

9th November, 1982 ~~1982~~

G.S.Haward and others

-v-

S.G. Hartas

1982/25

DEPUTY BAILIFF: This case arises out of a number of transactions on the stock exchange. The plaintiffs in this case are the partners in a long established firm in the city of London, called Earnshaw, Hayes & Sons. The defendant, Mr. Sidney Gordon Hartas, is a business man, who, in April, 1980, was attracted to an advertisement inserted in a newspaper of some sort in this Island, by Mr. B. Cox, who was the agent of the plaintiff company in Jersey. I use the word agent perhaps in a rather loose sense, but he certainly channelled work of a stock broking nature into that firm. Exactly what his relationship with them was is not a matter which we have been called on to examine. As a result of discussing the stock market with Mr. Cox, Mr. Hartas became interested in dealing with stocks and shares. In accordance with their usual practice, the plaintiff company, in the person of Mr. J.F.Harkness, deputy senior partner of the plaintiff company, sent a letter to the defendant at his premises, the Ainsdale Hotel, Rouge Bouillon, on the 28th April, 1980, in the following terms:-

"Dear Mr. ..."

he calls him "Hastas" by mistake -

"At the request of Brian Cox I have given 2 $\frac{1}{2}$ p for the call of 10,000 Press William & Son Ordinary 5p. shares @ 30p for your account for which I have pleasure in enclosing my firm's contract note.

I would be pleased if you would sign the enclosed letter of authority for me to accept business on your behalf from Brian Cox and return it to me.

At the same time I enclose registration form which I would be obliged if you could complete.

Yours sincerely, "

Now Mr. Hartas signed both those documents. So far as the letter of authority as regards business through Mr. Cox is concerned, the letter is in the following terms:-

"Dear Sirs,

This is to confirm the arrangement for you to accept instructions from Mr. Brian P. Cox of Colomberie Court, St. Helier, Jersey, to deal for me in stocks and shares."

In addition to that letter, as I say, a form which Mr. Harkness had sent was returned. That form was completed by Mr. Hartas and on the righthand side

halfway down, is a box with certain printed words in that box. There are the words "Non discretionary, Sterling, Discretionary, External" and above them the words "Type of account" and in brackets beneath those words "delete where inapplicable". Mr. Hartas put a tick against the words "Non discretionary". Therefore it is clear that the arrangement he had with the plaintiff company was that they should act for him in a non discretionary account, and, therefore, it follows from the evidence we have heard from Mr. Harkness, that stock brokers do not act on a non discretionary account except on the instructions of their clients. They do not alter those instructions unless specifically told by the client. But also it is fair to say that, in our opinion, a non discretionary relationship between a client investor and a stock broking firm is not altered by that firm occasionally being unable to carry out the instructions of the client, for example, in this case to sell 1,000,000 Raglan Property shares in September 1980, at the close of business shortly before an account finished or perhaps buying a few more of shares, of a particular share than instructed. The practice which grew up and was clear in our minds was that Mr. Hartas made it abundantly clear to Mr. Cox that he didn't want to become involved in substantial capital payments - he couldn't afford it. Therefore, he learnt from Mr. Cox a number of practices of the stock exchange, one of which was to buy and sell during a single account. We were told that an account lasts for two or sometimes three weeks and that each account at its end closes at 3.30 p.m. on a Friday. It is possible also that people may deal in stocks and shares without paying for their shares by the method of cashing and newing and that is in fact what Mr. Hartas did. That meant that before the end of each account he would monitor his shares or, to start with, Mr. Cox would monitor them for him or both would monitor them together and compare notes, and Mr. Hartas would issue instructions either to sell those particular shares within the account or cash and new them, which was a means of enabling him to carry on owning the shares or having them credited to his name without actually having to find the original purchase price for them and thus they went on into the new account. Settlement of course was generally speaking ten days after the close of each account. Since we have found that this was a non discretionary account which had to be operated only on the express instructions of a client we are also satisfied that in fact those instructions were given on each occasion and because, therefore, the plaintiffs had to have express instructions before they could act, we cannot find that there was an implied term which existed, that they had to sell or cash and new within each account. That being so, whether Mr. Hartas could cover, for example, new stocks which had to be paid for in cash or suspended stocks which again he would have to hold because they couldn't be sold or cashed and newed within the account as long as they were suspended is not relevant because the control as to what he did with those shares or whether indeed they were bought in the first place was entirely in his hands,

although it is perfectly true that he was tendered advice from time to time from Mr. Cox and Mr. Harkness he was given, as everybody knows and as indeed it was admitted, he was given tips of the market, but it was for him to decide whether to act on those tips and to give instructions to buy or sell as the case may have been. The contract was between the plaintiffs and Mr. Hartas and there was no alteration in that contract merely by the fact that after September, 1980, Mr. Harkness took over from Mr. Cox receiving the instructions from Mr. Hartas for his investments. The reason for that was that there had been some difficulties over a stock called Raglan Properties which had meant that at one stage Mr. Hartas owed the brokers a considerable amount of money and that caused him some difficulty. In the event, in September, 1980, the brokers agreed to cover him and carry him and transfer the matter on to a further account and Mr. Harkness took over from Mr. Cox. I stop there a moment to say that we do not consider that the details which we heard a great deal of during this case as to exactly what happened to the Raglan shares are relevant except they do show, as Mr. Boxall has asked us to find, that on occasions the brokers did not carry out the clients instructions, but in that particular case we are satisfied that they could not have carried out those instructions. It was not possible at the close of the account on a Friday afternoon to sell a large number of shares without a substantial loss. They, therefore, exercised professional skill in carrying over the account and in the event Mr. Hartas had no complaint about their dealings with Raglan Properties. It is fair to say also that from April to sometime in September, 1980, Mr. Hartas was learning as fast as he could from Mr. Cox how the difficulties operated in the stock exchange. After September we are satisfied that he could on occasions evaluate the state of the market himself. Indeed, that is not to say of course that he didn't take advice or have advice offered from Mr. Harkness, but he was so anxious over some stocks, for example in Alaska, that he investigated into them so thoroughly that his brokers were glad of the maps showing the areas of certain oil exploration in respect of certain companies which he had been told were going to make a fortune for him. These matters really rested for a time during 1980 to 1981. The account was operated perhaps not quite to the same depth as it had been before the Raglan Property matter, but sometime in March or April, Mr. Hartas formed the intention of going down to Ibiza to pursue certain business interests there. The account before he went to Ibiza showed that there was due to him some £5,392.62 and on the 6th April, that seems to be a date agreed by all the parties, he telephoned to Mr. Harkness to have a discussion about his account. The position was that the account on the stock exchange account was due to close on the 9th April, and so the settlement date would be on the 21st April, the reason for that being the intervening Easter holidays. Looking at the account which is headed 21st April, 1981, which is the account which followed that for which Mr. Hartas was paid the cheque I have just mentioned, well, in fact he wasn't paid until

the 9th April, because one of the reasons he telephoned to Mr. Harkness was to ask about his money. We see that there were a number of purchases in stocks, including one which was suspended, N.C.C. Energy Ordinary, and that of course meant that that would have to be paid for and taken up because of the rules of the stock exchange, but we see no contrary sales which were common features in the previous accounts which had been operating during the period I have mentioned, September to April. There is a conflict of evidence as to what took place during that telephone conversation, and that telephone conversation is the crucial piece of evidence which we have to evaluate in order to come to a conclusion in this case. According to Mr. Harkness he said that Mr. Hartas left no instructions. He told him that he'd been offered participation in a discotheque, he asked him to send him the money as I've just mentioned, which Mr. Harkness did on the 9th April. Mr. Hartas, according to Mr. Harkness, then said he would ring him about his shares and he, Mr. Harkness, suggested that rather than ring him because of the difficulty of communications from Ibiza he should use the telex. In the event he had no communication from Mr. Hartas although he was expecting a call. He did not have any recollection that during that telephone call he had been asked to sell Mr. Hartas' shares at the best price. Mr. Shore was heard before Mr. Hartas and he said that he had been sitting at a table fairly near Mr. Hartas in his hotel when that call was made and he said there were two things said. First, he heard Mr. Hartas ask to speak to Mr. Harkness, and we find that strange because there was a direct line on which Mr. Hartas usually telephoned to Mr. Harkness and he told us that that was the line which he usually tried. Secondly, he said, Mr. Shore that is, that he heard Mr. Hartas say to Mr. Harkness "Make sure that you sell my stock at the best price you can get", but there was no mention of time or when that was to be. Mr. Hartas' recollection is different from Mr. Harkness'-he says that he was asked by Mr. Harkness what the plaintiff company was to do with the open position, an open position of course being the one which had not been closed and was, therefore, liable to be paid for by the defendant. At that time there were a few shares which Mr. Hartas also held, but these are not important nor are they relevant to this issue. According to Mr. Hartas he said to Mr. Harkness "John, I leave them in your good hands, get the best prices you can for them". He told us that he said this to Mr. Harkness because he always had got the best prices and he was a very good dealer. He didn't, he agreed, tell him when to sell because he relied on the implied term, which is argued by Mr. Boxall, as being in the contract and, therefore, thought that those instructions were adequate to enable Mr. Harkness to sell as he usually had done within the current account. In the event when Mr. Hartas left Jersey to investigate his business in Ibiza he left no forwarding telephone number where he could be contacted, which we find strange inasmuch as he'd always carefully monitored his account before. On the other hand it may be urged that he left the account in

the hands of Mr. Harkness with the intention that it should be liquidated and wound up, therefore there was no reason, of course, for him to leave any number at all. On the other hand it can be said that it was strange for somebody who was such a careful investor not to leave a telephone number where he could be communicated with once the account had been closed in order that he might know where he finally stood. Be that as it may Mr. Harkness became a little worried about the account because he had not in fact closed it and it was standing at something like £61,000 in debit ^{when he} came to Jersey and called at the hotel. He was horrified when he saw that the documents which he had sent to Mr. Hartas had not been sent on, and by the documents we infer that this was in fact a copy of the account for the 21st April, showing the substantial balance in favour of his firm. Whilst he was in Jersey he eventually obtained, through Mr. Cox, Mr. Hartas' telephone number and there was a telephone conversation from Mr. Hartas to Mr. Harkness. Mr. Hartas said that he first heard of the fact that the account had not been closed from Mr. Cox and, thereupon, he immediately telephoned to Mr. Harkness. According to Mr. Harkness that conversation went this way. Mr. Hartas asked why the firm hadn't sold and he replied that he had had no authority. He got the impression that Mr. Hartas wanted to take the shares up. He offered to sell them, but Mr. Hartas said that he preferred to retain them and not to sell and he asked for time to sort matters out and said that he was coming back to Jersey to raise the money. Mr. Harkness said "I'm going to close the account down" and Mr. Hartas acquiesced. According to Mr. Hartas he denies that at the conversation on the 6th April, any question was mentioned of a telex and as I have said he first heard about the non closure of the account through Mr. Cox. He says that when he spoke to Mr. Harkness he called, he that is Mr. Harkness, called Mr. Cox a raving lunatic. Whether he said so or not the fact remains that Mr. Harkness must have felt some reservations about Mr. Cox's handling of Mr. Hartas' account over the Raglan matter the previous September otherwise he would not have taken over the management, I use that word in a loose sense, of the account. In addition to calling Mr. Cox a raving lunatic, when Mr. Hartas spoke to Mr. Harkness he asked what was happening and he said that he was being made to look a complete idiot. He was horrified to hear that, as Mr. Cox had already told him, that there was something like £61,000 outstanding and he asked him what he was going to do about it and Mr. Harkness said "I did not know what you wanted me to do" and Mr. Hartas said that he had told him what to do and then said "What are you going to do about it?". It was suggested that Mr. Harkness apologised in the sense that he asked Mr. Hartas, whom he knew by his christian name, he said "Leave it with me Sidney, we'll cover the situation" or "we'll carry the situation" in the hopes that the market might improve a little and at the time Mr. Hartas having discussed prices with Mr. Harkness calculated that he'd lose quite a bit. Originally when he went away he was satisfied that if the account had been closed as he said he instructed

Mr. Harkness / to do he would only have lost a few hundred pounds. He got the impression, so far as he was concerned, that Mr. Harkness felt that his firm had acted wrongly. Now it can be said that the versions which both Mr. Harkness and Mr. Hartas have told the Court support each other inasmuch as what Mr. Harkness said took place during the telephone call of the 6th April, and the Ibiza telephone call follow on quite naturally and indeed the same may be said for what Mr. Hartas said about the telephone call in April. However, there are these other matters to consider. Following the Ibiza telephone conversation, Mr. Harkness set about remedying the position and closing the account to the best of his firm's ability. Unfortunately it was a falling market. He wrote a number of letters to Mr. Hartas which although not sent onto him were read to him over the telephone by his wife. None of those letters were answered. Mr. Hartas' explanation was that as Mr. Harkness was in the wrong he was merely doing what he should do in any case. On the other hand it is suggested that a failure to answer those letters indicated an acceptance of the amount due to the firm as set out in those letters. To support Mr. Harkness' interpretation of the events we are satisfied that there was no mention in the telephone calls when to sell, and indeed that is admitted by Mr. Hartas himself, but only to do the best he could and, therefore, that could be interpreted either to sell within the account and close or wait to see if the market improved. In other words in this particular case Mr. Harkness, contrary to the previous arrangements, was being given a discretion. On the other hand it may be said that as the previous accounts had all been balanced every fourteen days or perhaps every twenty-one days depending on whether it was a two weeks or three weeks account, Mr. Hartas was entitled to believe that his last account would be balanced similarly. But of course the accounts being balanced previously meant that they were carried forward to the next new account and no questions seems to have arisen between Mr. Hartas and Mr. Harkness of any new account during the conversation of the 6th April. And again it may be said in favour of Mr. Hartas' interpretation of the conversation of the 6th April, that he was going away for a considerable time, that he was a man who normally monitored his investment program, ^{me} that he normally gave specific instructions for each and every transaction and that as he was going to a place where it would be extremely difficult to do that - he was going away and wanted to close his portfolio down when he did so. It is quite clear from the evidence that he had had a good run of profits and we are satisfied that he left the portfolio to look after itself. In a sense both could be said to be right. Mr. Harkness, we are satisfied, had no instructions to sell, but equally we are satisfied that Mr. Hartas did use some phrase such as "doing his best", but that is not, in our opinion, firm instructions to sell and close the account. There was a

misunderstanding, but the misunderstanding was on the part of Mr. Hartas. In the past he had previously given specific instructions, he failed to do so in this case and, therefore, we find for the plaintiff company with costs.