

FITZPATRICK  
v Harty

THE HIGH COURT

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1980 No.471

BETWEEN/

JOHN FITZPATRICK

Plaintiff

and

EDWARD P. HARTY

Defendant

and

BALLSBRIDGE INTERNATIONAL BLOODSTOCK SALES LIMITED

Third Party



Judgment of O'Hanlon J., delivered herein the 25th February, 1983.

The Plaintiff is a Farmer and the Defendant is a Horse Trainer.

A sale of bloodstock, described as "Derby Sale of Steeplechasers and Hurdlers" was held under the auspices of the Third Party at the Royal Dublin Society Showground on Friday, 29th June, 1979, and this action concerns a three-year-old chestnut gelding entered for the said sales by the Plaintiff, and purchased by the Defendant for the sum of 15,000 guineas. This represented a record price for the said sale.

The Conditions of Sale were set forth in the Sales Programme, and the Defendant acknowledged that he purchased subject to the said Conditions, and that he was aware of their existence. The Purchaser took delivery of the horse on the day of the sale and brought him to his training establishment at the Curragh. He was acting throughout the transaction on behalf of an undisclosed principal named Carl O'Brien.

In the course of the following month, July, 1979, a condition of lameness in the horse's left hind leg developed and manifested itself. The Defendant brought in his Veterinary Surgeon, Mr. Edward Gowing MRCVS, to examine the horse on the 24th July, 1979, and he diagnosed the horse as suffering, in his opinion, from a condition known as "Ring-bone" - a serious and generally irreversible arthritic condition. This diagnosis was confirmed by Professor Kealy, MRCVS, following X-Ray of the 31st July, 1979. The horse has remained ever since in the physical possession of the Defendant, but his condition has continued to deteriorate and it appears to have been recognised and accepted by all interested parties from September, 1979, onwards, that he must be regarded as unsound, and worth no more than a few hundred pounds.

A cheque in payment of the purchase price, dated 21st July, 1979, was sent to the Third Party, by or on behalf of the Defendant, on or after the date marked on the cheque, but on receipt of the unfavourable report from Mr. Gowing on the 24th July, the Defendant took steps to have the cheque stopped. The money has never been paid since, and in these proceedings the Plaintiff seeks payment of the purchase price, with interest as provided for in the Conditions of Sale; the Defendant disputes his liability to pay anything by reason of the unsoundness of the horse, and counter-claims for the cost of keeping the horse over a period of

almost four years. In addition, the Defendant claims to be indemnified by the Third Party in respect of any payment he may be required to make to the Plaintiff on foot of the Plaintiff's claim herein.

I propose to refer now to the issues which have arisen for determination between the different parties to the proceedings.

The primary issue which has to be determined is whether the horse at the time of the sale on the 29th June, 1979, was already suffering from the condition of ring-bone which has rendered him unsound and which has deprived him of any real value for the purposes for which he was purchased. There was conflicting evidence on this issue, which I shall have to review in some detail.

If the condition was one which arose after the date of the sale then it appears to me that the Defendant would have no further answer to the Plaintiff's claim, whatever might be his position in relation to his claim for indemnity as against the Third Party. On the basis that the condition existed at the date of sale, the Defendant claims to be entitled to resist the Plaintiff's claim in reliance on -

- (a) an express warranty of soundness which he says was given on the date of the sale by the Plaintiff's son;
- (b) the Conditions of Sale, and in particular the provisions therein contained concerning an "Agreed Veterinary Certificate" of soundness which

was to be furnished in respect of the horse;

(c) an alleged breach of a fundamental term of a contract occurring when the horse sold was suffering from a condition of unsoundness which rendered him valueless as a potential steeplechaser or hurdler.

The Plaintiff denies that any express warranty was given in respect of the horse. He further pleads that if his son gave any warranty, he had no authority, express or implied, to do so. He claims that, in the absence of any knowledge of a defect on the part of a Vendor, the Purchaser under the then current Ballsbridge Conditions of Sale was bound to take and keep and pay for any horse purchased by him which had been passed as sound by the Vendor's veterinary surgeon, and confirmed as sound by the Third Party's Veterinary Panel.

As against the Third Party, the Defendant pleads that they did not carry out the obligations imposed on them under their own Conditions of Sale, in relation to the furnishing of what is described in the Conditions as an "Agreed Veterinary Certificate", and that he has been prejudiced by that default on their part, and should be indemnified by them against any claim of the Plaintiff's. He also claims that they warranted to him that the horse was sound.

Now that I have summarised the issues which were canvassed between the different parties, I will turn again to analyse the evidence relating

to the primary issue already referred to i.e., whether the horse was suffering from the condition of ring-bone as of the date of sale.

The Plaintiff first saw the horse in its box on the morning of the sale. It was taken out for him, at his request, and was trotted up and down in the passage between the boxes. He was very impressed with the general appearance of the horse, but claims to have immediately detected some flaw in the movement of the horse. He said: "I noticed the movement behind was not as good as it should have been." On cross-examination: "I saw him from behind - (I was) disappointed."

He said he went round every horse in the sale. He saw the Plaintiff's horse again later in the day, in the collecting ring, and on this occasion he said he walked very well; was a good mover; good on the trot also; "He was a particularly good mover."

At some stage during the day he saw his client and reported favourably about the horse, and was apparently authorised to bid for him at the auction. Denis Mahony, the auctioneer who conducted the sale, said there was a reserve of 8,000 guineas on the horse. Bidding opened at about 5,000 guineas; the horse was put on the market at 8,000 guineas; there was plenty of interest shown, and the bidding went up by bids of 200 guineas to 10,000 guineas, and then by bids of 500 guineas to 15,000 guineas, at which price it was sold to the Defendant.

Next day (Saturday, 30th June), the Defendant said he showed the horse to the owner. The horse trotted very well and the owner was very pleased with him. The Head Stable Lad, Mr. McCormack, told him something about the horse in the first week. The Defendant kept an eye on him during the breaking-in period; he was never happy with his movement behind, but assumed it was only muscular as he had two veterinary certificates of soundness. The horse was rested more than usual; and didn't get better; and one day he was chronically lame, and couldn't do anything. Mr. Gowing was then called in on the 24th July, 1979.

On cross-examination he said the horse was "in the process of being ridden for three weeks"; became visibly lame on the 24th July, 1979, and then Mr. Gowing was sent for. Up to then he described his back movement as "waddling", "rolling", "swinging" his hind leg. He said: "He didn't become progressively lame - if so I wouldn't have exercised him."

Gerald McCartan, Farrier, said he saw the horse at the Defendant's stables on the 2nd July, 1979. "He was lame". He came back on Wednesday, 4th July - "not moving right; hoofs good; shod him on the 4th; no better - couldn't pin-point what was wrong, he was not moving right."

Mr. McCormack, the Head Man in the stables, said that on Saturday morning, the day following the sale, the horse was taken out and trotted up and down. He noticed nothing at that stage. "He was 25 minutes on the

lead under my supervision." He was not taken out on Sunday. On Monday - "gave him a jog round on the edge of the Curragh; ground very hard; jogged him left and right - not strenuous. He was wrong behind going both left and right. He was not using himself behind compared with the other two horses. Not an awful difference between that and being lame. The others were shod and he wasn't - I put it down to this." After the horse was shod, the witness said he was no better. "He never trotted sound from the Saturday after the sale; he did on that Saturday - brilliant." He said he spoke to Mr. Gowing about him on the phone about Thursday of the second week, but they continued to exercise the horse and saddled him and had a lad (Pat Clarke) up on him twice. He knew of no injury or blow sustained by the horse. He was broken, but has not been ridden since.

Three veterinary experts were called by the Defendant. Mr. Gowing said he had been told by McCormack that he was not happy with the horse's action and had had him shod; the witness assumed it was a minor thing and advised that the horse should be let out for exercise on peat. (He gave no date for this discussion). On the 24th July, 1979, he was told by the Defendant that the horse was definitely lame; the witness found some swelling and heat in the pastern and thought he had a ring-bone. He said the condition would take four or five weeks before it would manifest itself. "I felt it was there all the time Harty had it; I thought the condition

was there a minimum of four or six weeks."

He was then asked: "Can you say as a matter of probability that he was not sound on the day before the sale, when examined? A. I cannot in honesty say that." Asked again, whether he thought it more probable that the condition was there before the sale or arose subsequently, he said: "In view of the history, the condition must have been there at the time of the sale."

He was then referred to the examination carried out by Professor Byrne the day before the sale and said: "If not then showing lameness, it indicates that he was sound at that moment in time.... He must have been sound - not just a case of appearing to be sound."

He also said that he wouldn't have expected the horse to move beautifully in the ring after the tests of the previous day, if he had ring-bone, and wouldn't have expected him to improve between the morning and the afternoon of the sale.

Finally, he made the following statements, all of which are difficult to reconcile with each other:- "If sound on the day of sale and has not ring-bone, it has to have a period of time. To think it would form in three weeks is beyond science. I think it would take longer. It would depend on the age of the animal and the cause... I have to believe the condition was there at the time of sale... It is not probable that he



would be sound on the 25th and 28th, but tender from ring-bone on the 29th." He concluded by saying that it takes ring-bone four to five weeks, or four to six weeks, to manifest itself.

The evidence of this witness illustrates vividly, I think, the difficulty with which all the veterinary witnesses found themselves confronted in this case. It is apparent from their evidence that the condition of ring-bone in a horse is one which can develop with great rapidity once it has been initiated by trauma or some other cause, and the veterinary witnesses on each side found it very difficult to commit themselves to a positive view that the condition diagnosed as existing by Mr. Gowing on the 24th July, 1979, pre-dated or post-dated the date of sale - 29th June, 1979. The horse was examined on behalf of the Vendor by Mr. Tyrell, MRCVS, on the 25th June, 1979, and certified as sound by him on that date, and re-examined by two members of the Ballsbridge Panel - Professor Byrne, and Mr. Berry, - on the day before the sale. All of these veterinary surgeons are men of considerable standing in relation to the examination of blockstock; all claimed to have subjected the horse to rigorous exercise which should have showed up any fault in his movement, and none of them found him in any way defective in this respect, although Mr. Berry did raise a query about his wind, on which he was later overruled by Professor Byrne.

Professor Kealy, a specialist in radiology, was consulted by Mr. Gowing and <sup>had</sup> X-Rays taken on the 31st July, 1979, which confirmed the accuracy of Mr. Gowing's diagnosis of ring-bone. This witness said that from an examination of the X-Rays taken on the 31st July, 1979, "to the best of my belief I would have thought such lesion was present some four to six weeks." Asked could the condition have been subsequent to the date of sale, he replied: "It is not an exact science to find the date of lesions." He said it was possible the condition arose after the 29th June, but, "I think the probabilities, there were some changes on the date of sale... Other changes closer to the joint after the date of sale."

Mr. Webbin, MRCVS, a lecturer in Radiology in London University gave evidence based on examination of the X-Ray of 31st July, 1979. He said he found it difficult to reconcile the radiographic changes, which suggested recent and acute episode. "The history, but not the X-Rays, is more consistent with chronic development. I think from the history the condition was probably there on the 29th. I am surprised the degree of lameness remained so slight up to the 24th." He said the fissure which was visible on the X-Ray was relatively recent. He said it was unlikely the horse would move differently on two different occasions on the same day unless some underlying condition was responsible.

For the Plaintiff, Eamonn Fitzpatrick, son of the Plaintiff, who had

prepared the horse for the sale, said he had always been very healthy and with very good action. He said that he met the Defendant at the Curragh on Oaks Day, 21st July, 1979, and asked about the horse. The Defendant said he was fine - the only thing he had done wrong was drop a fellow in the furze on the Curragh. (This conversation was disputed by the Defendant).

Mr. Hennessy, a Farrier who had worked for the plaintiff, said he had attended the horse regularly prior to sale, and his action was perfect. Martin Ryan helped with the horse on the day of the sale and said his movement was good. He had to bring him out for interested persons to see between 11 a.m. and 5 p.m.

Mr. Nicholson, a farmer and horse-trainer, also spoke of his personal knowledge of the horse coming up to the time of sale, and as to his movement which he described as "perfect."

Mr. Tyrell was the veterinary surgeon who gave the certificate of soundness for the purpose of the sale. He said that if there were any incipient lameness the horse would not have trotted sound at the end of the tests to which he subjected him. He described him as a very good mover. He said he met the Defendant at a race meeting after the sale, and the Defendant said: "I am very pleased with him - he is the best mover in the yard. I was going to bring him down to Blessington Show"

(held on the 7th July) "to show them how good he was." Asked could the condition have been present at the time of the sale he said, Yes. Asked was it probably present at that time he replied: "I can't say that. I can't answer that." He said that if the horse was being pulled out and shown to customers continuously to 5 p.m. he must have been sound, otherwise it would have been noticed; "if the very early stages of ring-bone, would expect to see a lame horse at the end of the day, with heat and pain. If ring-bone, would have become aggravated as the day went on."

Professor Byrne said: "My opinion as a practising Veterinary Surgeon and going on clinical grounds, the amount of forced exercises the horse got from me and Berry would have put considerable stress on the pastern - he would have gone lame as a consequence. On the morning of the sale he would have been lame. I would not expect him to be moving beautifully in the afternoon."

Mr. Berry's evidence has already been referred to.

This issue of fact is one which has given me a great deal of difficulty in resolving, and that is why I thought it appropriate to refer again at such length to the passages in the evidence which appeared to me to have the greatest bearing on it. Ultimately, and not without some considerable doubt, I have come to the conclusion that it is more likely that the condition of ring-bone arose after the horse came into the Defendant's

possession and not before.

All the evidence about the horse's condition leading up to the date of sale suggests that his legs were perfectly sound. He was stated never to have required attendance by a veterinary surgeon for any injury or damage to the legs. We have the benefit of separate examinations by no less than three highly-respected veterinary surgeons immediately prior to the date of sale, which revealed no defect in the hind legs.

As to his condition on the day of the sale, I have to have regard to the fact that he appears to have excited considerable interest which necessitated him being taken out of his box during the day and exhibited for the benefit of potential purchasers, who must be presumed to have had a good deal of expertise in assessing the worth of the horses they were inspecting. If his movement was defective, in the manner described by the Defendant, which left the Defendant "disappointed", one would have expected the Defendant to take the matter up with the Plaintiff's son when he spoke to him about the horse; to ask him had he noticed this flaw in the horse's movement, and was there any explanation for it - but the Defendant does not suggest that he mentioned the matter to Mr. Eamonn Fitzpatrick at all. Secondly, if the horse's movement was noticeably wrong, this should have been apparent to others as well as to the Defendant, and should have affected the sale of the horse, but we know that there was keen competition

for the horse as soon as the bidding opened and that it produced a record price on the day. All this leads me to believe that the horse must have been in very good condition immediately prior to, and on the date of sale.

As to what happened from that time forward, I see no reason to disbelieve Mr. Tyrell's account of his conversation with the Defendant, at a date he cannot name accurately, but which must have been well into the month of July, when the Defendant - according to Mr. Tyrell, - described the horse as "the best mover in the yard", and one he was minded to bring down to Blessington Show on the 7th July "to show them how good he was."

This does not fit in with the account of trouble from Day One, which was given by the Defendant and the other witnesses from the stables, but it does seem to me to be consistent with Mr. Webbin's conclusion that the X-Rays suggested a recent and acute episode leading to the development of the ring-bone condition, rather than the chronic development suggested by the history given to him.

I am also of opinion that a comment made by Mr. Berry was legitimate in the circumstances of this case. He said that in the case of the purchase of a horse for a very high figure, such as had happened in the present case, he would have expected a veterinary surgeon to be called in immediately to see the horse if any lameness manifested itself within a few days of the purchase. The fact that the Defendant waited until the 24th

July before asking Mr. Gowing to look at the horse, and the fact that the cheque in payment of the purchase price was issued on or after the 21st July, are all circumstances which suggest to me that the onset of lameness came suddenly, and in the latter half of the month. The Defendant himself described the horse as becoming "one day, chronically lame - couldn't do anything - called in Gowing". He denied that the horse became "progressively lame" from the time of the sale - "if so we wouldn't have exercised him."

This review of the evidence leads me to the belief that the horse met with some mishap, or series of mishaps, after the sale, which led to the rapid onset of the condition of ring-bone, and which eventually left him completely incapacitated.

This finding produces the conclusion that the Plaintiff is entitled to recover from the Defendant the amount claimed, namely, the sum of 15,000 guineas (£15,750) with interest thereon at  $1\frac{1}{2}\%$  per month or part thereof from the 20th July, 1979 to date, which I compute (subject to correction) as £10,158.75, giving a gross figure of £25,908.75, for which judgment should be given against the Defendant.

Were it necessary for me to express my views in relation to the other issues which arose for determination between the Plaintiff and the Defendant, I would hold that the Plaintiff's son, Eamonn Fitzpatrick, had authority

to give a warranty in respect of the horse, in the absence of the true owner. He was allowed by the owner - his father - to hold himself out as the owner of the horse and to have himself entered as owner in the auctioneers' particulars as published in their catalogue. He was left in charge of the horse for all the arrangements leading up to, and on the day of the auction, and I would hold that the Plaintiff was estopped from disputing that his son's ostensible authority to do everything to bring about the sale of the horse on the date in question was co-extensive with his real authority.

However, having regard to the fact that the said Eamonn Fitzpatrick denied having given any warranty as to the condition of the horse, I would hold that the Defendant has failed to discharge the onus of proof in this regard. No reference was made to the alleged warranty in any of the correspondence or communications between the parties and their legal advisers until the Defendant swore an affidavit on the 3rd June, 1980, for the purpose of resisting an application for judgment by the Plaintiff. Since that time the accounts given by the Defendant, in that affidavit, in the reply to notice for particulars, and in the course of his evidence during the case, as to the actual words used by the said Eamonn Fitzpatrick, which were alleged to constitute a warranty, have been so many and so varied, that I can only conclude that the Defendant himself no longer has



any clear recollection of what was said on that occasion. In these circumstances I am faced with a situation where a warranty may have been given, or the Plaintiff's son may only have passed a few laudatory comments about the horse not intending them to have any contractual force whatever, or he may have been as non-committal as he himself represents. Accordingly I would not be prepared to hold that an express warranty of soundness was given.

Turning to the Conditions of Sale, I do not consider that the offer to a purchaser of an "Agreed Veterinary Certificate" is at all equivalent to offering him a guarantee of the soundness of the animal he is purchasing. What he is offered is a certificate by the vendor's veterinary surgeon that he has examined the horse and found him to be sound, supported by a similar finding emanating from the Ballsbridge Veterinary Panel based on an examination which takes place immediately prior to the sale. The purchaser then buys the horse at his own risk as to the possibility that the findings made on the two examinations may have been incorrect.

*Proh*  
Ballsbridge Sales, by their Conditions of Sale, declare that they shall have no liability arising from Veterinary Certificates, whether supplied by the Vendor or issued on re-examination in accordance with the Conditions of Sale. Conditions 3 and 11 provide, however, for a number of circumstances in which a horse purchased may be returned by the purchaser after the sale.

Condition 3 refers to several vices rendering a horse unsound and entitling a purchaser to return it, even where the sale may have gone through with an Agreed Veterinary Certificate, but lameness attributable to ring-bone or any other cause is not mentioned at all in this context. Condition 16 appears to give rise to an entitlement to make a complaint in respect of a lot purchased only in the case of misdescription, and concludes by providing that "No lot shall be returnable other than in accordance with this Condition and Condition 3 above."

I would incline to the view that the Conditions of Sale are framed in terms which are wide enough to exclude a claim for damages or rescission except in those cases which are specifically provided for by Conditions 3 and 16, and that an allegation of fundamental breach of contract would not be sufficient to defeat the exclusion clause unless there were some collateral contract made outside the terms of the Conditions of Sale upon which reliance could be placed.

This means that even if I took the view that the ring-bone was present at the time of sale, unknown to vendor, purchaser and auctioneers, the claim to repudiate the contract or for payment of damages would not be sustainable by reason of the fact that the terms of agreement between the parties are to be found, in their entirety within the four walls of the Conditions of Sale, with the addition only of the names of the parties, the description

of the animal sold, and the purchase price.

Finally I have to consider the claim for indemnity brought by the Defendant against the Third Party. This was based initially on an allegation that the auctioneers warranted the soundness of the animal the subject of the sale. As I have already held that the horse was sound at the time of the sale, this claim against the Third Party cannot be sustained.

It emerged in the course of the evidence, however, that Mr. Berry, the veterinary surgeon nominated to examine the horse on behalf of the Ballsbridge Veterinary Panel, came to the conclusion that he was a "Whistler," and disagreed with the Certificate of Soundness which had already been given by Mr. Tyrell. The matter then went to Professor Byrne as Referee, to decide whether the horse was a "Whistler" or not. He overruled this finding by Mr. Berry; the horse went back to Mr. Berry for further examination and he found him sound in every other respect. The Defendant was later issued with a document headed, "Agreed Veterinary Certificate", representing that Mr. Tyrell's finding of soundness had been confirmed by Professor Byrne, whereas this was not correct - the ultimate confirmation of soundness having come from Mr. Berry, while accepting Professor Byrne's verdict that the horse was not a "Whistler."

The Defendant complained that he had not been told that one member of the Panel had found the animal unsound, and that if he had been made aware

of this he would not have bid for him at the auction. It was submitted on behalf of the Defendant that the Third Party had not carried out the obligations imposed on it under its own Conditions of Sale, concerning the Agreed Veterinary Certificate, and that the Defendant had been induced thereby to purchase a horse which had later turned out to be worthless, in reliance upon a Certificate which was incorrect and incomplete. The document furnished to the Defendant made no mention of the examination carried out by Mr. Berry or of his findings.

It appears to me, however, that while there was considerable confusion as to which document should be regarded as the "Agreed Veterinary Certificate" for the purposes of the Conditions of Sale, and as to what it should contain, the real obligation of the Third Party under the Conditions of Sale is to ensure that a horse is sold subject to a Certificate of Soundness of the Vendor's veterinary surgeon, verified and confirmed by the Ballsbridge Veterinary Panel, and that this obligation was satisfied on the occasion of the present sale. The Defendant was familiar with the procedure whereby any difference of opinion between the Vendor's veterinary surgeon and the Panel veterinary surgeon has always been referred in the past for decision by a Referee appointed by the Panel, and although no mention of this procedure is made in the Conditions of Sale this does not invalidate it, in my opinion. The Conditions of Sale merely refer

(in Condition 7 (a)) to re-examination "by the panel"; "the Panel" is defined in Condition 1(d) as "a member or members of the panel of veterinary surgeons appointed by Ballsbridge Sales". There is no restriction as to the manner in which the panel shall regulate its own internal procedures, or requiring disclosure of its proceedings to intending purchasers. In my opinion, all a purchaser is entitled to demand is that the Veterinary Panel shall stand over, and confirm, the certificate of soundness given by the vendor's veterinary surgeon. The panel did so in the present case, and a certificate confirming that it had done so was issued by Mr. Wm. O'Rourke, V.S., in his capacity as Managing Director of Ballsbridge Sales.

I do not consider that there has been any breach by the Third Party of their contractual obligations under the Conditions of Sale, nor any negligence on their part, giving rise to a claim for indemnity or contribution against them in respect of the sums which the Defendant has by this judgment been found liable to pay to the Plaintiff. The claim against the Third Party must, accordingly, be dismissed.

Similarly, any technical irregularity which has emerged in relation to the Agreed Veterinary Certificate furnished on the occasion of this sale would not suffice to give the Defendant a sustainable cause of action against the Plaintiff for rescission of the contract or for damages.

I would conclude by saying that the proper course to take with regard to the horse would have been to dispose of him long since for what he could fetch, as it must have been apparent to all parties before the end of 1979 that he had no further value as a potential steeplechaser or hurdler.

I cannot understand why the parties did not agree to that course being taken at that time or at any time since, and it should still have been done even in default of agreement for the purpose of mitigating the loss and damage flowing from the transaction.

Approved.

*R. J. O'Hanlon*

R. J. O'Hanlon.  
25/2/1983.

Note: Counsel for the Plaintiff - John Blayney SC

James Carroll SC

Liam Reidy BL

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Stephen Lanigan-O'Keefe BL

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Joseph Matthews BL.