Judgment delivered Friday, 1982.
5 May 1982

Before: Sir Frank Ereaut, Bailiff.
Jurat R.E. Le Cornu.
Jurat L.A. Picot.

Between
Jersey Strawberry Nurseries Limited, Plaintiff.
and
William M. Staite, Defendant.

Advocate B.I.E. Le Marquand for the Plaintiff
Advocate D.F. Le Quesne for the Defendant

In late July or early August, 1978, the plaintiff, which was trading as a commercial grower, owned several fields, including the field called "Les Aix", near the Strawberry Farm, St. Peter. "Les Aix" was divided into three sections. In the two end sections strawberries were being grown. In the middle section measuring some three vergees there were rows of daffodil bulbs, which had been planted some two to three years previously. The bulbs had been planted in two layers, the top layer some two to three inches below the soil and the bottom layer some four to five inches below. The method of planting the bulbs had left a series of parallel ridges, (like corrugated hardboard), each two to three inches high, but after two or three years the height of the ridges would have been reduced.

At the date in question, the middle section of "Les Aix" (where the rows of bulbs were) was covered in weeds some two feet high, and Mr. J.V. Racz, a Director of the plaintiff, decided to instruct the defendant, an agricultural contractor, to swipe the weeds (as well as to do other work in the neighbouring fields). A swiper, otherwise known as a slasher, is a machine which cuts down weeds to about an inch or so above the soil. It does not penetrate the soil and so does not damage any bulbs which may be in the ground. Mr. Racz therefore showed the defendant the middle section of the field "Les Aix" and claims that he told him that he wanted him to swipe that section. He also claims that he told the defendant to be careful because there were bulbs there.

After /

After that meeting it was agreed that the defendant would send his employee who was to do the work to see Mr. Racz to receive detailed instructions. A few days later the employee, Mr. R. du P. Amy, visited Mr. Racz early in the morning because Mr. Racz was due to fly to London later the same morning. Mr. Racz conducted Mr. Amy round the several fields at which work was to be done. At "Les Aix" the two men walked to the edge of the middle section and Mr. Racz claims that he clearly told Mr. Amy to swipe the section and that he also warned him to be careful because there were bulbs there.

Later that morning, Mr. Racz having left the Island, Mr. Amy connected a rotavator to a tractor and proceeded to rotovate the whole of the middle section. Having finished, he then connected the tractor to a plough and proceeded to plough a small part of the section but then stopped work because, so he claimed, it began to drizzle, thus making the ground too heavy to continue.

Whilst this work was being carried out, Miss J.F. Do Carmo, a Portuguese employed by the plaintiff, visited the field three times. On the first occasion she saw Mr. Amy rotovating the field "too deeply" with the result that bulbs were being brought to the surface in a damaged condition. She speaks little English but she picked up some of the damaged bulbs and showed them to Mr. Amy to indicate that he was causing damage. He shrugged his shoulders and mumbled something but she thought that he had understood and that he would adjust the height of the rotovator. She left but returned a few hours later to find many more bulbs damaged. She left again and later returned to find Mr. Amy ploughing the section and causing more damage. She told him to go before he caused even more damage. Mr. Amy stared at her, continued ploughing for a little longer and then left. On the return of Mr. Racz to Jersey, Miss Do Carmo showed him the damaged bulbs, and Mr. Racz saw that many bulbs had been brought to the surface, some of them damaged.

The plaintiff now actions the defendant for damages for the financial loss which it has sustained, by reason of some bulbs being damaged and of others being buried at too great a depth to enable them to flower.

By consent, this Court is concerned at this stage only with the issue of liability. The plaintiff bases its claim for damages on two grounds. First, that it was an implied term of the agreement between the parties that the defendant or his servant would exercise reasonable care in the performance of the work. The defendant was in breach of that implied term both by performing the wrong work on the middle section contrary to the verbal instructions given by Mr. Racz, and by failing to heed his warning that there were bulbs in that section. Secondly, that Mr. Amy was negligent in that he performed the wrong work on the middle section contrary to the instructions given to him, he failed to heed the warning of Mr. Racz that there were bulbs in that section, and he failed to take notice of the large number of broken and damaged bulbs which his activities brought to the surface, which Miss Do Carno drew to his attention and which he knew or should have known were of value to the plaintiff.

Before dealing with those two specific allegations, we wish to state three conclusions to which we have come.

First, we are satisfied that at the date in question there were rows of bulbs in the middle section of the field. Some of the rows are still visible in recent photographs.

Secondly, we are satisfied that the use of a rotovator and of a plough did cause some danage to the bulbs. Only a small area was ploughed, but the whole of the section was rotovated, and even if the rotovator was used only to a depth of three to four inches, as Mr. Amy claimed, damage would be caused to the bulbs. We heard evidence on this point from Mr. J.P. Le Masurier, who was called as an expert witness. The extent of the damage must depend on a number of factors, which do not concern us at this stage.

Thirdly / ...

Thirdly, we are satisfied the bulbs had a value for the plaintiff. We say this because it was put to Mr. Racz in cross-examination that the bulbs had no value and that he wished them to be rotovated into the ground as a cheaper alternative to lifting the bulbs and throwing them away. We accept that rotovation is one method of disposing of unwanted bulbs, but we are satisfied that the bulbs did have a value and that Mr. Racz had no thought of destroying them. On this point we heard evidence generally from Mr. Le Masurier. In addition to the evidence of Mr. Racz himself we were told by Miss Do Carno that Mr. Racz had informed her that once the weeds had been cut down he intended to lift the bulbs.

We also heard evidence that Mr. Racz was dilatory in complaining about the damage to the bulbs, and furthermore that he permitted judgment by default to be taken against him by the defendant for the work done at "Les Aix" and other fields. That evidence was advanced to support the defence allegation that Mr. Racz was content that the bulbs should be rotovated into the ground because they had no value for the plaintiff. We have considered that evidence and the explanations of Mr. Racz. We agree that he was dilatory and unbusinesslike, but we are nevertheless satisfied that the bulbs did have a value for the plaintiff and that Mr. Racz did not want them rotovated into the ground and so destroyed.

We now revert to the two specific grounds of action, the first being that the defendant or his servant was in breach of the implied term of the agreement between the parties to exercise reasonable care in that they performed the wrong work contrary to the verbal instructions of Mr. Racz and that they failed to heed his warning that there were bulbs in the section.

Mr. Racz was adamant that he instructed both Mr. Staite and Mr. Amy that he wanted the section swiped and that he warned them both that bulbs were present. Both men denied that in evidence, and both said that the instructions of Mr. Racz were to rotovate and plough the section and furthermore that he made no reference to bulbs.

When showing Mr. Staite what work was to be done, Mr. Racz and he viewed the middle section from the entrance to the field and did not leave Mr. Racz's car. When Mr. Amy was shown round, however, he and Mr. Racz did walk to the edge of the middle section, but not onto it. Because the bulb foliage had by then died down, Mr. Amy would not have been aware that there were bulbs in the ground unless told. Mr. Racz claimed that the ridges were still visible, but Mr. Amy did not see them, and because of the high weeds and the fact that the ridges would by then have been reduced in height, we accept his explanation.

Miss Do Carmo was very certain in her evidence that Mr. Racz told her before he left for London that a rotovator was going to be used. It is true that Miss Do Carmo appears to have been confused about the function of a rotovator, because she added that when properly used a rotovator "will only cut above the ground", which of course is not an accurate statement and suggests to us that she was thinking of a swiper or slasher. Nevertheless, she was adamant that Mr. Racz used the word "rotovator" to her, and that evidence must raise a doubt in our minds as to what he said to Mr. Staite and Mr. Amy.

It is for the plaintiff to satisfy us on a balance of probabilities that Mr. Racz gave the correct instructions. It is possible that he did and that both Mr. Staite and Mr. Amy misunderstood his instructions; neither of them took notes. We accept that Mr. Racz wanted the section swiped and not rotovated. On the other hand, if Mr. Racz did give the instructions which he claims to have done, it is extraordinary that both men should have misunderstood him. When Mr. Racz spoke to Mr. Amy he was in a hurry to catch the London flight and he may not have taken sufficient care to give his instructions clearly.

We have come to the conclusion that the plaintiff has failed to satisfy us that the instructions of Mr. Racz to Mr. Amy were sufficiently clear to indicate that he wanted the section to be swiped instead of rotovated and ploughed. Moreover, it has failed

to satisfy us that he warned Mr. Staite and Mr. Amy that there were bulbs there. Accordingly, we find that the defendant was not in breach of the implied term of the agreement between the parties to exercise reasonable care.

We now deal with the second ground on which the plaintiff claims that the defendant is liable, namely, that Mr. Amy was negligent. We have already found that the plaintiff has failed to satisfy us that the instructions of Mr. Racz were sufficiently clear and that he expressly warned Mr. Staite and Mr. Amy that there were bulbs in the section. We have also accepted that Mr. Amy could not have known by looking before he started work in the section that there were bulbs under the ground. What therefore we have to consider is whether, as is alleged by the plaintiff, he was negligent in that he subsequently saw broken and damaged bulbs brought to the surface by the rotovator and the plough, or had his attention drawn to such bulbs by Miss Do Carmo, and yet continued in his work, thereby causing further damage.

Mr. Amy told us that when he began work in the section he did not see or feel any ridges, and we accept that, for the reasons already given. He said that he rotovated to a depth of three to four inches and the earth was thrown out at the back of the rotovator. He could not have failed, as he worked the section, to have seen any bulbs thrown up, but at no time did he see any, both when rotovating and ploughing. Furthermore, he denied that Miss Do Carmo ever spoke to him. He did see some Portuguese working in the strawberry sections, but no-one spoke to him. He stopped ploughing after completing only some six widths of the section because it began to drizzle and the soil was blocking the plough. He did not stop because of Miss Do Carmo; she never approached him.

Mr. Amy added that if Miss Do Carmo had shown him broken bulbs he would have stopped, because he was not "that stupid". He also said that if he had seen just a few broken bulbs he would have assumed that they were merely a few "rogue" bulbs which had been

left after / ..

left after the main crop had been lifted and therefore he would not have stopped. If, however, he had seen many broken bulbs being brought up he would have assumed that there were rows of bulbs and he would then have stopped and reported the matter to his employer. Mr. Staite told us that he would have adopted the same course of action if he had been in the place of Mr. Amy.

We have to decide whether, notwithstanding his denial, Mr. Amy did see any broken or damaged bulbs, and if so whether he saw a large quantity of them.

On this question, we have regard to the following further evidence. First, Mr. Staite told us that Mr. Amy did inform him that he had seen a few bulbs, but not a big quantity, and so he carried on working. Mr. Amy denied in evidence having said this to Mr. Staite.

Secondly, we have already referred to the evidence of Miss Do Carmo who claimed to have protested to Mr. Amy three times and shown him some broken bulbs. She said that she saw a considerable quantity of damaged bulbs, as also did Mr. Racz on his return from London.

Thirdly, Mr. Le Masurier told us that the effect of rotovating a field where rows of bulbs had been planted three inches deep would be "devastating". It would chop the bulbs up and bring some parts to the surface, which could then be seen as one continued to rotovate alongside the previous line.

In considering the answer to the question posed above, the Jurats are divided. One Jurat finds it impossible to believe that Mr. Amy would have ignored the protests of Miss Do Carmo if, as alleged, she had pointed out to him the broken pieces and had actually picked them up to show to him. Mr. Amy told us that he would then have stopped, and this Jurat is sure that he would indeed have done so. This Jurat therefore prefers Mr. Amy's evidence to Miss Do Carmo's and thinks it likely that Mr. Amy did not see the broken pieces because the thick weeds would have hidden them.

The other / [illegible]

The other Jurat is satisfied that Mr. Amy did see large quantities of broken and damaged bulbs, and I agree with him. Our reasons are as follows. Firstly, we find the evidence of Mr. Staite, to the effect that Mr. Amy mentioned having seen a few bulbs, of some significance. Mr. Amy was quite adamant that he had not said this, but Mr. Staite was equally adamant that he had. We cannot think that Mr. Staite could be mistaken on such a matter, and we are therefore satisfied that Mr. Amy did see some bulbs. Secondly, we consider that Miss Do Carmo gave her evidence honestly. It is conveivable that she felt somewhat to blame for not having prevented the damage in her employer's absence, and that she was therefore trying to make amends by giving perjured evidence, but that was not our assessment of her testimony. Furthermore, even though her knowledge of English is extremely slight, the meaning of her actions must have been perfectly clear to Mr. Amy. Thirdly, in the light of Mr. Le Masurier's evidence we would have expected that the rotovator would have brought up large quantities of broken bulbs, and therefore that evidence supports the testimony of Miss Do Carmo and of Mr. Racz.

Fourthly, and finally, we find some further support for our view in the fact that Mr. Amy stopped ploughing after completing only a small part of the section. Mr. Amy told us that he stopped because of drizzle. Miss Do Carmo said that there was no drizzle and indicated that he stopped because of her third protest. We find it difficult to believe that she could have invented this. Furthermore, if Mr. Amy had stopped because of drizzle, one would have expected that he would have been sent back later to finish the work. He never did return and Mr. Staite told us that he had a lot of other work on hand and he must have forgotten to send him back. This is possible, but we prefer the explanation that he did not return because Miss Do Carmo had protested at the damage.

It follows / ...

It follows that, by a majority, the Court has found that Mr. Amy did see a large quantity of broken and damaged bulbs and had his notice drawn to them by Miss Do Carmo.

That being the decision of the Court, we now have to decide whether he was negligent in the particular circumstances, that is to say, by continuing to rotovate and plough the section after being made aware of the presence in the ground of a large quantity of bulbs.

We need to ask ourselves two preliminary questions. First, was further damage caused to the bulbs after Mr. Amy became aware, and was made aware, that there were bulbs in the ground?. The Court, by the same majority, is satisfied that such further damage was caused, and that it was considerable.

Secondly, did Mr. Amy know, or should he have known, that the bulbs were of value to the plaintiff?. We have already found, by a majority, that Mr. Amy did see a large number of broken and damaged bulbs. On that basis, therefore, we are of the opinion that Mr. Amy did know, or should have known, that the bulbs were of value to the plaintiff, for two reasons. First, he told us that he had never heard of the practice adopted by some growers of rotovating or ploughing in bulbs which had no value. That means, therefore, that he did not think that he was following that practice. Secondly, he told us quite frankly that if he had seen a lot of bulbs coming up he would have gone back to report the matter to his employer. We think that he would have been right to do so, and the reason is that he would have had good reasons for thinking that the bulbs did have some value to the plaintiff.

We can now deal with the question whether, on the facts as found by the Court, the plaintiff has proved negligence on the part of Mr. Amy. To substantiate the allegation of negligence it is necessary, firstly, to show that the relationship between the

parties / ...

parties was such that the defendant owed to the plaintiff a duty to take care not to damage his property while carrying out the work which he had been instructed to do to the middle section of the field. Clearly there was such a duty and the defendant did not seek to argue that there was not.

The second matter for consideration is whether there was a breach of that duty. We have already found that Mr. Racz has failed to satisfy us that he gave clear instructions that he wanted the section swiped and not rotovated and ploughed. It follows that Mr. Amy was not at fault merely by reason of the fact that he rotovated and ploughed the section, and indeed our finding requires us to go further and say that in so doing he must be deemed for the purpose of this case to have been carrying out the instructions of the plaintiff.

The damage to the bulbs was occasioned in the course of carrying out those instructions, and furthermore was inevitable if those instructions were to be fully carried out. That raises the question whether conduct which causes damage can ever amount to negligence if the conduct in question is the literal carrying out of the customer's instructions and the damage is the inevitable result thereof. Counsel for the defendant drew a distinction between the case where there were specific instructions and the case where there were not. If, in this case, Mr. Racz had merely told Mr. Amy to clear the field of weeds, thereby leaving the mode of operation to him, then it could possibly be negligence to choose a mode of operation which damaged the bulbs. If, however, Mr. Amy was specifically told to rotovate and plough, then counsel submitted that he could not be negligent.

We consider that that is going too far. The fact that Mr. Amy caused the damage when properly and literally carrying out instructions as to the mode of work is, of course, a strong factor, but it is not conclusive that there was no negligence, and every case depends on its special circumstances. A man must exercise a certain standard of care. The usual standard adopted is that of a reasonable man, that is to say, reasonable care. The authorities show (and we

refer to / ...

refer to Charlesworth on Negligence, 6th Edition, Chapter 5, para. 202 on page 136) that the common practice of persons habitually engaged in a particular operation is strong evidence of what is reasonable care in the performance of that operation. In this case, both Mr. Staite and Mr. Amy told us that if they had been aware that there were rows of bulbs, and not merely a few "rogue" bulbs, they would have stopped to check. Although Mr. Staite did not actually say so, we have no doubt that he meant that he would have checked to confirm that there were rows of bulbs and on being satisfied that there were, he would have queried the matter with Mr. Racz. Mr. Amy told us that he would have reported the matter to his employer, who would, we have no doubt, have then checked with Mr. Racz. From that evidence we have no doubt that that is common practice and constitutes a reasonable standard of care in carrying out this type of work.

In this case the matter goes further, because the Court has found, by a majority, that the attention of Mr. Amy was drawn to the damage being caused by an employee of the plaintiff, and yet he ignored her protests. Having regard to the other facts which the Court has found, the continuing of the same mode of work, thereby causing more damage, must in our view amount to a failure to exercise a reasonable standard of care.

We therefore find that Mr. Amy was negligent and because that negligence occurred in the course of his employment and in the manner in which he carried out the work on the middle section, the defendant is vacariously liable.

Accordingly, on the issue of liability, we give judgment for the plaintiff.