JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 129/99

COR: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

BETWEEN	**DR. P. SAMUELS**	**DEFENDANT/APPELLANT**
AND	**LAKELAND FARMS LIMITED**	**PLAINTIFF/RESPONDENT**

Ransford Braham instructed by Livingston, Alexander & Levy for Appellant

David Henry instructed by Delroy Beckford for Respondent

1st, 2nd, 3rd 4th, 5th July 2002 & 31st July 2003

FORTE, P.:

The respondent owns a stud farm which is in the business of breeding mares and providing for their daily needs. The appellant is the owner of two mares, "Exotic Ruler" and "Fiery Link". He is also part owner of another mare, named "Mekamara". The issues on appeal arose out of an oral contract negotiated between the appellant and a Mr. Murphy who was at the relevant time, farm manager employed to the respondent. The contract concerned the "keep and care" of the appellant's mares by the respondent.

The respondent filed suit for the recovery of One Million, One Hundred and Seventy-Seven Thousand, Five Hundred and Eight Dollars (1,177,508.00) being the balance due and owing to it by the appellant in respect of stud fees and fees for keeping and caring for the appellant's horses. In addition, it detained the mares in lieu of payment.

The appellant counterclaimed for the loss of use caused by the wrongful detention of his mares. A set-off was also claimed in the amount of Fifty Thousand SixHundred ($50,600.00) Dollars which the appellant claimed was an amount due to him for veterinary ~~services~~ rendered on the farm.

The appellant maintained at trial ~~that he had entered~~ into an oral contract with Mr. Murphy the farm manager of the respondent, who was his friend, to provide veterinary services to the farm at a reduced rate and in return Mr. Murphy would keep and care for his mare "Exotic Ruler" at the rate of One Hundred ($100.00) Dollars per day, which was an amount, below that offered to other customers of the farm. He maintained that the contract between himself and Lakeland Farms was an Agistment contract.

The respondent maintained, however, that the terms of the oral contract exceeded that of mere agistment since (1) it included blacksmith services, together with the general care provided by any of the three veterinaries employed to the farm, (2) that it bordered on one of hire of work and labour, where one of the contracting parties undertakes to do something in consideration for a price. The respondent also contended that Mr. Murphy had

no authority to negotiate a reduction in the daily rates. In fact the rates charged for these services are standard rates applicable to all mares on the farm including those owned by the owner of the respondent, Mr. Richard Lake.

In coming to her conclusion, the learned judge at trial found the following:

1. The oral contract between the parties was:

   Not an agistment contract, but involved a great deal more than mere "keep and care".

2. There was a custom which dictated that if a customer fell into arrears, his animals were detained until payment was made in full. Lakeland Farms therefore had a lien over the mares.

3. The costs incurred for keep and care during the period of detention must be borne by Dr. Samuels.

4. Dr. Samuels did not render any veterinary services, submitted no bills and generally has no evidence to support his counterclaim.

Thereafter the learned judge awarded the respondent the sum of $2,678,849.32 together with interest at a rate of 48%.

The amount that the respondent claimed should be charged in respect of Exotic Ruler is in excess of the $100.00 per day. Dr. Samuels maintained that the agreed amount in his oral contract with Mr. Murphy was in fact $100 per day. As a result the question arose as to the authority of Mr. Murphy as farm manager, to make such an agreement with him. In addition the respondent

having detained the appellant's mares pending payment for their "keep and care" the issue also arose as to its entitlement to do so. The answer to this question depends on the character of the agreement, that is to say whether it was a mere agistment contract, or a contract which would permit the respondent to so detain the animals. Of the latter, another issue arose, as to whether the respondent was entitled to its fees for the period during which the animals were detained. In summary therefore, the issues which arise in this appeal are:

1. Did Mr. Murphy have authority to enter into an agreement with the appellant for the payment of a lesser sum than was the normal fee, in return for veterinary services being offered by the appellant?

2. Was the contract between the parties an agistment contract?

3. If it is not, is the respondent entitled to detain the mares pending payment of the outstanding fees?

4. Is the respondent entitled to the fees which accrued during the period when the animals were detained?

1. <u>The Authority of Mr. Murphy</u>

The contention of the appellant that he had a special agreement with Mr. Murphy in respect of Exotic Ruler had to be resolved without the benefit of hearing from Mr. Murphy, as he did not give evidence at the trial. The appellant however maintained that as Mr. Murphy was the farm manager, he (Mr.Murphy) had the authority to negotiate as to the fees to be charged for the services rendered by the farm. Mr. Richard Lake, on the other hand testified that Mr.

Murphy had no such authority. He was responsible for the husbandry of the animals, making arrangement for receipt of the animals, sending out invoices and signing for moneys received pursuant to those invoices.

The fees for the services offered to the respondent, Mr. Lake stated, are fixed fees even for his own horses, and Mr. Murphy had neither express nor implied authority to reduce those fees or even to negotiate with anyone concerning those fees.

On that background, the question has to be answered, as to whether there being no express authority given to Mr. Murphy (as agreed on both sides) there was nevertheless ostensible or apparent authority.

Lord Diplock in the case of ***Freeman and Lockyer v. Buckhurst Park*** [1964] 1 All E.R. 630 spoke to the operation of the doctrine of ostensible authority when he said at page 644:

> "An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted on by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed on him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation. The representation, when acted on by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract."

Lord Diplock opined (at page 646) that four conditions must be fulfilled to entitle a contractor to enforce against a company, a contract entered into on behalf of the company by an agent who had no actual authority to do so. He stated:

> "It must be shown: (a) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor; (b) that such representation was made by a person or persons who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract relates; (c) that he (the contractor) was induced by such representation to enter into the contract, i.e., that he in fact relied on it; and (d) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of that kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent."

In the instant case, there is no evidence that Mr. Lake made any representation to the appellant that Mr. Murphy had the authority to reduce the fees. In fact it was not until later, that Mr. Lake discovered that the respondent was enjoying this lower rate, which no-one else knew about. Mr. Lake therefore had no knowledge of this particular transaction. The question arises however, whether the mere fact that Mr. Murphy was the farm manager was sufficient for the appellant to conclude that he (Mr. Murphy) had the authority to enter into this special contract. Was the Company thereby representing to the appellant that Mr. Murphy as farm manager could enter on its behalf into this special contract? The answer to the question must depend on whether entering into the agreement was within the ambit of the occupation of a farm manager. It is only

When that the company could be said to have made representations that Mr. Murphy had the authority in question.

The evidence, however, was to the contrary. Apart from the evidence of Mr. Lake, the farm manager who succeeded Mr. Murphy, Elizabeth Ann Miller testified that it is not within the ambit of a farm manager in that particular industry, to vary or set the rates to be charged. This witness who had been engaged as farm manager in Jamaica and in England for over 30 years testified that at no time would she discuss fees with the owner of the horses as the fees were set. She would give the owner a schedule of the fees.

It was consequently not proved that the agreement entered into with the respondent, was within the ambit of the occupation of Mr. Murphy. As a result it cannot be concluded that the respondent Company, per Mr. Richard Lake, made any representation to the appellant that Mr. Murphy had any such authority. Indeed the only representation that Mr. Murphy had such an authority came from Mr. Murphy himself and "a representation made by the agent as to his authority cannot of itself create apparent authority:" (See Chitty on Contracts 28th Edition Volume 2 at paragraph 32-057)

It was advanced also that the learned judge did not deal with this question in her judgment. Mr. Henry for the respondent while conceding this fact, referred to the finding of the learned judge that the appellant did not do any work on the farm. This of course relates to the purported contract contended for by the appellant where he stated in evidence:

> "It was explained to me that $100 was below the farm rate at the time. The reason was as stated because of the reciprocal arrangement that I would make myself available to do work on the farm at all times on request."

Mr. Henry therefore maintained that since a material aspect of the "reciprocal arrangement" was not established, then effect could not be given to the other part which required the $100.00 per day rate.

It appears however that the learned judge did give some consideration to the question when she said in her judgment:

> "The ~~Defendant~~ had an obligation to pay the rates ~~agreed~~ from time to time and whatever 'special' ~~arrangements~~ he ~~might~~ have had with Mr. David Murphy (**and these are questionable as there is no evidence that Mr. Murphy had authority or approval to make such arrangement**) would have ended when Mr. Murphy ceased to be farm manager of Lakeland Farms and the normal going rates would apply." [Emphasis mine]

I would conclude that there was no evidence that Mr. Murphy had either actual or ostensible authority and consequently the issue must be resolved in favour of the respondent.

2. Was the contract an Agistment Contract?

It was conceded on both sides that in the case of an agistment contract there would be no entitlement in the respondent to detain the horses until payment of the fees was made. This is so because there would be no lien on the horses. The respondent, however contended that in any event, because of

custom in the industry the respondent would nevertheless be entitled to detain the horses. This latter contention will be addressed later in this judgment.

In the meantime I shall discuss the issue as to whether the contract made between the parties was in fact an agistment contract.

> "Such a contract 'arises where one man, the agister, takes another man's cattle, horses or other animals to graze on his land for reward, usually at a certain rate per week, on the implied term that he will redeliver them to the owner on demand. Agistment is in the nature of a contract of bailment; it confers no interest in the land and therefore does not require to be evidenced in writing." (See Halsbury's Laws of England, 4th Edition Volume 2 paragraph 214)

Paragraph 216 of the same volume of Halsbury's states as follows:

> "In the absence of special agreement, the agister has no lien upon the animals he agists, for he expends no skill upon them he merely takes care of them and supplies them with food, and his remedy is to bring an action for the price of grazing."

In the case of ***In re Southern Livestock Producers Ltd*** (1964) 1 WLR 24, upon which the appellant heavily relies, it was:

> "**Held,** that unless a bailee could establish improvement he could not sustain a claim to a particular lien; that a farmer did not improve a flock or a herd of animals by the mere supervision of the natural increase, however much skill and care was employed in the process; and that, therefore, while the farmer was required to, and did, employ labour and skill in his 'care' of the pigs and their litters under his agreement with the company, he had not made out his claim to have had a lien on the pigs in his possession, and had no charge on the proceeds of their sale."

The above case arose out of an agreement between the plaintiff farmer and a company in which the farmer agreed "to house, feed, care for and arrange for the proper 'servicing and farrowing of' a large number of sows, gilts and pig litters. The company provided the boars. The company went into liquidation, and the liquidator sold the herd without prejudice to the farmer's lien, paying the money into a joint account. The farmer claimed in the liquidation for a declaration that he had a particular lien on the herd for the sums expended in feeding and caring for the herd. The claim resulted in the above stated decision that the farmer had no such lien. In delivering the judgment of the Court (page 27), Pennycuick, J., relied on dicta in ***Scarfe v. Morgan*** (1835-42) All E.R. (Reprint) 43 which states –

> "... that by the general law, in the absence of any special agreement, whenever a party has expended labour and skill in the improvement of a chattel bailed to him, he has a lien upon it."

It should be noted that in the cited case there was a clear definition of "care" in the agreement i.e. the word means "house feed care for and arrange for the proper servicing and farrowing of". Although the evidence revealed that the farmer was required to employ and did employ labour and skill, the claim failed because the agreement did not provide for any improvement upon the subject matter of the agreement, namely the pigs and their litters. Pennycuick J., expressed the opinion (in coming to this conclusion) "that the operations comprised in the definition of 'care' add up precisely to 'care' in the ordinary sense of that word and do not seem to me to go in any respect beyond it." He

opined, "that it is of great importance to observe ... that the company is under obligation to supply the boars for the service of the sows. The position would be different if the farmer had to supply the boars."

The cited case was obviously decided on the basis that the agreement related solely to the "care" of the animals which by definition placed in the farmer only the responsibility of housing, feeding, caring for and arranging for the proper servicing and farrowing of the animals. The Court therefore on the basis of that dicta in ***Scarfe v. Morgan*** (supra) found that there being no improvement done to the animals, and having regard to the words expressly stated in the agreement, there was no entitlement on the farmer to a lien over the animals.

The following dicta of Parke B, in ***Scarfe v. Morgan*** (supra) as to the farmer's right to a lien is of relevance (supra) page 46:

> "The principle seems to be well laid down in ***Bevan v. Waters*** (1828), 3 C & P 520; by Best, C.J., that where a bailee has expended his labour and skill in the improvement of a chattel delivered to him he has a lien for his charge in that respect. Thus, the artificer to whom the goods are delivered for the purpose of being worked up into form, or the farrier by whose skill the animal is cured of a disease, or the horse-breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges. All such specific liens, being consistent with the principles of natural equity, are favoured by the law which is construed liberally in such cases.
> This, then, being the principle, let us see whether this case falls within it. We think it does. The object is that the mare may be made more valuable by proving in foal. She is delivered to the defendant that she may, by his skill and labour and the use of his stallion

> for that object, be made so, and we think, therefore, that it is a case which falls within the principle of those cited in argument."

In the ***Southern Livestock*** case (supra) Pennycuick J., also states at page 27:

> "It has been held as regards animals that there is a lien in favour of a person who trains a horse, a person who provides the service of a mare and a person who cares for an animal through illness. On the other hand, it is equally well established that there is no lien in favour of one who merely keeps a horse in a livery stable."

The authorities suggest that in cases where the agreement merely calls for the keep and care of the animals i.e. permission to graze on the lands of the farmer, and an obligation to feed and take care of the animal, it is in effect an agistment contract. In those circumstances, unless there is an express agreement, or custom and usage have created such a right, the farmer (the agister) would have no such lien. On the other hand, if the agreement goes beyond that and the farmer is required to do some acts or acts which would result in the improvement of the animal then he would have a lien on the animal to recover the necessary compensation for the work done to achieve the improvement.

In this appeal, the appellant maintains that the agreement between the respondent and himself amounted to no more than the mere "keep and care" of the mares. There were in fact agreements for the covering of the mares, but those were separate and distinct contracts. There was no outstanding arrears for the charges in respect of those stud fees and that the amounts owing, if any,

related solely to the keep and care agreement, which consequently gave no entitlement of a lien to the respondent.

On the other hand, Mr. Henry for the respondent argued that the agreement went far beyond a mere keep and care contract. He contended that the respondent was the owner of a stud farm and provided stud facilities, and that the so-called keep and care agreement must be viewed and assessed in that context. The evidence, he maintained support the following services offered in the oral agreement –

(1) Provision of pastorage and grain;

(2) Veterinary Services. The respondent enjoyed the services of three veterinaries who were employed to the farm and available at all times.

(3) Blacksmith services

(4) General care and upkeep of the horses and their off-springs born in due course.

(5) Pre-natal and post-natal care of the mares.

Mr. Henry relied on the evidence of Dr. Alexander, Veterinary Surgeon, and Ms. Elizabeth Miller, farm manager at the respondent's farm, to demonstrate the validity of his contention.

He pointed to the fact that Dr. Alexander visited the farm from time to time, to examine, vaccinate and treat the horses on the farm. There was an area of specialization in treating horses. Dr. Alexander is a specialist in animal fertility which was the area in which he primarily offered his services to the farm.

Ms. Miller testified that Mekamara was to be covered by Star of Manila which was a Lakeland Farm horse. Fiery Link and Exotic Ruler by Restless Thief and Royal Minister respectively both stallions at different farms but just across the road. The horse Royal Minister was out of the Ham Stud farm which required per Mr. Feanny that the mare be examined by a vet to ensure that it is ready to receive the stallion or to see if they have a follicle to breed on. In that case Dr. Bradford had to do that examination, and in the case of Restless Thief at Bombay Farm it was done by Dr. Alexander.

On the basis of the above, Mr. Henry contended that in so far as what is required under the contract involved medical examinations of the horses, a systematic re-servicing, there had to be skill and expertise in assessing the cycle of the horses. There had to be also testing to see if the horses were in foal as also to see if each had a follicle to breed on. He submitted that there was the care of the horses in foal and that where there was a delivery of a foal the value of the mare increases: that the farm has expended time, labour and expertise in the care of the horse in order to facilitate their breeding. The lien was created because of the particularity of the services rendered.

In resolving this issue, the learned judge found as follows:

> "I find that the Plaintiff, Lakeland Farms Limited, through its servants and or agents, including veterinarians and blacksmiths have expended time, labour and expertise in the keep and care of the Defendant's horses and that the contract between the Plaintiff and the Defendant was not an agistment contract but involved a great deal more than mere 'keep and care'."

The evidence does, as the learned judge found, reveal that the respondent undertook much more than keeping and caring for the mares. There were many obligations undertaken by the respondent that required special attention to and special treatment of the mares. Three veterinarians were available for the treatment of the mares, at all times, and blacksmith services were also provided. These mares were specifically sent to the farm to be covered by stallion, this being a stud farm. As a result special care and attention had to be given to them. This included, vaccinating the horses as well as determining when the horses were ready to be bred i.e. assessing the cycle of the mare. Special pre-natal and post-natal care had to be given to the mares. The horses, while in foal had to be taken care of and on the delivery of the foal, the value of each horse increases.

Given this evidence, the finding of the learned judge cannot in my view, be disturbed. Her finding that this oral agreement was not an agistment contract is supported by the evidence, and the principles of law applicable thereto.

3. Custom

In spite of the above conclusion, I turn now to the question, whether custom and usages existing in the Industry, nevertheless entitled the respondent to exercise a lien over the mares of the appellant. The learned judge found that there was in fact –

> "... a custom or practice that when a customer falls into arrears his animals are not delivered to him unless he makes full payment or makes arrangements

> for payment and the Plaintiff was entitled to detain the Defendant's animals because there were sums outstanding and the Defendant failed to pay or to make arrangements to pay. ...
> In the light of the finding above, the Plaintiff had a lien on the horses and was entitled to detain them. In addition the costs incurred for their keep and care during the period of withholding must be borne by the Defendant."

Mr. Braham referred us to the four essential elements necessary to establish a valid custom. These are (1) it must be immemorial; (2) it must be reasonable; (3) it must be certain in its terms, and in respect of both the locality where it is alleged to obtain and the persons whom it is alleged to affect; and (4) it must have continued as of right and without interruption since its immemorial origin. (See Halsbury's Laws of England 4th Edition Volume 12 paragraph 606)

(i) Immemorial

In theory for a custom to be immemorial, it must be in existence from the commencement of the reign of Richard 1 in 1189. Where however, it is impossible to show a continued existence, the courts will support the custom if circumstances are proved which raise a presumption that the custom existed at that date. Evidence showing continuous user as of right as far back as living testimony can go is regarded as raising the presumption [See paragraph 607 Halsbury's (supra)].

As a general rule proof of the existence of the custom as far back as living witnesses can remember is treated, in the absence of any sufficient rebutting

evidence, as proving the existence of the custom from time immemorial. The periods during which living witnesses have been able to testify as to the existence of customs and which have been held sufficient to raise the presumption of existence of the customs from time immemorial, have varied greatly in different cases, but twenty (20) years may be sufficient. [See Halsbury's (supra) paragraph 622, ***R v. Goffe*** (1823) 2 B & C 54 and ***Mercer v. Denne*** (1905) 2 Ch. 538]. In the instant case, there was evidence, establishing that over an average period of twenty-seven years the witnesses recognize the detention of horses in agistment contracts as a custom. Richard Lake, the owner of the respondent company who has been involved in the industry for twenty (20) years described the detention of the appellant's mares for non-payment as the 'norm in the industry.'

Derrick White, owner and breeder of horses for thirty-three (33) years and a Director of Caymanas Track for ten (10) years testified that:

> "Where customers who have horses for keep and care at a farm and do not pay fees, the custom is to hold the horses."

Mr. White's testimony was based on his experience of keeping many horses at various stud farms.

Elizabeth Miller testified that she has managed stud farms in Jamaica and England for the "past 30 years". She stated: (Page 76)

> "I am aware of custom in industry in Jamaica when fees not paid one gets in touch with client, sends invoice to client, if client does not pay I go and see them. If they have contract with them, if through

> verbal or written correspondence we get no reply, a letter is written by me with the permission of the owner of the farm to the Racing Commission and after a certain amount of time they give them to pay if they do not pay they are on the forfeit list.
> The horse will be retained (sic) and stay on the farm until the money is paid. That is the practice as far as I am aware.
> The cost of care and attention to horse would be the responsibility of owner of the horse. That is the custom or practice in the industry."

Mr. Phillip Feanny, race-horse trainer and part owner of a stud farm testisfied that he has been involved in the industry for twenty-six (26) years. He stated at page 74:

> "There is a custom if ~~you~~ don't pay. You don't get ~~your horse~~ or if you don't ~~make arrangements to pay~~. That has been the case as far back as I can remember.
> The practice is that the individual who owns the horse would continue to pay while I detain horse. Bill continues to mount. This is the practice from I have been involved."

Mr. Braham contended, in the face of the above evidence that the respondent had failed to prove that the custom existed, and that it had existed for the required period of time. He based this argument on two grounds, one that the testimony of Ms. Miller which speaks to the horse going unto a forfeit list for non-payment meant that the owner of the farm would be entitled to sell or to take the ownership of the horse in lieu of fees. In the industry, however, it is not the name of the horse that is placed on the forfeit list but that of the owner. The placing of the owner's name on a forfeit list means merely that the horse

could not be entered in a race, until the money is paid thereby removing the name of the owner from the forfeit list: (See Rules).

Secondly, Mr. Braham relied on the fact that another witness, Mr. David DeLisser and the appellant both testified that there was no such custom, and therefore the custom was not "established to the required certainty." In my view the evidence of those witnesses did no more than put the question of whether there was a custom in issue, and it was thereafter a question of fact for the learned judge. She rejected the evidence for the defence on this point and obviously by her finding accepted the evidence of the respondent's witnesses.

(ii) Reasonable

> "A custom must be reasonable. Reason for this purpose is not to be understood as meaning every unlearned person's reason, but artificial and legal reason warranted by authority of law. Consequently, a custom may be good even if no particular reason for it can be assigned; it is sufficient if there is no good legal reason against it. It is not for the party asserting a custom to prove its reasonableness, the rule is rather that a supposed custom may be rejected if it is unreasonable."

The above statement which is a correct statement of the law is taken from Halsbury's 4th Edition Vol. 12(1) at paragraph 609. The learned author of this noble work states also:

> "Since customs are by definition inconsistent with the common law, they are not invalid merely because they are contrary to common law principles. ***R. v. Abbot of Selby*** [(1329) 97 Selden Soc 137] They are only unreasonable if they are inconsistent with those general principles which, quite apart from particular rules or maxims, lie at the root of our legal

> system, or if they are contrary to the first principles of justice."

The contract in the instant case could not be held unreasonable merely because of the common law principle, which governs the question of the entitlement to detain the chattel under an agistment contract.

In my view, the custom to detain horses by a party who undertakes its "keep and care" cannot be held to be unreasonable as that party would have been put to expense and time in undertaking those responsibilities. Consequently, it must be reasonable to permit that party to detain the chattel (the horses) until payment for their care and upkeep is made.

(iii) Certainty

The custom must be one which is definite and certain, so that by the application of it, in each particular case it may be shown with certainty what are the rights which the custom gives in that case. There must be some definite limit to the right claimed to exist under an alleged custom (1) in respect of its nature generally, (2) in respect of the locality where the custom is alleged to exist, and (3) in respect of the persons alleged to be affected by it. (See Halsbury's 4th Ed. Volume 12(1) paragraph 615).

The authors of Halsbury's state that some definite limit must be assigned to the area in which the custom is said to obtain. However, in the instant case, no evidence was led as to the locality in which it is alleged that the custom obtained. Instead, it was contended that the custom existed within the Industry.

However, the respondent also relied on, the usage in the Industry. In dealing with the subject of usage, the authors of the text state at paragraph 445:

> "Usage may be broadly defined as a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life, or more fully as a particular course of dealing or line of conduct which has acquired such notoriety, that where persons enter into contractual relationships in matters respecting the particular branch of business of life where the usage is alleged to exist, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary; ..."

Also, in the case of ***Cunliffe-Owen v. Teather & Greenwood Cunliffe-Owen v. Schaverien Habermann Simon & Co Cunliffe-Owen v. Schaverien Habermann Simon & Co. Cunliffe-Owen v. L.A. Seligmann & Co.*** [1976] 3 All E.R. 561, Ungoed-Thomas, J offers some assistance on the principles that govern "usage", in the following words:

> " 'Usage' is apt to be used confusingly in the authorities in two senses, (i) a practice, and (ii) a practice which the court will recognise. 'Usage' as a practice which the court will recognise is a mixed question of fact and law. For the practice to amount to such a recognised usage, it must be certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known in the market in which it is alleged to exist that those who conduct business in that market contract with the usage as an implied term, and it must be reasonable. The burden lies on those alleging usage to establish it, in this case, the defendants. The practice that has to be established consists of a continuity of acts, and those acts have to be established by persons familiar with them, although, as is accepted before me, they may be sufficiently

> established by such persons without a detailed recital of instances. Practice is not a matter of opinion of even the most highly qualified expert as to what it is desirable that the practice should be. However, evidence of those versed in a market, so it seems to me, may be admissible and valuable in identifying those features of any transaction that attract usage and in discounting other features which for such purpose are merely incidental and if there is conflict of evidence about this, it is subject to being resolved like other conflicts of evidence."

The above dicta, with which I agree, show that the criteria to establish usage are almost in unison with the requirements to establish a custom. Both must be certain, reasonable and continuous in its application. A custom must be immemorial, while a usage must be notorious. The evidence in the instant case certainly establishes the elements of both custom and usage.

Mr. Braham, however, contended that a usage cannot operate to contradict the common law. For this proposition he relies on certain dicta in the case of ***Myer v. Dresser*** [1864] 16 C.B. (N.S.) 646. The first is in the judgment of Erle, C.J. at 660:

> "It is a self-evident contradiction to my mind to say that the general law does not allow the deduction, and that there is a universally established usage to allow it. A universal usage which is not according to law cannot be set up to control the law ... Such a general right as that claimed here would, I think, be very inconvenient; it would be giving opportunity for making unlimited claims for deduction, and lead to great confusion. No such difficulty arises in the case of particular usages confined to local districts. Many contracts are construed by the course of business in the particular trade or in the particular place where they are made. But that is not at all analogous to a universal usage pervading the whole world."

The other is in the judgment of Byles, J at 667 which reads:

> "Then, can custom change the law? I need say no more than this, that, if this is to be considered as a general law for all mankind in all places, it is an attempt to prove the law by a usage, which cannot be done. If it is to be treated as a local custom it clearly is not a local custom. If it is a custom of a particular trade, it seems to be only a mode of settling accounts."

Though the learned Judges appear to use the term "custom" and "usage" interchangeably, as if they are the same, the words which fell from them speak to the inability of "a universally established usage" to overrule the common law. Erle, C.J. recognized, however, that no such difficulty would arise where the usage is confined to a local district, or to a particular trade.

In the instant case, it seems to me, and I so hold that all the elements of custom and usage were established by the appellants through the evidence of the witnesses which has been earlier recorded in this judgment.

The evidence certainly supports a finding that in the thoroughbred industry it has always been recognized that a horse can be detained for the non-payment of fees.

(iv) Continuity

There is no need for "actual continuous use since 1189." The evidence did not disclose any interruption in the custom, but instead demonstrated that it was practised in the Industry in excess of twenty (20) years.

In the event I would hold that the learned judge was correct when she found on the evidence that there is such a custom.

4. Was the respondent entitled to fees while the horses were detained?

The respondent supported this claim on the basis of an existing custom to that effect. The evidence of the four witnesses (supra) establishes that the respondent would be so entitled, and so the same considerations which apply to the detention would apply to the question of fees. In my view this claim would also satisfy, the four elements necessary to establish the existence of such a custom. Consequently, I would not interfere with the finding of the learned judge that ... "the cost incurred ~~for their keep and care~~ during the period of withholding must be borne by the defendant."

Counter-Claim – Damages

On May 19, 1998 eight horses escaped from Lakeland Farms Ltd. Seven were recovered but the eighth Exotic Ruler's yearling, belonging to Dr. Samuels was never recovered.

The appellant contended that the respondent, as bailee, was responsible for the protection of the horses, and that the respondent failed to take reasonable care. It is for the respondent to prove that it exercised reasonable care, and consequently was not responsible for the loss of the yearling. This, the respondent failed to do, and as a result is liable to the appellant for the value of the yearling.

A valuation of the horse, set by Mr. DeLisser, a valuator, is $100,000.00 and in the absence of any evidence to the contrary that valuation ought to be accepted. The appellant is therefore entitled to recover the sum of $100,000.00 on his counterclaim.

Interest

The appellant contended that the award of a rate of interest of 48% per annum is excessive, and suggested that a rate of 20 to 30% per annum would be more appropriate. Counsel for the respondent, however submitted that between 1995-1998, the rate of interest was not stable. In 1995, the lowest rate available was 29% and the highest 65%. An average interest for the period 1995-1997 would come to 48%, the amount awarded by the learned judge. The appellant also complained that interest was awarded on each month's expenses, and contended that interest ought to have been awarded on the sums owed by the appellant. In my view this is a valid complaint, and consequently the judgment should be amended to reflect this approach. Mr. Henry for the respondent conceded that amount owed was calculated on the basis of a monthly interest and that amount awarded accordingly.

He also conceded that the award for $2,678,849.42 already included the award of interest and an additional amount of $485,566.70 for interest ought not to have been added to the award. In the circumstances, the award must be corrected to an amount of $1,177,508.00 plus interest at the rate of 48% per annum.

In the event, the appeal is dismissed in respect of the claim. In relation to counterclaim, the appeal is allowed in part; and an award of $100,000.00 made to the appellant with interest at 48% per annum from the date of the loss of the animal to the date of judgment.

The appellant must pay the costs of the appeal limited to four days' hearing costs, the respondent to pay the costs on the counter-claim limited to one day's hearing costs. Such costs to be taxed if not agreed.

BINGHAM, J.A.

I agree.

SMITH, J.A.

I agree.