 was a fair price. There was no other evidence of value before the court. It follows that there was no loss. The loss was caused by the death of High Spirits which was unforeseeable and too remote.
>
> 109. I accept that the death of High Spirits some 6 weeks after the contract was not a reasonably foreseeable consequence of the breach of warranty of authority but I think that Mr Howd's submission oversimplifies the position.
>
> 110. If the property in High Spirits would not have passed to the buyer under the alleged contract then I agree that Mr Howd's submission represents the measure of damages. If the property in High Spirits had not passed to the buyer, then the seller's damages would be governed by section 50 of the Sale of Goods Act 1979 and the seller would not be able to recover against the buyer any loss that was unforeseeable as at the date of the contract. In other words the risk of unforeseeable loss would have remained with the seller. A similar position would be reached if the property (and therefore the risk of unforeseeable loss) had reverted to the seller.

70. It appears to me to be clear from those paragraphs that, if property and risk would have passed under the contract only on delivery (or perhaps on payment and delivery), the judge would have accepted Mr Howd's submission and held that the measure of damages was nil because the contract price and the value of the horse were the same and, although the claimant did not have the £70,000, he had the horse, which was worth £70,000. In that event the judge would have held that the "risk of unforeseeable loss", ie the risk of the claimant losing the value of the horse because it unforeseeably contracted peritonitis and had to be put down, would be taken by the seller. The judge distinguished that situation from a situation in which under the contract the property and risk would have passed before the obligation to pay the price arose. That is, I think, clear from the next four paragraphs in his judgment.

71. They are in these terms:

> "111. On the other hand the position is in my view quite different if under the alleged contract the property (and thus the risk of unforeseeable loss) would have passed and remained with the buyer. In that event the seller could have maintained an action for the price under section 49 of the Sale of Goods Act 1979 against the seller and could still have maintained it in the event of an unforeseeable loss to High Spirits.
>
> 112. If Mr Howd's submissions are correct the seller is in a worse position in an action for breach of warranty of authority than he would have been in an action against the alleged buyer. His position is worse because the risk of unforeseeable loss has been passed back from the buyer to the seller. In my view the true position is that the measure of damages in a case such as this depends on where the risk of unforeseeable loss lay at the time of the loss. If, under the warranted contract, the risk would have been with the buyer if the warranty had been true then the seller can recover the price notwithstanding the unforeseeable loss. On the other hand if the risk would have been with the seller he can only recover the difference between the price and the value of the goods (which - in this case - would have been nothing).
>
> 113. It is to be noted that this analysis does not mean that the seller can recover the price if there is no unforeseeable or partial unforeseeable loss. In that event the seller has gained the value of the goods (High Spirits) because the property has not in fact passed. Thus he must give credit for the actual value of the goods against the price.
>
> 114. It follows in my judgment that Habton Farms can recover the price of High Spirits as damages for breach of warranty of authority notwithstanding the unforeseeable death of High Spirits if at the time of the death of High Spirits the risk of unforeseeable loss would have been with Mr Williamson if the warranty had been true."

72. The crucial point in that reasoning, if I have understood it correctly, depends upon the provisions of section 49(1) of the Sale of Goods Act 1979, which provides:

> "Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods."

The judge held that, if under the contract the property in High Spirits would have passed to the buyer before the price became payable, the claimant could have sued the

buyer for the price without running the risk of the unforeseeable loss of the horse because that risk would already have passed to the buyer. I recognise that that is so, but it does not seem to me to lead to the conclusion which the judge reached, as between the claimant and the first defendant.

73. The distinction which the judge draws in paragraph 112 of his judgment is between the case just described, where the risk of unforeseeable loss would have been with the buyer and the case referred to in the last sentence of paragraph 112, where the risk would have been with the seller, in which case the judge held that the seller could only recover the difference between the contract price and the market value of the horse, which (as he held) would have been nothing. He then held in paragraph 114 that whether the claimant had to give credit for the value of the horse depended upon whether, at the time of the death of High Spirits, the risk of unforeseeable loss would have been with the buyer or the seller if the warranty had been true.

74. While I see the force of that reasoning, I do not think that it can be correct. To my mind its fallacy is that it tests the question as at the time of the unforeseeable loss. Thus, on the facts here (subject perhaps to the principles relating to mitigation of loss) it would mean that the claimant could recover £70,000 by way of damages whenever the horse died. Suppose the claimant kept the horse for, say, a year and the horse then contracted peritonitis and died, on the judge's analysis the claimant would be entitled to the same sum by way of damages. I do not think that that can be correct.

75. As I see it, the position must be tested as at the relevant date, which seems to me to be at the latest when the horse would *in fact* have been delivered in return for the price if the first defendant had had the warranted authority (my emphasis). It is I think important to note that the reason is not because the horse would have had no market value at the *arranged* or *contractual* time of delivery but because it would have had no market value at the date on which the horse would have been delivered *as a matter of fact* if the first defendant had had the warranted authority.

76. I entirely agree that on the basis of the judge's conclusion that risk and property would have passed when the contract became unconditional, if the second defendant had been a party to the contract and had failed to pay, the claimant could have sued him for the price and would have been entitled to recover the price even if the horse had died before the price became payable or, indeed, was paid. Thus if, on the facts here, the first defendant had had the second defendant's authority to contract to buy the horse on his behalf and the second defendant had not paid, the claimant could have sued the second defendant by bringing proceedings at any time within the limitation period and recovered the price even though the horse had died long before. So for example he could have recovered the price in these proceedings, which were commenced on 15 January 1999, even though the horse had died and regardless of when the horse died.

77. If the horse had not died, he would equally have been entitled to sue for the price but would have been bound to deliver the horse to the buyer. Moreover, that would have been so whether the property and risk passed before delivery or not.

78. We are however concerned, not with a claim for the price, but with the correct measure of damages for breach of warranty of authority. The starting point is the price because if the warranty had been true the claimant would have received the price. It is not, however, the end of the matter because, although the claimant would have received the price, it would have parted with the horse, whereas, in the events which happened, it did not. In these circumstances (as stated earlier) the question is what, if any, credit the claimant is required to give in respect of its retention of the horse.

79. I can see that if, at that time, the horse had already died but the buyer would have been liable for the price because the property in the horse had already passed to the buyer, the measure of damages for breach of warranty of authority would be the price. That is, however, because at the critical date the claimant would no longer in fact be either the owner of or in possession of the horse.

80. The same is not true where the claimant still owns and has possession of the horse at the critical date. In my opinion the claimant must give credit for the value of the horse at that time, whether risk and property in the horse would have passed under the contract before or after the price was paid. In either event the claimant still has the horse, whatever its value, at that date and should give credit for it in both cases or neither. That is, I think especially so on the facts of this case because if the first defendant had in fact had the authority of the second defendant to buy the horse, as already stated, on the judge's findings of fact the second defendant would have paid for the horse and taken delivery of it. The claimant would have received the contract price of £70,000 but would have parted with the horse. That is so, whenever property and risk would have passed under the contract.

81. In these circumstances it seems to me to make no sense to hold that the measure of damages is different depending upon when risk and property would have passed, at any rate in a case where the seller in fact retains both and where, if the agent had had the warranted authority, the principal would have paid and taken delivery of the horse and become its owner. In both cases, at the critical date, instead of the contract price the seller has the horse which has the same value as the contract price.

82. On the facts of this case the critical date was 2 or 3 November 1998 because (as explained above and as the judge held) there is no doubt that, if the second defendant had in fact authorised the first defendant to contract to buy the horse on his behalf, he would have gone through with the purchase and would have paid for it by 2 or 3 November. He would then have received the horse. It appears to me that on those facts it can make no difference whether, under the contract, the risk and property would have passed before or after that date. On either basis the claimant's loss seems to me to be the same and the question whether or not to apply the normal measure of damages should be answered in the same way. For these reasons I would not accept the reasons given by the judge as an appropriate basis for refusing to take account of the value of the horse on 2 or 3 November.

83. I initially prepared a judgment concluding that the normal measure of damages was appropriate on the facts of this case. I considered two possible bases upon which it

might be said that the normal measure should not be adopted. The first was if it was within the reasonable contemplation of the parties on 12 October that if the second defendant did not take pay for and take possession of the horse by, say, early November the horse might contract an illness and die. I concluded that, assuming that to be correct in principle, it could have no application to the facts here because the judge expressly held in paragraph 109 of his judgment that the death of High Spirits some six weeks after the contract was not a reasonably foreseeable consequence of the breach of warranty of authority. Nor (if that is different) was it within the reasonable contemplation of the parties.

84. The second possible basis was there was no market for the horse between the latest relevant date, on 2 or 3 November, and the time when the horse contracted peritonitis. I can see that, if there were no market for the horse, as in the case of the shares in *ex parte Panmure*, or the market fell during the time it would have taken to sell the horse, as discussed in *Simons v Patchett*, such facts would have a potentially significant effect on the normal measure of damages. That is because they would affect the market value of the horse to be set off against the contract price.

85. However, as I understand it, no attempt was made on the part of the claimant at the trial to establish that that was the case. In any event the judge made no such finding. On the contrary it seems to me to be implicit (if not explicit) in his conclusions that he took the view that the horse could have been sold on the market between 3 November and the end of November.

86. Mr Hartley submitted that nothing should be deducted from the contract price unless the first defendant had pleaded and proved that the claimant had failed to take reasonable steps to mitigate its loss. However, it is plain from the reasoning in the authorities, as shown in particular by the reasons given by Robert Goff J in *The Elena d'Amico*, that that is not so in the case in which the normal measure of damages is applicable. Thus, if the decision of the claimant not to sell the horse when the Easterbys learned that the second defendant would not go through with the purchase was independent of the breach, the normal measure of damages must be applied, whether the decision not to sell the horse was reasonable or unreasonable.

87. In these circumstances I initially formed the view that there was no reason why the normal measure of damages should not apply. That seemed to me to follow from an application of the underlying principle which was stated by Lord Esher in *Firbank's Executors v Humphreys* (quoted in paragraph 51 above), namely that the measure of damages is the difference between the position in which the claimant would have been if the first defendant had had the second defendant's authority to enter in the contract for the sale of the horse and the position in which it was in fact.

88. On the facts of this case as found by the judge, the answer seemed to me to be the same whether the property would have passed before or after delivery or payment. In either case, if the first defendant had had the second defendant's authority to make the contract the claimant would have received the price but parted with the horse. The events which happened would of course have been the same in either case, so that the measure of damages should be the same in either case. On his findings of fact, it

seemed to me that the loss of the value of the horse was not caused by the first defendant's breach of warranty or, put another way, that it was not (in the words of the Sale of Goods Act) the natural and probable consequence of the breach and was not within the reasonable contemplation of the parties.

89. Since drafting a judgment in substantially those terms I have seen a draft of Auld LJ's judgment and, in the light of it, have reached a different conclusion, not on the basis of the reasoning of the judge that all depends upon when property would have passed under the contract, but because I am persuaded that this is a case in which it would not be appropriate to apply the normal measure of damages. In the light of Auld LJ's analysis, I agree with him that this is one of those cases in which it is wrong to regard the decision of the claimant not to sell a chattel on the market as independent of the breach of contract. My reasons are shortly these.

90. The question in each case is whether, as Viscount Haldane observed, the decision arises out of the transaction. In *The Elena d'Amico*, at p 89, Robert Goff J gave *R Pagnan & Fratelli v Corbisa Industrial Agropacuaria Ltda* [1970] I WLR 1306 as an example of a case in which it was held that a decision to buy goods at a reduced price arose out of the transaction. Robert Goff J said:

> "That case illustrates how, in an appropriate case, where a buyer goes out into the market subsequently and buys in, his action in buying in may be an action which is not independent of the original transaction with the consequence that any saving which he makes must be brought into account in the assessment of damages."

Equally here it seems to me that, if the decision not to sell the horse arose out of the transaction in the sense that it was not independent of it, that fact should be taken into account in assessing the damages.

91. The question should I think initially be tested as at say 2 or 3 November. At that time, although the Easterbys had been told that the second defendant did not propose to go through with the purchase, they had not been told that the first defendant had had no authority to make the contract on his behalf. It appears that they had been told very little. The judge recorded Mr Tim Easterby's attitude at the Newmarket October Sales as being that he would not attempt to sell a horse that was already sold. The attitude of the claimant on 2 November can be seen from the entry in Mr Peter Easterby's diary (quoted above): "ring about High Spirits money – will not leave premises till get paid".

92. It is clear that as at 2 or 3 November the claimant was proceeding on the basis that the contract was still on foot. That seems to me to have been an entirely reasonable attitude. The decision not to resell the horse at that time cannot in these circumstances fairly be regarded as an independent market decision. No-one had suggested that there had never been a binding contract and, on the basis that there was such a contract, it was entirely reasonable for the claimant to treat the contract as still

on foot, especially since it had been informed that the horse had passed the vet and that the x-rays were OK.

93. The question then arises whether the position changed thereafter in the period before the horse unfortunately contracted peritonitis. I have reached the conclusion that it did not. There was a conversation between the first defendant and Mr Peter Easterby before the claimant's solicitors wrote the letter of 13 November. There is no suggestion that at that time the first defendant told Mr Easterby that he had not had authority to make the contract. Moreover, so far as appears from the judge's findings, there was then no communication from the first defendant until after he learned of the death of the horse.

94. If the matter is tested as at the second half of November, it does not seem to me that it had significantly changed. It was to my mind reasonable for the claimant to continue to claim the price and, if nothing happened, to sue for the price. Thus the decision not to sell the horse in the market was not a market decision, but was (as it had been throughout) part of the decision to continue seeking the price under the contract, which there was still no reason to think was not valid. In all the circumstances I agree with Auld LJ that it was only as a result of the first defendant's breach of warranty that the claimant was still pursuing throughout November and into December a non-existent contract and seeking to effect delivery under it in return for the price

95. In these circumstances, it seems to me (on mature reflection) that the claimant's continuing failure to sell the horse on the market arose out of the transaction and thus of the first defendant's breach of warranty of authority. It was not the ordinary case of a decision taken independent of the wrong but was a decision which was caused by it.

96. Since writing the above, I have seen a draft of the judgment of Jonathan Parker LJ in which he expresses the view that it is wrong to proceed on the basis that the claimant made a decision not to sell the horse because the judge made no finding to that effect. I recognise that he did not make an express finding that the claimant decided not to sell the horse, but it appears to me that such a finding is implicit in his conclusions. First, if (as the judge held) there was a market for High Spirits, it is reasonable to suppose that the horse would have been sold unless the claimant had decided not to sell it. Secondly, the evidence and the judge's findings show (as stated above) that throughout November the claimant was claiming the price, which, given that the horse was still alive and in its possession, of course it could only do if it was able to deliver the horse.

97. In these circumstances, once it is held that the claimant acted reasonably in relying upon the 'contract', it seems to me that on the particular facts of this case the decision not to sell the horse or, put another way, the fact that the horse was not sold during November arose out of the first defendant's breach of warranty of authority and was not independent of it.

98. In this regard I would only add this with regard to my reference in paragraph 90 above to the *Pagnan & Fratelli* case. I did not intend to say that this case was akin to that on the facts or that there was here a continuous course of dealing. I simply included it as an illustration of the distinction being drawn by Robert Goff J in *The Elena d'Amico* between a case where a market decision arose out of and was not independent of the breach, which in that case was a breach of contract.

99. In all these circumstances, although I recognise that I initially took a different view and that Jonathan Parker LJ remains of that opinion, I agree with Auld LJ that this is not a case for the application of the normal measure of damages. What then is the effect of that conclusion? It is I think that the market value of the horse as at 2 or 3 November should not be deducted from the contract price, because the decision not to sell was itself caused by the breach of warranty of authority. As I see it, in the ordinary case to which the normal measure of damages applies, if the horse dies before it can be sold, the measure of damages is the price because there is no market value of the horse to be deducted from it. So here, once it is concluded that the decision not to sell was itself caused by the breach, if the horse died there is no longer any relevant value in the horse to be deducted from the price. I agree with Auld LJ that the death of the horse should be treated in much the same way as the fall in the market price in *Simons v Patchett* and the total collapse in value in *ex parte Panmure*.

100. There would of course come a time at which it could properly be held that the decision not to sell the horse was a market decision independently of the breach of warranty. Once that moment came, the correct approach would in my opinion be to deduct the market value at that time from the contract price and to award the difference (if any) as damages for breach of warranty of authority. As I see it, it would be irrelevant whether the decision to sell at that time was reasonable or unreasonable because (for the reasons given in *The Elena d'Amico*) the decision whether or not to sell would not be caused by the breach but would be independent of it. However, until that moment came, which it had not by the time that High Spirits had to be put down, I agree that the position is comparable to that of the claimant in *Suleman v Shahsavari* [1988] 1 WLR 1181, especially per Andrew Park QC at p 1183 in the passage quoted by Auld LJ.

101. For the reasons I have given, I agree with Auld LJ that the correct measure of damages on the facts found by the judge was £70,000 on the basis that no deduction should be made from the price which would have been paid by the second defendant if the first defendant had had the warranted authority.

102. I would add just two further points. The first is that it seems to me that it is irrelevant that the judge held that it was not within the reasonable contemplation of the parties that the horse might die. There is of course always a risk that a horse might die for some reason. As I see it, the position is the same as it would have been if the horse had for some reason died before it could be sold in the ordinary case. In that event the market value of the horse on the due date would have been nil. In both that case and this the loss naturally resulting in the ordinary course of things from the breach of warranty of authority was the contract price of £70,000.

103. The second point is that the above conclusion makes it unnecessary to consider when property and risk would have passed under the contract. However, the judge held that risk and property would have passed before payment and delivery would have taken place on 2 or 3 November. Although Mr Howd did not, I think submit on the hearing of the appeal that that conclusion was wrong, I would like to express my reservations about some of the judge's reasoning on this point.

104. In reaching the conclusion that the property and risk would have passed when the first defendant communicated the lifting of the conditions to the claimant, the judge rejected the submission that risk and property would have passed on payment and delivery of the horse on 2 or 3 November. He did so in paragraphs 115 to 118 of his judgment as follows:

> "115. Under section 20 of the Sale of Goods Act 1979 ("the Act") unless otherwise agreed the goods remain at the seller's risk until the property in the goods is transferred to the buyer. Thereafter the risk passes to the buyer. Under section 17 of the Act where there is a contract for the sale of specific goods the property in them is transferred to the buyer at such time as the parties intend it to be transferred. In determining the intention of the parties the court has to have regard to the terms of the contract, the conduct of the parties and the circumstances of the case. Section 18 of the Act sets out 5 rules for ascertaining the intention of the parties in the absence of a different intention appearing.
>
> 116. Where a contract for the sale of specific goods is made subject to a condition upon the fulfilment of which the transfer of property depends the property will not pass to the buyer when the contact is made but only when the condition is fulfilled. Until that time the contract takes effect as an agreement to sell and not a sale of goods. In his skeleton argument and final submissions Mr Dhillon submitted that that was the position here. He relied on the fact that Mr Williamson never communicated to Habton Farms that he approved of the vet's report or the x-rays. However Mr Nimmo communicated to Habton Farms that both were approved and it is that stage that the agreement would have become unconditional if Mr Nimmo had had the necessary authority.
>
> 117. Mr Dhillon also drew to my attention some observations of Diplock LJ in *Ward v Bignall* where he made the point that in modern times very little is required to give rise to the inference that the property in specific goods is to pass only on delivery. He drew my attention to Mr Peter Easterby's diary entry for 2nd November to the effect that High Spirits will not leave premises till get paid. He submitted that that was sufficient to give rise to the inference.

> 118. I see the force of Mr Dhillon's submissions; in the end, though, I cannot accept them. In my view if Mr Nimmo had been properly authorised the property in High Spirits would have passed to Mr Williamson when the contract became unconditional. The note in the diary is not inconsistent with this. It is clear from sections 39(1) and 41 of the Act that Habton Farms as an unpaid seller would have had the right to retain High Spirits for the price while in possession of it notwithstanding the property in High Spirits had passed to the buyer."

105. My reservations about those reasons are these. The underlying principle is that under section 17 of the Sale of Goods Act 1979 property passes when it is intended to pass. It seems to me that there are strong grounds for concluding that the parties intended the property to pass on delivery (or perhaps on payment), for the reasons given by Mr Dhillon (as set out in paragraph 117 quoted above) in reliance upon Diplock LJ's well known observation in *Ward v Bignall* [1967] 1 QB 534 at 545 that in modern times very little is required to give rise to the inference that the property in specific goods is to pass only on delivery. On the facts here, it seems to me that it is most unlikely that the parties, and especially the claimant, intended the risk and property to pass when the contract became unconditional, whatever its rights as an unpaid seller.

106. However, I say nothing further about the point because (as indicated earlier) Mr Howd does not challenge the finding in this appeal and, for the reasons which I have given, unlike the judge, I do not think that the correct measure of damages depends upon when the risk and property would have passed under the contract.

Conclusion

107. For the reasons given, I would dismiss the appeal in so far as it is submitted that the first defendant was not liable for damages for breach of warranty of authority. I would also dismiss the appeal on damages, although not without hesitation and only after being shown the way forward by Auld LJ.

Lord Justice Jonathan Parker :

108. I agree that the appeal on liability should be dismissed, for the reasons Lord Justice Clarke has given. On the issue as to the measure of damage, however, I have the misfortune to differ from Lord Justice Clarke and Lord Justice Auld (whose judgment I have read in draft). I think Lord Justice Clarke was right first time. I would have allowed the appeal on that issue.

109. The legal analysis as to the measure of damage for breach of warranty of authority is in my judgment as follows.

110. A warranty by A to B that he has the authority of C is treated as a collateral contract pursuant to which A offers to warrant that he has C's authority in return for B dealing with C (see Chitty on Contracts, 28th edn, vol 2, para 32-099). Two consequences follow from that. First, the contract is breached, at the latest, when B acts to his detriment in reliance on the warranty; that is to say, in a case where A purports to contract with B on behalf of C, at the time when the purported contract is concluded. Secondly, the contractual measure of damage applies. As Lord Esher made clear in *Firbank's Executors v. Humphreys* in the passage from his judgment quoted in paragraph 1308 of *McGregor* (see paragraph 52 above), that involves a comparison between the position B would have been in had A had C's authority and the position he was actually in, given the absence of that authority.

111. Applying that analysis to the facts of the instant case, as found by the judge, the position is in my judgment as follows.

112. The judge found that a contract was concluded between Mr Peter Easterby (acting on behalf of the claimant) and Mr Nimmo (purportedly acting on behalf of Mr Williamson) over the telephone on 12 October 1998 (see paragraph 79 of the judgment). On that date, if no earlier, Mr Nimmo breached his warranty that he had Mr Williamson's authority to contract on his behalf.

113. Prima facie, therefore, the measure of damage falls to be applied at that date. On that basis, the comparison is between on the one hand a situation in which the claimant had the benefit of a contract for the sale of the horse for £70,000, and on the other hand the actual situation of the claimant, viz. that it retained the horse (worth £70,000) which remained unsold. Given that there is no basis for supposing that Mr Williamson would not have performed the contract purportedly concluded by Mr Nimmo on his behalf had Mr Nimmo had his authority to do so, the value of the purported contract was £70,000: i.e. equal to the value of the horse at that date. Hence the loss was nil.

114. On that approach, it matters not at what stage in the sale (had there been one) the property in the horse would have passed to Mr Williamson since the assumption is that (whenever the property passed) the sale would have gone through and the price of £70,000 would have been paid.

115. My Lords consider that in applying the contractual measure of damage in the instant case the value of the horse is to be brought into account at nil, with the result that the damages are to be quantified at £70,000, representing the value of the purported contract. Logically, this can only be correct, in my view, if by analogy with cases such as *Simons v. Patchett* the relevant date for applying the contractual measure of damage is not the date of the breach (12 October 1998) but some date *after* the death of the horse on 2 December 1998. However, on the findings of the judge in the instant case I can for my part see no reason for departing from what I take to be the prima facie position that damages for breach of warranty of authority fall to be assessed at the date of the breach. In particular, it seems to me, with respect, that my Lords' reliance on a decision on the part of the claimant not to sell the horse is misplaced, since the judge made no finding that any such decision was made. On the

contrary, as Lord Justice Clarke points out in paragraph 16 above, the judge completes his review of the evidence as to what occurred at the Newmarket sales in October 1998 by saying (in paragraph 68 of his judgment):

> "The highest it can be put is that High Spirits was still for sale."

116. Nor do I derive any assistance from the decision of this court in *R. Pagnan & Fratelli v. Corbisa Industrial Agropacuaria Limitada* (referred to by Lord Justice Clarke in paragraph 90 above). In that case there was a continuous course of dealing between the defendant sellers and the claimant buyers, at the conclusion of which the buyers had suffered no loss. The Court of Appeal held that the buyers could not recover in respect of a loss incurred at an earlier stage in the course of dealing, which was subsequently made good. In the course of his judgment in that case Salmon LJ said (at *ibid.* p.1316A-E):

> "Normally when a seller tenders goods which are so defective that they do not correspond with the contract, the buyer has an option. He can reject the goods and recover as damages the difference between the contract price and the market price at the date of the breach if the market price is then in excess of the contract price. Alternatively, he can take the goods and deduct from the purchase price, or claim damages for, the difference between the value of the goods at the time of delivery and their value had they been up to contract. But the buyer cannot have his cake and eat it, as these buyers are seeking to do. They went through the motions of rejecting the goods in October 1995. Indeed they did, in law, reject them. They did so, however, in the confident expectation that, as a result of their rejection and the sequestration order, they would be able to negotiate a new agreement under which they would acquire the goods at a price favourable to themselves. This they did by their purchase of November 13. The price was substantially below the market price and their resulting profit certainly exceeded the difference between the May contract price as varied and the prevailing market price at all relevant times.
>
> Damages for breach of contract are awarded for loss suffered. Here the buyers suffered no loss. It is only by looking in isolation at the sellers' failure to deliver sound goods that the buyers' claim is even arguable. This failure cannot in my view properly be looked at in isolation because together with the purchase of November 13 which arose out of the situation in which the buyers found themselves, it formed one continuous dealing between the same parties in respect of the same goods. As a result of this dealing, looked at as a whole, the buyers, notwithstanding the sellers' breach, made a profit and no loss. To allow the buyers' claim would in my view be contrary alike to justice, common sense and authority."

117. There is no comparable "continuous course of dealing" in the instant case. In my judgment, the death of the horse in the instant case cannot be equated with a case in which a buyer buys defective goods at a knock-down price from a seller who is in

breach of contract. Nor can I discern in *Pagnan* any principle relevant to the instant case.

118. For those brief reasons, I would have allowed the appeal on the issue of the measure of damage.

Lord Justice Auld :

119. I agree with Lord Justice Clarke that the appeal should be dismissed, both on the issue of liability and that of damages. I add a few words of my own on the troublesome issue of the measure of damages.

120. Damages for breach of warranty of authority, on the first *Hadley v. Baxendale* principle, should normally be for loss that is within the ordinary and natural consequences of the breach. More precisely, they should normally be the difference between the claimant's position had the warranty been true and his actual position in consequence of it being untrue; *Firbank's Executors v. Humphreys* [1886] QBD 54, CA, at 60. Still more precisely to the facts of this case – a breach of warranty of authority as to the purchase of goods – the measure of damages is normally the contract price less the market price, if any; *Simons v. Patchett* (1857) 7 E & B 568 and *Re National Coffee Palace Company, ex p. Panmure* (1883) 24 Ch D 367, CA.

121. The first task, therefore, is to establish the claimant's entitlement to the price of the goods against Mr. Williamson had Mr. Nimmo committed him to the purchase. Section 49(1) of the 1979 Act provides that a seller is entitled to claim the price against a buyer where, under the contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for them in accordance with the terms of the contract. In this case, had there been a contract with Mr. Williamson, the property in the horse would have passed to him in about mid October 1998 when Mr. Nimmo informed the claimant of the approval of the report and x-rays, thus rendering the contract unconditional. So, the starting point for the claimant's loss caused by Mr. Nimmo's breach of warranty of authority is the claimant's right to recover the price that otherwise it could have expected to receive on about 2nd or 3rd November 1998, the arranged time for delivery.

122. That notional entitlement to price, though a step on the way to assessing the measure of damages for breach of warranty of authority, is quite different from the remedy of damages for breach of a contractual obligation, whether against the notional buyer for some breach other than failure to pay the price or against a third party for breach of warranty of authority. All that the seller has to do is prove that the price is contractually due. He does not have to prove any actual loss, for example, that the subject matter of the contract has a lower market value than the sale price or no market value at all. Similarly, there is no room for questions of remoteness or, generally, of mitigation of damages; see *Benjamin*, para. 16-003.

123. However, where the seller has not delivered the goods because they have been lost or destroyed in the meantime, his entitlement to claim the price from the buyer for the

price depends on where, in the meantime, the property and the risk lie. Where the property and the risk remain with the seller, his entitlement to the price depends on his continuing ability and willingness to deliver them in accordance with the contract. Where they have passed to the buyer, the buyer must pay the price even if the seller is unable to deliver them because they have been lost or destroyed. See: *Benjamin*, paras. 6-001, 9-051 and 16-017; *Fragano v.* Long (1825) 4 B & C 219, at 223; *Alexander v. Gardner* [1835] 1 Bing NC 671; *McPherson, Thom, Kettle & Co. v.. Dench Bros.* [1921] VLR 437, at 445; and see also Sealy [1972] Camb LJ 225, at 237-8.

124. So, if there had been a contract between the claimant and Mr. Williamson and the horse had perished while still in the possession of the claimant and before the arranged delivery date, the claimant could have sued Mr. Williamson for the price. Equally, it could have recovered the same figure from Mr. Nimmo by way of damages for breach of warranty if the horse had died then rather than whilst still undelivered four weeks later. That is because, at the arranged time of delivery, the horse would have had no market value to off-set against the price because it was dead.

125. Should it make any difference in the breach of warranty claim against Mr. Nimmo that the horse died four weeks later while still in the ownership and possession of the claimant and at its risk, and that, as a result of the breach of warranty, it was not and never had been the property and at the risk of Mr. Williamson? Before answering that question, it is important to note that the Judge expressly found that there had been no rescission or acceptance by the claimant of repudiation of the notional contract with Mr. Williamson. So if it had existed as warranted by Mr. Nimmo, it would have continued in being notwithstanding Mr. Williamson's repudiation, and the ownership and the risk would have remained with him. It was only as a result of Mr. Nimmo's breach of warranty that the claimant was still pursuing throughout November and into December a non-existent contract with Mr. Williamson and seeking to effect delivery in return for the price.

126. Given the *Firbanks* principle that the claimant's measure of damages for breach of warranty of authority is his loss from his inability, due to the falsity of the warranty, to sue Mr. Williamson for the price, it seems to me that in the circumstances of the case its loss is the same. But for Mr. Nimmo's breach, the claimant would have had the benefit of the contract with Mr. Williamson and would have shed ownership and possession of the horse and the risk of its loss in exchange for the price. Instead it was put in the position of having to decide whether to pursue its claim for the price or accept the repudiation of the contract by Mr. Williamson and sell the horse elsewhere. The claimant chose the former, as it believed it was entitled to do, claiming in the alternative against Mr. Nimmo for breach of warranty. It was not to know at that stage where the truth lay. In such circumstances, in my view, the death of the horse when it occurred, should not be treated differently from a fall in the market price as in *Simons v. Patchett* or a total collapse in value as in *ex p. Panmure*.

127. The fact that there was no contract of sale with Mr. Williamson and that at the time of the horse's death the claimant still owned and possessed it, is no reason, when

assessing the measure of damages, to ignore the claimant's actual loss as a result of the breach of warranty. Where a seller in such a notional contract has accepted the notional buyer's repudiation and sold elsewhere at a lower market price, as in *Simons* v. *Patchett*, the measure of damages will, of course, be the price less the market value normally identified at that sale price. But where, as here, the claimant has not accepted repudiation and is seeking to enforce it, the position is different. It is only in that quandary, including retention of ownership and of the risk of loss of or damage to the horse, because of the breach of warranty of authority. If the contract had proceeded, it would have divested himself of the ownership, possession and risk of harm to the horse in return for the price some four weeks before the horse had to be put down. The claimant should not be in any worse position than it would have been if there had been a contract simply because it transpires that it is entitled to damages for Mr. Nimmo's breach of warranty of authority and not to the notional sale price against Mr. Williamson. Its position is comparable to that of the claimant in *Suleman v. Shahsavari* [1988] 1 WLR 1181, for damages for breach of warranty for loss of a bargain for the purchase of a house. Andrew Park, QC, (as he then was) sitting as a deputy High Court Judge, held that, though the usual measure of damages in such a claim was the difference between the contract price and the market value at the date of completion, it was not an absolute rule and that damages could be assessed by reference to the value at some other date if it was more just to do so. He held, at 1183E, that that was particularly so where, as in the case before him:

> "the innocent party reasonably continues to try to have the contract completed: in such a case it is logical and just to assess damages as at the date when (otherwise than by his default) the contract is lost."

128. Thus, I would hold in the circumstances that the claimant's financial loss from the death of the horse, namely the loss of a valuable contract, was an ordinary and natural consequence of Mr. Nimmo's breach of warranty of authority, just as might have been a loss resulting from a general fall or collapse in the market price for horses of this calibre during that period. It does not follow that the claimant could have recovered the price of the horse by way of damages whenever the horse died, say a year later. There may be a number of reasons for that, the most likely being that at some stage before the death of the horse the claimant would be taken to have had a duty, as against the warrantor, to mitigate its damages by accepting the notional buyer's repudiation and seeking another buyer.

129. For those reasons, the claimant's decision not immediately to attempt to sell the horse elsewhere and its death were not independent of the breach of warranty. In any event, as Clarke LJ has noted, the market for horses of the quality of High Spirits is not the same as that for shares or some classes of goods in which there is a readily available market. It might have taken some time to find a buyer at an acceptable price and to finalise sale to him after the necessary checks and preliminaries. Even if the claimant had promptly accepted Mr. Williamson's repudiation or denial of the contract, four to five weeks delay before a successful sale elsewhere was not an unlikely delay as a result of Mr. Nimmo's breach of warranty.

130. I do not consider that the holding of Robert Goff. J (as he then was) in *Koch Marine Inc v.. D'Amica Societa Di Navigazione* ARL *("The Elena D'Amico)* [1980] 1 Lloyd's Rep 75, is to the point. There, the plaintiff charterer had accepted the owners' wrongful repudiation of the time charter. The court was concerned with a claim for damages for breach of charterparty in which, critically to Robert Goff J's decision, there was an available market to charter a substitute vessel. Given that availability, he held that the charterer's decision not to take advantage of it was an independent cause of the loss claimed, a general approach, which, he said, was equally applicable to a contract for the sale of shares breached by a buyer. But the circumstances of that case are far removed from those here where the claim was for the loss of a valuable contract of sale, which the claimant was reasonably seeking to enforce and where, in my view, there cannot be said to have been a comparable availability of market which the claimant should, in the circumstances, have explored or which would have resulted in a sale before the horse's death.

Order: Appeal dismissed with costs to be assessed if not agreed; no order for costs of today, save costs of preparation to be the respondents; application for permission to appeal to House of Lords refused; stay of execution pending petition to House of Lords; if petition granted, stay to continue until determination of appeal.

(Order does not form part of the approved judgment)