

JERSEY / JUDGMENT

Grove and Briscoe -v- Baker

[2005] JRC 095 (11 July 2005)

[2005] JRC 095

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

judgment

the bailiff:

Introduction

1. This is an action by the plaintiffs, Eric Grove ("Mr Grove") and his daughter, Louise Briscoe ("Mrs Briscoe") to recover a loan of £83,333 from the defendant, Leslie Ernest Baker ("Mr Baker"), together with accumulated interest on the loan at the agreed rate of 25% per annum. The contract is embodied in a short agreement sent by Mr Baker to Mr Grove and counter-signed by both plaintiffs.

Background

2. The background to the making of the loan was as follows. Mr Grove and Mr Baker had previously been engaged in business together. In 2002 they agreed to become involved in a joint enterprise for the purpose of purchasing the former Les Arches Hotel in St Martin and the development of the site by constructing houses and flats. They formed a company "Cool Waters (Les Arches) Limited" ("the company") in which Mr Baker held 50% of the shares and the plaintiffs between them held the remaining 50%. A preliminary agreement of sale was executed on 16th December 2002. The purchase price was £2,850,000. It was expressed to be subject to the obtaining of planning consents. There was a provision that the agreement would lapse if completion had not taken place by 14th March 2003. By a supplementary agreement of 21st March 2003 that date was extended to 11th April 2003. If completion did not take place, a penalty provision in the agreement was to be triggered by which the deposit of £285,000 (which had been paid by the plaintiffs) would be payable to the vendor. The company had obtained funding from the Royal Bank of Scotland International Limited in the sum of £7,275,000. It was a condition of that funding that the company should provide from its own resources the first £1,000,000 of the purchase price. The original agreement between the company's shareholders was that Mr Baker would provide £250,000, the plaintiffs would also provide £250,000, and the remaining £500,000 would be provided by a bridging loan called "mezzanine funding" to be arranged by Mr Baker. On 9th April 2003, two

days before the completion date, Mr Baker told the plaintiffs that he had been unable to arrange the mezzanine funding and he asked them to supply the shortfall of £500,000. It is against this background that the agreement which is the subject of this action was reached.

3. There were a number of telephone conversations between Mr Baker and Mr Grove on the 10th April, as a result of which revised financial arrangements and shareholdings in the company were agreed. The £1,000,000 was to be provided as to £250,000 by Mr Grove, £250,000 by Mrs Briscoe, £250,000 by the plaintiffs jointly, and £250,000 by Mr Baker. The shareholdings in the company were revised so that between them the plaintiffs held 66 2/3% and the defendant held 33 1/3%. The plaintiffs were therefore to provide in cash between them £750,000, whereas Mr Baker was only to provide £250,000. On the basis of a one-third shareholding, he should have provided £333,333. It was agreed that the shortfall of £83,333 should be treated as a loan from the plaintiffs to Mr Baker and that he would pay interest on that loan at 25% per annum, that interest to be paid quarterly in arrears.

4. Mr Baker sent a letter to the plaintiffs on 10th April 2003 setting out the terms of this agreement. It was later counter-signed by the each of the plaintiffs. The crucial paragraphs were in the following terms - "In consideration of you each contributing funds of £250,000 (and thus a total of £500,000) and you jointly contributing a further £250,000 between you I hereby agree that with effect from you paying the amount as provided in paragraph 3 hereof the shares of Cool Waters will be beneficially owned as to one-third by myself and one-third by Eric and one-third by Louise and we will participate in the profits of Cool Waters in the same one-third ratios ." [The proportions held by the plaintiffs were later adjusted between themselves, but nothing turns on that.] Interest on one-third of £250,000 and thus on £83,333.33 will be due by me to you jointly at an interest rate of 25% per annum until such time as I pay to you jointly the said sum of £83,333.33 such interest to be paid quarterly in arrears.

5. On 11th April 2003 a further complication ensued when it transpired that Mr Baker was unable to produce the £250,000 due from him. This led to a further agreement between the parties whereby the money was advanced by the plaintiffs and was to be repaid by 5 pm on 25th April 2003. In the event that obligation was met.

6. The agreement provided that interest was to be paid quarterly in arrears. The first payment was due on 10th July 2003 and was paid on time. The second payment was due on 10th October 2003. This interest was not however paid until 11th November 2003 as part of a package of arrangements involving monies claimed to be due to Mr Baker's firm by the company. That package of arrangements involved the retention by the company of £3,353.47 on account of the interest payment of £5,208.31 due on 10th January 2004. The balance of £1,854.84 was not however paid on that date. Mr Grove wrote on 15th January 2004 reminding Mr Baker of the overdue payment, which was still not met. On 11th February 2004, Mr Grove wrote again threatening that if the payment was not made by 25th February, he would refer the matter to his solicitors. The payment was in fact made on 25th February. The next quarterly payment was due on 10th April 2004 and again was not paid on the due date. On 16th April 2004, Mr Grove wrote to Mr Baker stating - "As you will be aware, the most recent interest payment due by you to Louise and myself jointly under clause 2 of the Agreement should have been paid on 10 April 2004, but was not so paid. In addition, as the Agreement is silent as to the period of the loan made

by Louise and myself jointly to you in the principal sum of £83,333.33 pursuant to the Agreement, the loan is repayable on demand. Accordingly, I hereby formally demand immediate repayment of the principal sum of £83,333.33 together with the latest unpaid interest instalment in the sum of £5,208.31. If the total sum of £88,541.64 has not been received by me by close of business on Wednesday 21 April 2004 then I shall instruct my lawyers to take all necessary steps in order to recover that sum." 7. Mr Baker replied on 21st April stating that any repayment of the capital was "out of the question. The loan is outstanding until the development is completed in accordance with the Heads of Terms." Proceedings were instituted by the plaintiffs on 11th May 2004. The Plaintiffs' Submissions 8. Mr Gleeson who represented the plaintiffs conceded that the agreement concluded on 10th April 2003 made no express provision for the repayment of the capital sum of £83,333. He contended, however, that the plaintiffs were entitled to claim repayment on three grounds. First, he submitted that the failure to pay the stipulated interest on the due date on three consecutive occasions was a fundamental breach of the contract of loan which entitled the plaintiffs to treat the contract as terminated (*résolu*). Secondly, he submitted that it was an implied term of the contract that a persistent failure to pay the interest on the due date constituted an "event of default" which entitled the plaintiffs to treat the contract as discharged. We think that counsel meant "terminated" or " *résolu* ". Thirdly, counsel submitted that, although the contract was silent as to the terms of repayment of the loan, it was an implied term of the contract that it was repayable on demand. The Defendant's Submissions 9. The defendant represented himself. We wish to record that he did so in a competent and courteous manner. He did not, naturally, express his contentions in the way in which a lawyer might have done on his behalf, but nonetheless his submissions were clear and easy to follow. Mr Baker's arguments were essentially three-fold. First, he contended that the agreement was, in effect, imposed upon him. He had asked that the interest be rolled up during the development, but Mr Grove had refused, insisting that the interest should be paid quarterly. Secondly, he submitted that the capital was due only at the end of the project when the last sale was completed. Thirdly, acknowledging that the Court had a discretion as to whether the contract should be treated as terminated, Mr Baker submitted that it would be equitable to order that the capital and interest be repaid at "the financial conclusion of the scheme". Mr Baker asserted that he was willing to pay the interest, but that after April 2004, Mr Grove had been unwilling to accept the interest unless the capital were repaid as well. 10. It is convenient to deal first with the submissions of Mr Baker which can indeed be disposed of shortly. The old maxim is "*la convention fait la loi des parties*". The court is not empowered to rewrite contracts into which parties capable of contracting have entered with their eyes open. If there is a defect of consent, the court may of course treat the contract as null; additionally, the court may in certain circumstances imply certain terms into the contract and modify it in that way. But in general terms, the court has no jurisdiction to remake contracts which the parties have made of their own free will. 11. As to Mr Baker's first submission, he may have entered the contract to pay interest quarterly in arrears reluctantly, but he entered it nonetheless, and is bound by it. As to his second submission, there is no evidence that the capital was due to be repaid only at the end

of the building project. This was an assertion first made in Mr Baker's letter of 21st April 2004 in reply to Mr Grove's letter of 16th April. Mr Baker stated that the loan was "outstanding until the development is completed in accordance with the Heads of Terms". It is not clear to what 'Heads of Terms' refers, but it is clear that this provision did not form part of the expressed terms agreed between the parties. Mr Baker's third submission, that we should re-write the agreement between him and the plaintiffs so as to enable the repayment of capital and interest to be made upon the conclusion of the building project is not one which we can accept. The Law 12. Counsel for the plaintiffs contended that the law on termination of contract followed the English model and that it was therefore proper to have regard to English authority in this area. He relied upon *Hamon v Webster* 2002 JLR 138 in support of this contention. We think that this proposition was stated too broadly and that too much has been drawn from the court's decision in *Hamon v Webster*. In that case, the court was concerned with the question whether it was necessary for the innocent party to apply to the court to treat a contract as terminated in the event of some fundamental breach of an obligation by another party. The court held, applying principles of English law and rejecting the approach adopted by French courts, that - "... save in respect of leases (where an application to the court is necessary), an innocent party may terminate a contract where the breach is one which goes to the root of the contract or where the contract itself specifically provides that he will have a right to terminate the contract in respect of the breach in question. The innocent party need not have recourse to the court." 13. We interpose that determining the Jersey law of contract is too often presented by counsel (we exonerate counsel in this case) as a battle between legions carrying the flags of French law and English law respectively. The court is too often enjoined to apply French law to this problem, or to apply English law to that. This court is concerned only to apply the law of Jersey. If we can do so, we will apply the custom and the law laid down in previous decisions of this court. If the law cannot be found in that way, we must adopt principles from elsewhere. As has been stated by successive judges for fifty years or more, the surest guide to the Jersey Law of contract is the works of Pothier. However, as the court also stated in *Selby v Romeril*, 1996 JLR210 at 218, Pothier was writing many years ago and "our law cannot be regarded as set in the aspic of the eighteenth century". Our customary law is organic and must absorb influences from other jurisdictions where a particular issue is not clear. It is the principles rather than the foreign law which are applied and, once applied, become the law of Jersey. These principles themselves will, in due time, need to be developed; in those circumstances the court may, or may not, develop the law in accordance with any changes which may have taken place in the jurisdiction from the which the principles were originally imported. 14. In *Hamon v Webster* the court determined that a contract could be terminated (résolu) without an application to the court. It did not decide that the right to treat a contract as terminated followed the English model or was to be considered in accordance with English law. In fact the law relating to résolution is not dissimilar to the English remedy of rescission. Nonetheless there is at least one important distinction in that the remedy of résolution in Jersey law is available at the discretion of the court wherever the failure to comply with an obligation can be said to be sufficiently serious to justify a cancellation of

the contract. A trivial or insignificant failure to comply with an obligation would not be sufficient. The failure must go "to the root of the contract" (*Hamon v Webster* , and *New Guarantee Trust Finance Limited v Birbeck*

[1977] JJ71 at 83), or involve "a breach of a fundamental condition" (*Hanby v Moss*

[1966] JJ 625) or be "sufficiently serious to justify the termination of a contract" (*Hotel de France (Jersey) Limited v the Chartered Institute of Bankers* , 21st December 1995 Unreported 256). These are the principles to be applied to the first submission of counsel for the plaintiffs that the failure to pay interest at the due time was a fundamental breach of the contract of loan which entitled the plaintiffs to terminate the contract. 15. We turn next to the law relating to implied terms. Pothier's rules for the interpretation of contracts, to be found in his *Traité des Obligations* , part I, chapter I, 5th rule, provide, in translation - Usage is of so much authority in the interpretation of agreements, that a contract is understood to contain the customary clauses although they are not expressed; in *contractibus tacite veniunt ea qua sunt moris et consuetudinis* . For instance, in a contract for the lease of a house, though it is not expressed that the rent shall be paid half-yearly at the two usual feasts, and that the tenant shall do such repairs as are usually done by tenants; these clauses are understood. So in contract of sale, although the clause that the seller shall be bound to warrant and defend the purchaser from evictions, is not expressed, it will be understood. 16. The rule that terms may be implied into a contract if it is the custom of the trade to include them has been developed by the courts. In *Sibley v Berry* , 9th July 1987 unreported 111, the Court of Appeal considered an appeal by the widow of a man who had lent money to the respondent free of interest in order to enable her to buy a house. There was no written contract. The evidence was, however, that it was an indefinite loan, made in friendship, which was repayable upon the sale by the respondent of the house which she had purchased. The principal question for the court was whether a term could be implied into the contract requiring the respondent to sell the house or, alternatively, stipulating that the loan was repayable on reasonable notice. The Court of Appeal examined the principles applied in England as laid down by the House of Lords in *Liverpool City Council v Irwin* and another

[1977] AC 239 , citing a passage from the speech of Lord Wilberforce beginning at page 253 - "There are varieties of implications which the courts think fit to make and they do not necessarily involve the same process. Where there is, on the face of it a complete bilateral contract, the courts are sometimes willing to add terms to it as implied terms: this is very common in mercantile contracts where there is an established usage: in that case the courts are spelling out what both parties know and will, if asked, unhesitatingly agree to be part of the bargain. In other cases where there is an apparently complete bargain the courts are willing to add a term on the ground that without it the contract will not work - this is the case, if not of "The Moorcock"

(1889) 14 PD 64, itself on its facts, at least of the doctrine of *The Moorcock*, as above, as usually applied. This is, as was pointed out by the majority in the Court of Appeal, a strict test - though the degree of strictness seems to vary with the current legal trend - and I think they were right not to accept it is as acceptable here. There is a third variety of implication, that which I think Lord Denning MR favours, or at least did favour in this case, and that is the implication of reasonable terms. But though I agree with many of his instances, which in fact fall under one or other of the preceding heads, I cannot go so far as to endorse his principle. Indeed, it seems to me, with respect, to extend a long and undesirable way beyond sound authority. The present case, in my opinion, represents a fourth category, or I would rather say, a fourth shade on a continuous spectrum. The Court here is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms. In this sense the Court is searching for what must be implied". 17. Le Quesne JA continued - It remains to consider whether the case can be brought within the second of Lord Wilberforce's categories, that is, the category of cases in which something must be implied because without it the contract "will not work". Lord Wilberforce himself remarked further about this category of case on page 254, "In my opinion such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less. A test in other words of necessity." He went on, on page 205, to refer to the judgement of Bowen L J, in the earlier case of *Miller -v- Hancock*. In that judgement, referring to the term which, in that case, it was sought to imply, which in fact he held should be implied, Bowen L J, said that the term to be implied was something without which the whole transaction would be futile, something the absence of which would render the whole transaction inefficacious and absurd. If one considers these terms, necessity, futile, inefficacious, absurd, it is clear that the test to be applied is a stiff test. 18. This then is the hurdle to be overcome by a contracting party who seeks to persuade the court that a term should be implied into a contract. It must be shown, either that the term is customarily included in contracts of the kind in question, or that it is necessary to imply the term in order to ensure that the contract is not futile, inefficacious or absurd. Conclusions 19. We consider first whether the failure to pay interest at the due time was something which went to the root of the contract, or was so serious that the contract can be treated as terminated. The contract provided simply that interest was "to be paid quarterly in arrears". It did not provide that payment on or before the due date was of the essence of the contract, nor that failure to pay on the due date would entitle the plaintiffs to terminate the contract. The first quarterly payment of interest was made on time. The second payment was not made until a month after the due date, but it is necessary to consider the background to that payment. Mr Baker had claimed that the sum of £20,000 was due to his firm by way of a fee for services rendered to the company. That claim was initially resisted by Mr Grove, but ultimately conceded. The payment of interest was taken by way of deduction from the £20,000 due to Mr Baker's firm. The balance of the third quarterly payment was made six weeks late, but on the other hand the plaintiffs had had the benefit of the bulk of the interest for two months prior to the due date. The fourth quarterly payment was six days overdue when Mr Grove wrote purporting

to treat the contract as terminated. Taken in the round, we do not consider that the failures to pay interest on the due dates were cumulatively sufficiently serious to justify the plaintiffs in treating the contract of loan as terminated. They were of course entitled to sue for the overdue interest, but they were not entitled on this basis to reclaim the capital by treating the contract as terminated. 20. We turn to the question whether an implied term may be imposed on the contract of loan in either of the forms for which the plaintiffs contended. The first was that a persistent failure to pay the interest on the due date constituted an "event of default" entitling the plaintiffs to terminate the contract. The alternative was that, although the contract was silent, the loan was repayable on demand. 21. The evidence of Mr Grove was that the relatively high rate of interest of 25% per annum was stipulated in order to incentivise Mr Baker to repay the capital sum quickly. In the context in which the loan was made, that is the failure of Mr Baker to arrange the mezzanine funding, we accept that evidence. If the interest had been paid on the due dates, it may be that the plaintiffs would not have pressed for repayment of the capital. But the interest was not paid on the due dates. A high rate of interest is of no benefit to a lender if the interest is not paid. 22. It is true that the contract made no express provision for the repayment of the capital. But the parties clearly intended that repayment should be made. This was not a contract of loan similar to that in *Sibley v Berry* where the loan was interest free and made as an act of friendship. This was a commercial contract between partners. Suppose that the interest had not been paid at all. Would the plaintiffs have found themselves then locked into a contract of loan in perpetuity and obliged to sue periodically for arrears of interest? That would, in our judgment, be an absurd situation in the context of a contract of loan where the plaintiffs had advanced money to Mr Baker in order to enable him to remain involved in the joint venture. We find that it was an implied term of the contract of loan that the capital was repayable on formal demand. That formal demand was made by the plaintiffs in Mr Grove's letter of 16th April 2004. In view of that conclusion, it is unnecessary for us to consider whether there was a persistent failure to pay the interest on the due dates which constituted an "event" entitling the plaintiffs to terminate on that ground. 23. We give judgment for the plaintiffs. Authorities *Hamon v Webster* [2002]JLR 138. *Selby v Romeril* , [1996]JLR210 at 218. *New Guarantee Trust Finance Limited v Birbeck*

[1977] JJ71 at 83. *Hanby v Moss*

[1966] JJ 625 . *Hotel de France (Jersey) Limited v the Chartered Institute of Bankers* , (21st December 1995) Jersey Unreported 256. *Pothier , Traité des Obligations* , part I, chapter I, 5th rule. *Liverpool City Council v Irwin and another*

[1977] AC 239 . *Sibley v Berry* , 9th July 1987 Jersey unreported 111. 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/2005/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/grove-and-briscoe-v-baker-2005-jrc-095-11-july-2005>

Prepared on 23 October 2026 · Esheria