12 pages.

ROYAL COURT 164A.

31st October, 1990

Before: The Bailiff, and
Jurats Blampied and Vibert

Before:	Richard Brocken	Plaintiff
And:	Albert Charles Coxshall	Defendant

Advocate G.R. Boxall for the plaintiff.
Advocate M.M.G. Voisin for the defendant.

JUDGMENT

BAILIFF: The plaintiff is a developer and the defendant is a building contractor. He is also the beneficial owner of Le Cave (Sandybrook) Limited which owns a site at Le Hocq, St. Clement. The defendant acquired this company in August, 1986, and was required to give an indemnity to his Advocate, Advocate Gruchy. This he did and it is in the following terms:

> "I, Albert Charles Coxshall, hereby indemnify you and your firm from any claim whatsoever that may arise in regard to the title of the real estate owned by Le Cave (Sandybrook) Limited and any other matters arising in connection with the company's affairs as I wish to acquire the company shares through me or Socol Limited without delay and at my risk".

Thus the defendant knew at that time that there were possible difficulties about the title of the company to the site.

The defendant then obtained planning permission from the Island Development Committee for two houses to be erected on the site.

In July, 1988, because he had some money outstanding from insurance claims, he decided not to develop the site himself but to sell it. He met Mr. Bryan Heppolette, an estate agent, at that time employed by Broadlands Estates whom he knew socially. He told Mr. Heppolette that the site might be for sale. Mr. Heppolette had a look at it and he in turn telephoned a number of persons whom he thought might be interested, including the plaintiff.

The defendant agreed to pay Mr. Heppolette one per cent commission after what Mr. Heppolette described as some lighthearted banter.

Insofar as it is relevant we are satisfied that Mr. Heppolette, through his firm, of course, was the defendant's agent and never was the agent of the plaintiff as the defendant claimed during the course of his evidence.

The plaintiff and the defendant met on the site and eventually agreed a price for the company which in effect was the site of £87,500. The formal arrangements would be for the sale of the company's shares because the site was its total asset.

It could be said that that agreement was binding in itself, but we were not asked to decide on that point and it was not pressed by the plaintiff.

On the 27th July, that is to say very shortly after that meeting and after consulting Advocate O'Connell in the absence of Advocate Boxall the plaintiff wrote to Mr. Heppolette concerning the arrangements. This is what he said:

"27th July, 1988

Mr. Bryan Heppolette,
Broadlands Estates,

Jersey, C.I.

SUBJECT TO CONTRACT

Dear Sir,

I write to confirm that Mr. A. Coxshall of Craigie Doone, Le Hocq, agreed at a meeting attended by you and myself and Mr. Terry Graham to sell me the shares of his Company (Le Cave (Sandybrook) Limited). This company owns two building sites at King's Close, Le Hocq. As agreed I enclose a cheque for the sum of £8,750.00 this represents 10% of the purchase price £87,500.00 and is by way of deposit to be held by you as stakeholder with all interest to accrue in my favour pending completion of this transaction. Mr. Coxshall agreed with me that this transaction will be subject to the following conditions and all monies paid over by way of deposit or otherwise shall be returnable to me in the event that any one or more of these conditions is not satisfied, together with all interest which has accrued thereto during the period of time that you have held this money as stakeholder.

Contract being researched and okayed by my advocate.

The Company being searched and okayed by my advocate.

Test holes being dug us and okayed by our engineer.

The engineer's drawings being passed by I.D.C.

Mr. Coxshall paying all the engineer's and architect's fees.

There being no restrictive covenants on the sites.

Mr. Coxshall will remove all plant and building materials which he owns from the site on completion of the transaction.

Permission of the Finance and Economics Committee being granted for the development.

Yours faithfully

MR. R. BROCKEN.

The words "subject to contract" were inserted upon Mr. O'Connell's advice. The important condition was that concerning the company's title.

Mr. Voisin, for the defendant, submitted that the condition which I have just mentioned regarding the company's title together with the others which became of little or no importance as matters proceeded was in fact a condition precedent and that until the title was cleared by the passing of the appropriate 'contrat de transaction' there was no

enforceable agreement. Even if the words "subject to contract" were deleted by subsequent agreement between the parties. To this it may be answered: first, the removal of the words "subject to contract" might include also the removal of the conditions themselves because it could be said that they were part of an existing obligation which was suspended merely until the happening of one event - that is to say the title being cleared.

Secondly, if the condition precedent was satisfied by the defendant within a reasonable time as he seemed about to be able to do before the injunctions imposed in November 1989, then the parties were bound to complete, that is to say to carry out the formal sale of the shares and the defendant could not rescind the agreement because of a higher offer.

Thirdly, the defendant by his own actions had failed to carry out the condition precedents as he was bound to do under the agreement (see Hyams -v- Russell (1970-71) JJ Vol. 1 Part 3 189. If the words "subject to contract" had not been added to the plaintiff's letter of the 27th July, 1988, the Court would have had to decide if the condition precedent meant that there was no agreement at all in July, 1988, or whether there was an obligation suspended only until the happening of a stated event (see Cheshire and Fifoot on the Law of Contract (8th Ed'n) at p.116. That position was in fact reached in May, 1989. By that time good progress had been made in sorting out the title. The remaining difficulties concerned in fact the Northern and Western boundaries.

The evidence of Mr. Bougeard who was the conveyancing manager at the plaintiff's advocate and that of Mr. J. Lakeman and Mr. W. Le Brun who were employed as clerks in the chambers of Advocate Gruchy in May, 1989, makes it clear that the 'contrats de transaction' (to put right the title) were in fact on the point of being passed.

On the 22nd May, the defendant telephoned the plaintiff and asked to meet him. They met on the site and according to the plaintiff all conditions were removed and cancelled because the defendant said that he was short of money and as a token of the plaintiff's intent he

agreed to release to the defendant the money held by the estate agents as stakeholders.

There is some dispute about whether the plaintiff or the defendant suggested that the deposit be paid to the defendant. But after the meeting he requested and received the following advice from Advocate Gruchy: estate agents should pay the money to Advocate Gruchy direct and this was done.

From the time that Advocate Gruchy received the money, it may be said that in Law it belonged to the defendant, although clearly from what he told us he did not realise that. (See Ellis -v- Goulton and another (1893) 1 QBD (C.A.) 350). After that meeting the plaintiff regarded himself as bound unconditionally to complete and the deposit at risk if he did not.

The defendant wanted the money so that, as he said in his evidence, the plaintiff could not renege. If this was his intention and we believe that it was then equally he, on the other hand, could not renege. Nevertheless he said that he was not that short of money so as to convert a conditional agreement into a binding one. The contractual relationship such as it was between him and the plaintiff had not altered.

The effect of the payment of a deposit to a party is set out in Howe -v- Smith (1881) Ch. (Vol. XXVII) 89 and I read from the judgment of Fry LJ as follows:

> "Money paid as a deposit must I concede be paid on some terms implied or expressed. In this case no terms are expressed and we must therefore enquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it will be brought into account. But if the contract is not performed by the payer it will remain the property of the payee. It is not merely a part payment but it is then also in earnest to bind the bargain so entered into and

creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract".

It only requires me to add to that passage that a contract for the sale of shares in the company need not be in writing.

On the 1st August, the defendant through Advocate Gruchy, purported to terminate such agreement as then existed between him and the defendant. Advocate Gruchy wrote to Bailhache and Bailhache and to Broadlands Estates who believed that the sale of the shares was so far advanced as to enable them to submit an account which they did to Advocate Gruchy.

In spite of the defendant's strenuous denials that Broadlands Estates were his agents which he gave to us during the evidence, Advocate Gruchy in his letter to the estate agents said that he would advise Mr. Coxshall that commission would be due if Mr. Brocken ended up as the purchaser.

The Court therefore has to decide what took place between the parties on the 23rd May, 1989, and depending on what we find then the effect of our findings.

We are satisfied that there was no express cancellation of the words "subject to contract". Indeed, we doubt if either party understood fully what those words mean. We accept the principles set out in Cohen -v- Nessdale Limited (1982) 2 All ER 97 which would enable us (if we can and we think it appropriate) to find by necessary implication that there was an implied agreement to change the original agreements of July, 1988, from one that could not be enforced to one that could be.

It was submitted by Mr. Voisin that had the parties felt that from that time they were bound unconditionally the plaintiff would have told Bailhache and Bailhache and because there was no direct evidence that he did, therefore his evidence on this point was untrue. But there is a file note of the 26th May from Advocate Boxall to Mr. Bougeard saying that the plaintiff was anxious to complete. He knew also that the

lawyers for the defendant and the neighbouring owners were working towards completing the 'contrat de transactions'. The evidence of Mr. Le Brun who was working then in Mr. Gruchy's office is clear on this point and so is that of Mr. Sullivan who was employed in Mr. Voisin's office. At that time, as it so happened, Messrs. Voisin & Co. were acting for one of the neighbours.

It is also clear that after May the lawyers - that is to say the lawyers acting for the defendant and for the two neighbours - were still pursuing their activities and attempts to draft the necessary 'contrat de transaction' and that is evidenced for example by a letter of the 27th June from Messrs. Voisin and Co to Bedell & Cristin on behalf of the defendant.

It so happens that there is a number of office memoranda which has helped the Court to decide the point at issue.

Before meeting the defendant on the 23rd May the plaintiff telephoned to Bailhache and Bailhache on the 22nd May. There is an office memorandum to that effect and there are two office memoranda in respect of the 23rd May. The memorandum for the 22nd May is as follows:

> "Mr. Brocken phoned re King's Close and was hoping for an up-date from Michel Bougeard but he had left. Mike O'Connell gave Mr. Brocken instructions on how to write a letter to the vendor which he did and which the vendor accepted regarding the sale of shares. The vendor now wants £20,000 more and Mr. Brocken would like to know if he (the vendor) is legally bound having accepted the terms of the letter. He is meeting the vendor on site at 8 a.m. tomorrow morning and will phone us afterwards".

On the 23rd May we find the following memorandum:

> "Richard Brocken phoned re King's Close. The purchase price for King's Close is £87,500 and Mr. Brocken will be giving Mr. Coxshall £8,750 today. He is meeting him at 12 o'clock at Broadlands".

There is a further memorandum of 23rd May.

"Mr. Brocken is now going to Broadlands at 2 p.m. today. He is going to get the deposit back and Broadlands are going to give him a letter asking him to forward it to Gruchy. He really does need to speak to you either at 2 p.m. at Broadlands or before that time he can be contacted on his 'Cellnet' phone...." (and then the number follows).

The plaintiff said that on the morning of the 23rd May the defendant said he could get more for the site. At the bottom of the office memorandum of the 22nd May, 1989, there are some words in manuscript in the handwriting of Advocate Boxall. They are as follows:

"You have had a meeting with Coxshall this a.m. He is in some difficulty financially - run out of steam. He has had an offer of 20K (I think that must be £20,000) more. You've got the same deal. You want to release the deposit. Michel (that of course is Mr. Bougeard) seems to be very confident".

When the defendant telephoned Advocate Gruchy on the 23rd May about the deposit following his meeting with the plaintiff a note was taken by Mr. Lakeman who sat near Advocate Gruchy during that telephone conversation and the text of that note is as follows:

"A.C. Coxshall telephoned attendance A.C. Coxshall/GIEG (GAL in hearing) re Mr. Brocken.

1) Wants to take money away from Broadlands and give to Albie.

2) Mr. Gruchy suggested that money should be paid as a deposit through his lawyer.

3) Preliminary agreement based on contracts to come and specifying 10 per cent deposit.

4) Two legal firms are on the point of agreeing to be party to fixing boundaries.

5) Warned of the holiday.

6) Final advice - don't do anything before the event that gives Broadlands the money before the deal is finalised".

Paragraph 4 of that memorandum in our opinion supports the evidence of the plaintiff that he felt on the 23rd May when he met the defendant that he could quite happily make the conditions unconditional because he knew that the question of the boundary was about to be completed or nearly so.

An extraordinary event then took place not immediately but in the month of November. The night before the injunction was obtained (that is to say the night of the 16th November, 1989) the plaintiff met the defendant in a restaurant called "La Bastille". He went furnished with a tape recorder, supplied by Mr. Watkins, a private detective, which he concealed on the table and recorded his conversation with the defendant.

Although it is clear that the plaintiff regarded himself as morally and legally bound (which he mentioned in the tape) he attempted to reach an agreement with the defendant at a higher price. He was unsuccessful. The attitude of the defendant may be judged by three extracts of the tape. I should say here that Mr. Watkins said that after the tape was recorded he transcribed it again in the company of the plaintiff and from the second transcription it was typed out. I now refer to the three extracts. The first one is at the beginning of the interview and the plaintiff says this:

> "Well, I figured that we had a deal" (he'd been asked what he wanted to talk about) "I left the money in place all that time and all that. That the headache yours to sort out the boundaries. By the same token we always agreed that we would buy it no matter what happened. Which you'd agree with that, wouldn't you"? The defendant replied "Yes, I'd go along with most of that. It's your man that stopped the fucking ball rolling because of the boundaries (indistinct)".

The second extract is halfway down the same page and again Mr. Brocken is speaking. Mr. Coxshall had said that he hadn't had any money out of it in the meantime (he expressed it somewhat differently) and Mr. Brocken replied:

"Neither have I as a matter of fact. He has charged me £2,300 and odd pounds legal fees which end up on your doorstep no matter what happens and we will all end up in a row and I don't want the row. You agreed to sell me the shares at that and in it you said that you'd sort out the boundaries. Now, alright, the boundaries have gone and all that but I'm willing to buy it even without subject to contract. See what the situation now with you".

And the reply is:

"Well the situation is now that I've been offered a lot more money".

And the third extract I want to mention is at the bottom of p.4 of the transcript. The parties had some discussion about money and the site and the restaurant itself and what the defendant said is this, almost it seems out of the blue:

"All I want is the fucking money in my bank".

We think it necessary at this stage to refer to three other matters. First, as we have already said, the defendant knew of the difficulties or the possible difficulties about the boundaries when he met the plaintiff on the site in July, 1988. We think that he did discuss those difficulties in the manner set out in the plaintiff's letter to the estate agent of the 27th July, and that he accepted that the responsibility for settling the boundary difficulties and clearing the title was his.

Secondly, he was reminded further about his responsibilities by Mr. Lakeman in a very careful letter drafted by Mr. Lakeman and sent to Mr. Coxshall dated 2nd September, 1988. In that letter the responsibility for putting the matter right by negotiating with the neighbours and if necessary re-negotiating with the plaintiff was placed fairly and squarely upon the shoulders of the defendant. He acquiesced with what his lawyers were doing until a higher offer came his way.

The third matter I have to mention is this. That wherever the evidence of the plaintiff conflicted with and diverged from the evidence of the defendant the Court unhesitatingly has preferred that of the plaintiff.

Having looked at the evidence and considered it in accordance with the test in matters of this nature: on the balance of probabilities, we are satisfied that we may, by necessary implication, find that at the meeting of the 23rd May, 1989, the agreement of July, 1988, was converted from an unenforceable one into an enforceable one and accordingly we find for the plaintiff.

We have not made any further Order, Mr. Boxall, at this stage, we want to hear you as to what you are asking us to do. We know that in the Order of Justice you did in fact ask for a specific performance but you also asked "and/or damages". Now, what exactly are you asking for?

We will order that the defendant by way of specific performance will transfer the shares to the plaintiff in the sum of £87,500 within a reasonable time. That is what you said in the Order of Justice. Is that sufficient or do you want a fixed date? Within a reasonable time. We make no stipulations to title and we do so because the plaintiff himself was prepared to take the company unconditionally.

The Order for specific performance will be suspended for seven days and if within that time Mr. Voisin does not come to ask for a date to make representation to the Court, it will come into effect. There will be an Order for taxed costs.

Authorities referred to:

Taylor (Appellant) -v- Fitzpatrick (Respondent) (1979) JJ 1.

Hyams -v- Russell (1970-71) JJ Vol. 1 Part 3 at 1891.

Roberts -v- Wyatt: The English Reports (Vol. CXXVII) Common Pleas V, at 1080 (n.b. case heard 9th February, 1810).

Duddell -v- Simpson: Chancery Appeals 1866-67 (Vol. 2) at p.102.

Sansom -v- Rhodes: The English Reports (Vol. CXXIII) Common Pleas XI at 103 (n.b. case heard 29th January, 1840).

Ellis -v- Goulton and another (1893) 1 QBD 9 (C.A.) 350.

Dies and another -v- British and International Mining and Finance Corporation Ltd (1939) 1 KBD, 724.

Mobil Sales and Supply Corporation -v- Transoil (Jersey) Ltd (1981) JJ 143.

Oeuvres de Pothier, Nouvelle Edition (Tome Premier), Chapitre 1, p.167.

Cricklewood Property & Investment Trust Ltd and others -v- Leightons Investment Trust Limited (1945) 1 All ER 252.

British Movietonenews Ltd -v- London and District Cinemas Ltd (1951) 2 All ER 617.

Stickney (Appellant) -v- Keeble and another (Respondents) (1915) House of Lords at p.386.

Howe -v- Smith (1881) Ch. (Vol. XXVII) 89.

Cheshire and Fifoot on the Law of Contract (8th Ed'n) at p.116.

Prestige Properties Ltd -v- Styles et Uxor (12th March, 1989) Jersey Unreported.

4 Halsbury 9, paras. 261-267.

Chitty on Contracts (26th Ed'n) Vol. 1, paras. 793-798.

Chitty on Contracts (26th Ed'n) Vol. 1, para. 1657.

Von Hatzfeldt-Wildenburg -v- Alexander (1911-13) All ER 148.

Cohen -v- Nessdale Limited (1982) All ER 97.

Aberfoyle Plantations Limited -v- Cheng (1959) 3 All ER 910.

Re Sandwell Park Colliery Co. Field & Ors. -v- The Company (1928) All ER 651.

Caney -v- Leith (1937) All ER 532.

4 Halsbury 42, para. 92.

4 Halsbury 9, p.p. 450-457.

Wragg -v- Lovett (1948) 2 All ER 968.