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Finlay C.J.
Griffin J.
Hederman J.

THE SUPREME COURT

345/88

PERNOD RICARD & COMRIE PLC

Plaitniffs/
Respondents

and

FII FYFFES PLC

Defendant/
Appellant

JUDGMENT delivered on the 11th day of November 1988 by FINLAY C.J. (NEM. DISS)

This is an appeal by the Defendant (FII) against the Order of the High Court made on the 21st October 1988 directing specific performance of a contract made between the Defendant and the Plaintiffs for the purchase by the Plaintiffs of all shares in Irish Distillers Group Plc, registered in the name of or under the control of the Defendant at a price of £4.50 per share, the Defendant being at liberty to elect to be paid in cash or by means of debentures as provided for in the Plaintiffs' general offer in respect of the

said shares. The said Order also perpetually restrained the Defendant, its servants, agents or nominees from selling or agreeing to sell, or otherwise disposing of all or any part of the said shares to any person other than the Plaintiffs or their nominee. The Defendant has appealed against both parts of this Order. The proceedings by the Plaintiffs claiming the Order for specific performance and the injunction which they secured, were instituted by Plenary Summons dated the 5th September 1988. The action came on for hearing before Costello J. in the High Court and was heard on the 6th, 7th, 11th, 12th, 13th and 14th October 1988, and having reserved judgment, the learned High Court Judge gave judgment on the 21st October 1988.

The Defendant in its defence to the Plaintiffs' claim in addition to a series of denials, specifically pleaded two preconditions which it was alleged had been agreed between it and the Plaintiffs before any liability on foot of a contract to sell shares could arise and which had not been satisfied. The first

of those was an assertion that prior to the execution by the Defendant of any agreement for the sale of the shares or of any irrevocable undertaking in respect of its shares, the Plaintiff would procure and furnish to the Defendant a letter of tax clearance from the Chairman of the Revenue Commissioners in a form acceptable to the Defendant's taxation advisers. The second precondition alleged was that no liability would arise between the parties unless and until a written agreement was produced, perused, agreed and executed.

In the course of his judgment the learned trial Judge identified four additional preconditions to liability of the Defendant on the contract asserted on its behalf by the witnesses in evidence, though not pleaded. They were

1. That Irish Life would agree to the Plaintiffs' offer.

2. That the Plaintiff would obtain shares or irrevocable undertakings to sell shares amounting to not less than 40 per cent of Irish Distillers' shares.

3. That no higher bid would be received.

4. That EEC clearance would be given in advance.

Notwithstanding the fact that the Defendant had not pleaded any of these four additional conditions precedent, the learned trial Judge dealt with them in his judgment and found that none of them had been established. He was also satisfied that the execution of a written contract was not a precondition to the incurring of liability, and he dismissed the Plaintiffs' claim that the production of a tax clearance certificate was a condition precedent to a liability to sell the shares.

Against that judgment the Defendant appealed on a number of grounds, but in the submissions made before this Court by Counsel on its behalf the appeal was confined to a challenge to the finding made by the Learned Trial Judge:-

(a) that upon an agreement being reached between the parties on Saturday, the 3rd September 1988, for the purchase of the shares at a price of £4.50 per share

by a method described in the evidence as a conditional purchase agreement, the production by the Plaintiffs to the Defendant of what was known as a "tax clearance certificate" in relation to that transaction was a condition in but not a condition precedent to the contract made between the parties, and

(b) that upon the variation of that contract agreed late on Saturday, 3rd September 1988 whereby the acquisition of the shares was to be by an "irrevocable undertaking" instead of by a conditional purchase agreement, the obligation to produce a "tax clearance certificate" ceased to be even a condition in the contract.

The transactions out of which this claim arises are part of a takeover bid by the Plaintiffs for the shares of the Irish Distillers' Group Plc.

In the course of his judgment Costello J. has set out in a complete but succinct form the character and background of the various companies and individuals concerned in these transactions and the general

circumstances surrounding the bid and the negotiations between the parties before the Court. The accuracy or completeness of that general background history as contained in the judgment of the High Court has not been in any way challenged before us on this appeal and it is unnecessary for me to repeat it. The negotiations and discussions between the representatives of the Plaintiffs and of the Defendant out of which this dispute arises took place on three days in September 1988, that is to say, Friday, the 2nd September; Saturday, the 3rd September; and Sunday, the 4th September.

The Learned Trial Judge heard evidence in great detail about those meetings from practically all of a significant number of persons representing the protagonists and their advisers on each side of the negotiations. He reached certain conclusions with regard to what occurred at those meetings which are findings of primary fact, and in addition drew certain inferences from those conclusions.

The law

It has been agreed by Counsel for each of the parties before us that the principles governing the appellate jurisdiction of this Court in an appeal of this category from the High Court are those which were laid down most recently by the decisions of this Court in

Northern Bank Finance Corporation Limited v. Charlton & Ors. 1979 I.R.:

J.M. and G.M. v. An Bord Uchtala 1988 ILRM 203;

and

Hanrahan & Ors. v. Merck Sharpe & Dohme (Ireland) Ltd., judgment of Henchy J., unreported, delivered the 5th July 1988.

These principles are firstly that findings by a trial Judge of primary or basic facts which depend upon the assessment by him of the credibility and quality of a witness will only be interfered with by this Court on appeal when such findings of primary fact can not in all reason be held to be supported by the evidence. Secondly, that where there are facts or conclusions inferred from the primary facts as found, that those

inferences and their consequences for the purpose of the resolution of the issues before the Court may be set aside or replaced if it, drawing its own inference from the primary facts as found, considers that the inferences drawn by the judge of trial were not correct. It is of importance to stress that in this statement of these principles a reference to the question of the assessment by the judge of trial of the credibility of a witness is a reference to credibility in its legal sense, namely, reliability of memory and testimony, and is in no way confined to credibility in the narrow sense of truthfulness. In fact one of the findings of primary fact made by the Learned Trial Judge in this case, was that he had concluded that whereas some witnesses were in relation to certain events more trustworthy and accurate than others, that there were no witnesses before him who sought to be untruthful.

The judgment appealed against

With regard to what occurred on the first meeting between the parties, which was on Friday, the 2nd

September, the Learned Trial Judge stated as follows:

> "M. Jacquillat offered to buy FII's shares in Irish Distillers at 430p per share. He was prepared to give loan stock in Comrie Plc in exchange for them instead of cash. He was prepared to have the stock guaranteed by Societe Generale and that the stock could be for eight or nine years as required by FII. He made it perfectly clear they would make no general bid for the shares in Irish Distillers unless he had the prior agreement from FII as well as Irish Life, that they would sell their shares. No agreement as to price was reached at this meeting but it was indicated that FII was looking for a price in the region of 470 to 480 per share. There was very considerable discussion on the method of acquisition. This was in the main dealt with on the Plaintiffs' side by Mr. Desmond who explained that it was proposed to acquire the FII's shares by means of a share purchase agreement and not by the execution of an irrevocable undertaking, that he was aware of the tax problems involved, that a scheme had been evolved which would get over them and which that very morning was being discussed between a fellow director and Counsel and his colleagues were arranging to see the chairman of the Revenue Commissioners that day to obtain his confirmation that the transaction would not attract immediate liability to tax. There was strong opposition

from the FII side to the proposed method of acquisition because of its apprehended tax implications and on at least three occasions it was strongly urged that acquisition should take place by means of an irrevocable undertaking to be given by FII. FII clearly left the Plaintiffs' representatives with the impression that if this method was adopted it would have no concern about the tax situation."

The Learned Trial Judge went on to deal with the meaning and effect of what is described as the tax clearance certificate or tax clearance letter, which is an informal opinion from a tax inspector, as to the probable view to be taken by him when a scheme is presented before him, and identified the two tax problems which were in discussion at the meeting on the Friday. These were the question as to whether the proposed form of purchase agreement would qualify for relief under Schedule 2 of the Capital Gains Tax Act 1975 and whether that qualification would be negated by Section 63 of the Finance Act 1982. The Learned Judge went on to hold that the Plaintiffs agreed that a tax clearance certificate on these matters would be

obtained, but he held that such agreement was in the context of a conditional purchase of shares and that it was implied by what the Defendant's representative said "that one would not be required if instead an irrevocable undertaking was given".

With regard to that portion of the judgment, the challenge on behalf of the Defendant is that there were not any primary facts on which the Learned Trial Judge was entitled to reach a conclusion that it was implied by the Defendant's representatives that a tax clearance certificate would not be required if instead of a conditional purchase agreement an irrevocable undertaking was given. Secondly, and as part of that challenge, they assert that even if there were primary facts to support such implication it was unreasonable and should be set aside by this Court as an incorrect conclusion.

The next meeting between the parties was on the morning of the following day, Saturday, the 3rd September. At this meeting the Plaintiff's representatives produced three documents. One was a

draft of the conditional purchase agreement for the shares; one was a very brief opinion of Senior Counsel that the form of that agreement would qualify for the tax concessions contained in paragraph 4, subparagraph (2) of the Second Schedule to the 1975 Act; and the third was a draft of the terms of a press announcement of the principal terms of a general offer. The parties separated after a short preliminary meeting and the Defendant and its representatives and advisers studied the documents which had been supplied to them. The findings of the Learned Trial Judge with regard to what then occurred were thus stated by him:

> "Before the FII representatives returned to the meeting Mr. Flavin had called Mr. Desmond out for a private conversation and said to him that the price of 430 was not good enough and that Pernod would have to do much better. He left Mr. Desmond with the impression, as he had made no mention of the tax problem that FII was accepting the Plaintiffs' views on the tax situation. When the full teams met, Mr. Desmond's assessment of the situation proved correct. Mr. Flavin acted as the Defendant's spokesman. He indicated that they were satisfied with the documents. He

informed the Plaintiffs' representative that his tax advisers thought the opinion of Counsel was a good one, that the proposed method of implementing the transaction was satisfactory to the Defendant, but that notwithstanding this view the Defendant still required a tax clearance certificate. Whilst indicating the Defendant's acceptance of a sale transfer by means of the purchase agreement he stated 'I can't understand why you are not going the irrevocable route' and implied as had been done the previous day that the 'irrevocable route' would have obviated the Defendant's tax problems..... Mr. Flavin had called on Mr. Mooney to speak during the course of his remarks and Mr. Mooney had indicated that he thought Counsel's opinion was a correct one but that a tax clearance certificate was nonetheless required on both the 1975 Act and the 1982 Act points. A question has arisen as to whether he added that a certificate would be required for whatever route was taken. Whilst I think it is unlikely he said this as the Defendant had accepted that the sale be completed in the manner proposed by the Plaintiffs and furthermore none of the Defendant's witnesses recalled him saying so, the point was not taken up by Mr. Flavin and it was not made clear to the Plaintiffs' representatives that the Defendant wanted a tax certificate should the agreement be changed and an irrevocable undertaking executed instead."

The Appellant again challenges the finding of the Learned Trial Judge in this portion of his judgment to the effect that Mr. Flavin by his remarks again implied that the irrevocable route would have obviated the Defendant's tax problems. The Learned Trial Judge then found that after further negotiations with regard to price, a price of 450p per share was agreed between the parties and that upon that agreement being reached Mr. Flavin after a mutual shaking of hands said: "We are partners now", and offered on behalf of the Defendant to give the Plaintiffs help in getting additional "irrevocables" before the public bid was made. He further found that at that stage M. Jacquillat wanted to know when they could sign the agreement and that Mr. Flavin said that there was a difficulty because their legal adviser had to go to a wedding and that they could sign on the following day. He said to M. Jacquillat not to worry about it: "We will arrange all that. We are all together now". Subsequent to that conversation M. Jacquillat phoned Mr. Neil McCann

who had left the meeting at an earlier stage and told him that he had accepted the offer of sale at 450p per share and Mr. McCann on the evidence expressed satisfaction and congratulated M. Jacquillat. Arrangements were then made for a further meeting on the following day. On these findings of facts the Learned Trial Judge came to the following conclusion:

> "As to the tax clearance certificate I think that the Plaintiff had agreed on the previous Friday when it was urging the share purchase route as the method of completing the transaction that it would provide a tax clearance certificate and it impliedly if not expressly reiterated this agreement on the following morning. As to the form the certificate would take, I think it was agreed that it would cover the two points which had been raised. But I do not think that the parties agreed that it must be in a form approved by the Defendant, nor do I think that it was agreed that no contractual obligation would arise until the tax clearance certificate was produced; on the basis of the testimony in the case and the parties' conduct, I conclude that the production of the tax clearance certificate was made a condition precedent in the contract and that by this contract the Defendant had accepted an obligation to

transfer its shares provided the certificate was available within three days of a general offer being made. This meant that the Defendant was under an obligation to sign a contract on the following Sunday even if the tax certificate was not at that time available. It is relevant to point out that both parties were confident that a certificate could be obtained, a confidence partly arising from Mr. Desmond's assurances but also (1) from the nature of the proposed contract document, (2) the advices both had received that it complied with the relevant 1975 Act provisions and (3) their own knowledge that the transaction was a bona fide one and one which complied with the 1982 Act provisions. The evidence relating to the negotiations established that a concluded agreement had been entered into by which the Defendant had agreed to sell its shares at 450p per share and would receive debentures in Comrie Plc in exchange, that this agreement was conditional (a) on the Plaintiffs making a general offer based on terms in the draft press notice, and (b) on the production before the time fixed for completion of a tax clearance certificate and that the transfer would be made within three days of the making of the general offer."

It is clear from the judgment that the Learned Trial Judge reached these conclusions on what he found to have been said at the meetings on Friday and Saturday

and also on the probabilities of the case laying some stress on the fact that M. Jacquillat had made it perfectly clear that he would go back to Paris unless he attained the Defendant's agreement to sell and that as an experienced negotiator it was unlikely that he would move to the second stage of his strategy which was the acquisition of the Irish Life's shares, until he had completed the first. He did so and immediately on meeting the representative of Irish Life, Mr. Haslam was informed by him that he was aware that Pernod had done a deal with FII. Subsequent evidence established that Mr. Haslam had been so informed by Mr. Flavin. The Learned Trial Judge also relied for the conclusion which he had reached as to the nature of the condition with regard to tax clearance as being <u>in</u> the contract as distinct from precedent <u>to</u> it, on the activities and conduct of Mr. Flavin after the meeting on Saturday afternoon in seeking to assist in obtaining the adherence of other substantial shareholders in Irish Distillers to the offer being made by Pernod.

After the meeting of Saturday, the 3rd September, between the parties and the meeting between the representatives of Pernod and the representatives of Irish Life which occurred on Saturday afternoon, the findings of primary fact made by the Learned Trial Judge indicate that the following events took place.

The Plaintiffs having successfully achieved undertakings which they calculated would probably lead to their having guaranteed to them by Monday the acquisition of more than 50 per cent of the shareholding, decided to offer to the Defendant its preferred option of an acquisition of shares by irrevocable undertaking.

This was done in a telephone conversation between Mr. Flavin and Mr. Desmond which took place at about 7 p.m. On that occasion Mr. Flavin rang Mr. Desmond to report to him on his attempt to secure for the Plaintiffs the acceptance by the Norwich Union of an undertaking to sell its shares. Having done so, he then enquired: "What about the tax clearance?" To this Mr. Desmond replied: "You don't have to worry about that. We will

take the easy option; we will go your suggested route". It has been found and not disputed that Mr. Flavin understood this to mean that the Plaintiffs would accept an irrevocable undertaking in place of a conditional purchase agreement and agreed to this variation of the contract.

He then said: "What about the roll-over relief?" To this Mr. Desmond replied that there would be no problem getting the relief through and that the best person to confirm that was Mr. Swannell. Mr. Swannell was an official of a bank supporting and advising the Plaintiffs in relation to this bid, but was not in any way involved in obtaining any tax clearance certificate.

Mr. Swannell thereafter phoned Mr. Flavin and explained the reasons for his belief that proceeding by the method of irrevocable undertaking must result in obtaining "roll-over relief". In neither of these conversations which he had with Mr. Desmond and Mr. Swannell did Mr. Flavin make any enquiry as to whether a tax clearance certificate had been obtained from either

the Revenue Commissioners or from a tax inspector.

On Sunday morning Mr. Swannell phoned Mr. Flavin seeking to put forward the hour for the meeting which had been fixed for 5 p.m. on that day, and he explained that it was the Plaintiffs' intention upon the conclusion of that meeting to announce their general offer simultaneously in Paris, London and Dublin, and that the necessary translation of its terms for the Paris announcement made the logistics of a 5 p.m. meeting very difficult, if not impossible.

Mr. Flavin having agreed to try and meet this request rang Mr. Swannell back to say that the earliest the meeting could be brought forward to would be 4 p.m.

In this conversation he again raised the question of roll-over relief; Mr. Swannell reiterated the arguments made by him the night before and Mr. Flavin concluded by saying: "Don't worry" and expressing his belief that it would only take about half an hour to sign the documents at the afternoon meeting.

At about 4 p.m. on Sunday, the 4th September 1988

the Plaintiffs' representatives attended at the arranged meeting-place, namely the offices of D.C.C. in Stillorgan, but were not met by the Defendant's representatives. After an appreciable interval, Mr. Flavin came into the room where the Plaintiffs' representatives were and said: "You have probably heard that GC & C had made an offer of 525 and that it had received the authorisation of the take-over panel to make it." The Plaintiffs' representatives were not aware of this, although they had learned that Mr. Dempsey, Chairman of GC & C had, in a radio programme, at lunchtime, indicated his intention on its behalf of making an offer of 500p per share. However, they assumed that this would be an unauthorised bid.

M. Jacquillat said: "We have an agreement and I want you to sign". Mr. Flavin did not deny the existence of an agreement but having reiterated a couple of times that a new situation had been created and having said: "We have a very difficult situation", he left the room. Mr. Flavin subsequently returned

and said to Mr. Desmond: "Have you got the tax clearance?' Mr. Desmond replied stating that the Defendant did not need it as "you are going the irrevocable". To that statement there was no reply, repudiation or any comment.

Further discussions later took place between M. Jacquillat and Mr. Desmond on the one hand and Mr. Flavin and Mr. Neil McCann and Mr. Carl McCann on the other hand. The general import of these conversations appears to have been pressure by the Plaintiffs' representatives on the Defendant's representatives to honour their alleged agreement and no assertion was made by any of the representatives of the Defendant as to the existence of a condition precedent as to tax clearance which had not been fulfilled.

The meetings then concluded with a clear threat made on behalf of the Plaintiffs to take some form of legal action.

The Learned Trial Judge placed very considerable emphasis on the three telephone conversations to which I have referred and to what was said and not said at the

meetings on Sunday the 4th September, in reaching his conclusion

(a) that tax clearance was never a condition precedent to the formation of a contract, and

(b) that after the acceptance of irrevocable undertaking as a substituted method for the acquisition of the shares it was not even a condition in or of the contract.

On his findings of fact with regard to what was said in the telephone conversations and at the meetings I find these conclusions not only correct but the only reasonable inferences which could be made.

I would find it inconceivable that if Mr. Flavin believed that the negotiations which he had conducted as a principal spokesman on behalf of the Defendant, had by the afternoon of Saturday, the 3rd September, resulted only in a contract, subject to a precondition of the production of a certificate of tax clearance, irrespective of what method of acquisition was employed, he would have reacted to Mr. Desmond's telephone conversation as he did. There can be no doubt that Mr. Desmond was

contending in that conversation that no tax clearance was then necessary since irrevocable undertaking was the method of acquisition and was accepted as such. His offering the advice of Mr. Swannell could be consistent only with an assertion that the substituted method of acquisition was demonstrably safe and avoided the necessity for a certificate of tax clearance.

If, as is submitted by the Defendant, it had at that time a contract which was subject to a fundamental precondition before the formation that a tax clearance certificate would be obtained by whatever method the shares were to be acquired, it is to me incredible that Mr. Flavin would not in that telephone conversation have asked the simple and vital question as to whether a tax clearance certificate had been obtained and if not when would it be available. It is equally incredible that Mr. Flavin would, if that were the nature of the contract, have agreed to being contacted by Mr. Swannell who was certainly not a person who could possibly be involved in the obtaining of a tax clearance certificate from the

Revenue Commissioners or from an inspector of taxes. Instead, one would have expected him to request further information from Mr. Desmond who earlier had been the person involved in seeking a tax clearance certificate. Not only do I find the absence of these enquiries wholly inconsistent with the Defendant's case, but no plausible explanation of it was afforded in the evidence in the High Court nor suggested in the submissions before this Court.

The request made by Mr. Swannell on the morning of Sunday, the 4th September, to Mr. Flavin for the putting forward of the meeting was expressly based on the timing of a public announcement simultaneously to be made in London, Paris and Dublin. Such an announcement could only relate to the existence of binding undertakings to sell shares and the making of an offer. Mr. Flavin who in his evidence has expressed considerable doubt as to the possibility of obtaining a tax clearance certificate over the week-end and who had neither sought nor been afforded in the two telephone conversations on the

previous evening any assurance that one was forthcoming, again omitted to make any enquiry concerning it, and simply agreed to the putting forward of the meeting expressing a belief that it would only take about half an hour to sign the documents. If a tax clearance certificate was a condition precedent to the formation of a contract and none was yet available putting forward the meeting by an hour was clearly unwise, and announcements in London, Paris and Dublin were irrelevant because there would be nothing to announce.

The sequence of events which has been found in the High Court to have occurred at the meeting on Sunday afternoon are in my view correctly interpreted by the Learned Trial Judge as being a very strong confirmation of his view of the terms agreed between the parties at that time. In the face of a direct challenge to accept and sign an agreement, no denial was made of the existence of a liability so to do.

As what can only be described as an afterthought, ten minutes later a clearance certificate was mentioned by Mr. Flavin and when its necessity was repudiated by Mr. Desmond the matter was not pursued.

This Court has in the submissions made on behalf of the Defendant been urged to have regard to the very considerable sums of money at stake in these negotiations and to the fundamental importance to the Defendant of what is described as "tax efficiency" in any sale.

Such considerations would make even more incredible than it otherwise might be that the spokesman for the Defendant, with advisers available to him, would not when challenged with the existence of a concluded agreement have in an unambiguous fashion, mentioned the existence of an unfulfilled precondition if such precondition existed.

Subsequent to this meeting on Sunday, the 4th September, the Plaintiffs obtained an interim injunction restraining the Defendant from parting with its shares to anybody other than the Plaintiffs.

The Plaintiffs have in this appeal relied upon statements subsequently made by Mr. Flavin, both in discussions with Mr. Desmond which originated in a "without prejudice" form but which the parties agreed

could be adduced in evidence before the High Court and in a conversation which Mr. Flavin had, at his own initiative, with Mr. Hooper of the Investment Bank of Ireland.

I would accept that these statements are generally clearly inconsistent with the belief on the part of Mr. Flavin in an avoidable contract to sell or in the absence of any contract to sell, but they are not, in my view, vital to the determination of the issues which were before the High Court and which are before this Court. I do not read the judgment of the Learned Trial Judge as relying strongly upon them (though it does mention them).

I would therefore reject the challenge to the Learned Trial Judge's finding that there was no tax clearance precondition to the formation of this contract.

With regard to his further finding that by reason of the substitution of irrevocable undertaking for conditional purchase as the method of acquisition of the shares, a tax clearance certificate ceased to be a condition in the contract, I have come to the following

conclusions.

The statements and actions of Mr. Flavin and other representatives of the Defendant from the time of Mr. Flavin's conversation with Mr. Desmond at approximately 7 p.m. on Saturday evening to the conclusion of the meetings on Sunday afternoon, are as relevant to this issue as they were to the issue of the existence or non-existence of a precondition. Again it would appear to me, as it appeared to the Learned Trial Judge, difficult to explain the failure of Mr. Flavin in any of these telephone conversations to enquire about the progress towards obtaining a tax clearance certificate, even if this was only a condition in the contract. It is, in my view, impossible to explain how, if the situation were that the obtaining of a tax clearance certificate remained a condition in the contract, notwithstanding the change of the method of acquisition of shares, that Mr. Flavin on agreeing to that change would not have firmly stated that the obtaining of a tax clearance certificate remained a necessary condition

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in the contract.

It is equally incredible, in my view, that Mr. Flavin at the meetings on Sunday afternoon would, if that were the situation, have left uncorrected and uncontested Mr. Desmond's assertion that no tax certificate was now necessary.

Apart from the Learned Trial Judge's conclusion that previous references to a tax clearance certificate and to the desirability of going by the "irrevovocable route" which had taken place on Friday and Saturday, were so linked as to imply that one was a substitute for the other, which I would find an acceptable conclusion, I am satisfied his decision on this issue was correctly arrived at, having regard to the events of Saturday evening and Sunday.

I would therefore dismiss this appeal.

approved
T. A. Finlay
14:11:1988.