

JERSEY / JUDGMENT

Cooke -v- Mold [2010]

JRC 093 (14 May 2010)

[2010] JRC 093

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

judgment

the bailiff: 1. On the 16th April, 2010, I signed an Order of Justice granting an ex-parte interim injunction restraining the defendant from disposing of or dealing in any way with the property known as Zanzibar Restaurant, St Brelade ("the property") and an associated injunction against the party cited restraining it from assisting the defendant in any such disposal or dealing. 2. On 22nd April I heard an urgent inter partes application by the defendant to set aside the injunction. I gave leave for the intervener, being a company to which the defendant had agreed to sell the property, to intervene in the proceedings in support of the defendant's application. At the conclusion of the hearing I discharged the injunction. I now give the reasons for that decision.

Background Facts 3. The essential facts are not in dispute. The property was until recently owned by Mr Roy Grimshaw. He died on 1st December, 2009. By his Will, he left the life enjoyment of the property to his widow ("Mrs Grimshaw") who is the defendant's step-mother, with reversion to the defendant, who is his daughter. The Will is yet to be registered but the defendant and Mrs Grimshaw have agreed to sell the property. For convenience I shall on the whole refer simply to the defendant unless it is appropriate to refer to both of them. 4. The plaintiff has been interested in the property for some time. About a year ago he heard through Mr Jonathan Sharp, the tenant of the property, that it might be for sale at about £2 million. He thought it might be ideal for him and his wife to downsize to once their children left home and he made tentative enquiries through Mr Sharp, but nothing came of these because Mr Grimshaw was ill. 5. In January 2010, following Mr Grimshaw's death, the plaintiff's lawyers, Bedell Cristin, approached Advocate Fiott of Voisin expressing interest on behalf of the plaintiff but again nothing came of this. 6. Advised by Thompson Estates, the defendant and Mrs Grimshaw decided to sell the property by tender. Advocate Fiott was instructed to draw up the necessary documentation. 7. It is convenient at this point to refer to certain key provisions of the tender documents. First, there was a notice which was placed in the Jersey Evening Post. This invited tenders for the purchase of the property and said that the conditions of tender could be obtained from the offices of Thompson Estates. Importantly, it stated in bold at the foot of the notice "The vendor does no (sic) bind herself to accept the highest or any tender." 8. All interested parties received the conditions of tender which were in a document entitled "Sale by Tender of the Zanzibar Restaurant, St Brelade's Bay, St Brelade" ("the tender conditions"). The relevant clauses for present purposes of the tender

conditions are as follows:- "(2) The vendor does not undertake to accept the highest or any tender. (3) The person whose tender is accepted shall be the Purchaser and shall be informed of the acceptance of his tender by letter sent to him by post addressed to the address given in his tender and every letter so sent shall be deemed to have been received two working days after the date upon which it shall have been posted. (4) The Purchaser shall within five days after the posting of such notice of acceptance pay to the vendor's said Agent a deposit equal to 10% of the amount of his tender and shall complete the appropriate form of application to the States of Jersey Population Office for consent to the transaction. The said deposit shall be paid by the Purchaser to the Vendor to be applied as hereinafter mentioned. (5) The delivery of the tender to the Vendor's said Agent shall constitute an undertaking by the person submitting the tender to the effect that [if] his tender is accepted he will complete the purchase of the property by the passing of the necessary deed or contract of sale and conveyance of the property before the Royal Court no later than three weeks after the date on which the Population Office shall issue consent to the transaction. (7) In the event that either party shall fail, neglect or refuse to complete the transaction in accordance with the terms of these present conditions then the defaulting party shall pay to the persisting party a sum equal to one third of the amount of the Purchaser's tender by way of agreed and liquidated damages. (11) No tender will be considered as a valid tender if the Purchaser shall, when submitting the tender, seek to attach conditions thereto other than those contained herein." 9. Three tenders were submitted by the due date. One from a third party was for £1.5 million. The plaintiff offered £2,550,000 subject to five attached conditions. Four of these were of a fairly technical nature but one of them made the tender subject to finance being in place. 10. The intervener submitted a referential bid in the sum of "£40,000... plus GST if payable, above the value of the highest tender received by Thompson Estates (including any other referential tender) which complies fully with the conditions of tender laid out in the tendering particulars issued by Thompson Estates." 11. The defendant and Mrs Grimshaw attended at the offices of Thompson Estates on 9 th April to consider the tenders. They decided to accept the offer from the intervener which, by reference to the bid of the plaintiff, came to the sum of £2,590,000. They were influenced by the fact that it was unconditional. They were keen to obtain cash as quickly as possible and they were concerned about the plaintiff's condition as to the provision of finance to the plaintiff. The intervener was informed that its bid had been accepted. 12. On 10 th April the plaintiff was informed by Mr Sharp on the telephone that he had been told by Mrs Grimshaw that the winning bid had been referential to the highest fixed sum bid made. The plaintiff was surprised to find that a referential bid had been accepted. Following this, he made a further bid through Mr Sharp by letter dated "Sunday", which must have been 11 th April. It stated that the plaintiff had been in touch with Mr Sharp and had asked him to advise the defendant that he would contact Advocate Fiott the next day in order to make an offer of £3,250,000, free of any conditions, in cash. Advocate Fiott met with the defendant and Mrs Grimshaw on 12 th April to discuss various matters and they disclosed that letter to him at the time. Advocate Fiott pointed out that the defendant and Mrs Grimshaw had accepted the intervener's offer and that this was binding on them. Failure to complete the transaction with the intervener would result in an action for damages as a consequence of Clause 7 of the tender particulars. The defendant and Mrs Grimshaw decided to continue with the sale of the property

to the intervener. 13. It was in those circumstances that the plaintiff issued an Order of Justice dated 16 th April seeking a declaration that the referential bid by the intervener was invalid and requesting such orders as the Court may think fit as to any further tender process. The Order of Justice also sought damages. The ground relied upon in the Order of Justice was that referential bids were not permitted by the terms of the tender and the defendant's acceptance of the intervener's bid was therefore invalid. 14. I was informed during the hearing that the consent of the Population Office had been received on 16 th April. The parties were therefore contractually obliged to pass contract before the Royal Court by 7 th May at the latest, although it had been intended to pass contract earlier. Discussion 15. All parties agreed that an injunction may only be granted when there is a serious issue to be tried (see *American Cyanamid Co-v-Ethicon Limited*

[1975] AC 396). The defendant and the intervener argued that the plaintiff's case was doomed to failure and there was no serious issue to be tried; Mr Cadin on behalf of the plaintiff argued to the contrary. 16. Both sides relied on the case of *Harvela Investments Limited-v-Royal Trust Co of Canada (CI) Limited*

[1985] 2 All ER 966. This was the case which Bedell Cristin had originally referred to in correspondence when querying the outcome of the tender process and which was relied upon by Advocate Taylor when presenting the ex parte application to me. The plaintiff drew from the case the simple proposition that referential bids were unlawful and therefore the tender process in this case had been conducted unlawfully. 17. However one needs to consider carefully exactly what was said in *Harvela* . In that case the vendors held a parcel of shares which they wished to sell to one of two rival offerors. Sale of the shares would give effective control to whichever of the offerors was successful. The vendors invited both parties to submit by sealed offer or confidential telex a single offer for the whole parcel of shares by a stipulated date. The vendors stated in the invitation to bid that they bound themselves to accept the highest offer received by them which complied with the terms of the invitation. The plaintiff in the case tendered a bid of '\$2,175,000. The second defendant in the case tendered a bid of '\$2,100,000 or \$101,000 in excess of any other offer expressed as a fixed monetary amount, whichever is the higher'. The vendors accepted the second defendant's bid as being a bid of \$2,276,000 and entered into a contract with them for the sale of the parcel of shares. The plaintiff brought the proceedings contending that the second defendant's bid was invalid and accordingly there was a binding contract between the vendors and the plaintiff for the sale of the shares for \$2,175,000. 18. The leading speech was that of Lord Templeman. He drew a distinction between sale by auction (where a bidder can adjust his bid by reference to rival bids) and a fixed bidding sale (where a bidder may not adjust his bid but must specify a fixed amount which he hopes will be sufficient, but not more than sufficient, to exceed any other bid). The House of Lords held that the procedure in *Harvela* was a fixed bidding sale with the consequence that the referential bid of the second defendant was not valid. Lord Templeman made clear at 973 that, whether there was an auction or a fixed bidding sale, the critical factor was that the vendor had undertaken to sell to the highest bidder. Lord Diplock analysed the procedure in terms of unilateral and synallagmatic contracts and

went on to point out that what was critical was that the vendor assumed a legal obligation to transfer the property in question to the highest bidder because he had bound himself to accept the highest offer. 19. In my judgment, the legal position is accurately described in the Irish case of *Smart Telecom Plc-v-Radio Telefis Eireann and Glanbia Plc*

[2006] IEHC 176 . In that case the first defendant wished to sell sponsorship of its weather forecast. It invited the four parties who had indicated a willingness to sponsor the forecast to submit their best offer in the form of a sealed bid by a prescribed deadline on terms as to the presentation of the bid. Importantly, the first defendant committed itself to awarding the contract to the highest bidder. The judge applied *Harvela* and held that referential bids were not permitted. He described the general legal position in the following terms:- "23 In law, an invitation extended by an inviter to prospective contractors seeking tenders from them is normally regarded as an invitation to treat. A response to such an invitation constitutes an offer which the inviter is free to accept or reject. If, however, in extending the invitation the inviter states that the contract will be awarded to the highest bidder the position at law is different and contractual rights may flow from such an invitation. All parties to this litigation accept, and in my view correctly, that the R. T. E. offer was not an invitation to treat. Rather it was an offer which would ripen into an enforceable contract in favour of the highest bidder who accepted it in accordance with its terms". 20. In my judgment, it is critical that in this case the defendant made it clear that she was not bound to accept the highest or indeed any tender. This was specifically stated in the notice and in the tender conditions and was the basis upon which the plaintiff and all other bidders must be taken to have made their bids. The defendant could have chosen to accept the offer of £1,500,000 from the third party despite the fact that it was the lowest. She could have decided to accept an offer because she was friends with the particular bidder even though that bid was not the highest. She could have decided to reject the highest offer because (hypothetically) the bidder happened to be red haired and she did not like red haired people. She could have accepted a private offer outside the whole tender process rather than any of the bids made under the tender process. Mr Cadin accepted correctly that, because she had made it clear that she was not bound to accept the highest or any tender, she could have done any of these things and the plaintiff would have had no remedy even if he had made the highest offer. 21. In these circumstances there cannot be any legal justification for implying a term into the tender process that, regardless of her ability to do anything she liked in respect of the various bids, the defendant was not entitled to accept a referential bid. The fact is that, as a result of saying that she was not bound to accept the highest or any tender, the vendor had complete discretion as to what course of action she chose to take because there was no necessity for a sale to result from the tender process (as she was not bound to accept any tender). The reasoning relied upon by the House of Lords in *Harvela* as to the unsatisfactory consequences of allowing referential bids does not apply where the vendor is not bound to accept the highest tender. In the end, Mr Cadin was reduced to arguing that one is left with a lingering sense of unfairness if one party makes a referential bid

which is accepted and the other party has made an offer in the absence of knowledge that a referential bid might be accepted. But that is a consequence of the way in which this tender was conducted, namely that the vendor was not bound to accept the highest or any tender and could proceed as she thought fit. 22. For these reasons I concluded that there was no serious issue to be tried because the plaintiff was bound to fail. I therefore discharged the injunction. 23. I would add one matter by way of postscript. All counsel agreed that there was no Jersey authority on the point at issue and I was referred only to the two cases which are cited above. At one stage in the hearing, Advocate Cadin submitted that French law might be different and this might lead to Jersey law differing from England and Irish law. My response to that is two-fold. First, it is incumbent upon a plaintiff who seeks the exceptional remedy of restraining a person from selling property which she owns to satisfy the Court that there are proper legal grounds to take such a step. It is quite insufficient to speculate that French law might lead Jersey law to hold that there is an arguable case. The onus is undoubtedly upon a plaintiff in such circumstances to convince the Court that there is a serious issue to be tried. 24. Secondly, Jersey law attaches great importance to the maxim 'la convention fait la loi des parties'. In this case the legal basis upon which the tender was effected and therefore the basis upon which all the bidders made their tenders, was that the vendor was not obliged to accept any tender, let alone the highest one. It is difficult to conceive in those circumstances of anything which might lead to a conclusion that the vendor did not have a completely free hand as to which tender and the form of any tender which she might choose to accept. Authorities American Cyanamid Co-v-Ethicon Limited

[1975] AC 396 . Harvela Investments Limited-v-Royal Trust Co of Canada (CI) Limited [1985] 2 All ER 966. Smart Telecom Plc-v-Radio Telefis Eireann and Glanbia Plc

[2006] IEHC 176 . Page Last Updated: 15 Oct 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2010/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/cooke-v-mold-2010-jrc-093-14-may-2010>

Prepared on 25 October 2026 · Esheria