

**Judgment 20/2006 F R Properties Limited v Skipton – Court of Appeal
(Civil Appeal File 362) 7th April, 2006**

Land law – conveyance – conditions of sale – subject to survey – failure to specify date by which purchaser’s right to withdraw could be exercised – preliminary issue as argued before the Royal Court was mistakenly drafted – appeal from findings by the Royal Court – a question of construction and not of implied terms – operative date for withdrawal must be some date prior to the completion date – appeal dismissed

IN THE COURT OF APPEAL OF GUERNSEY

The 7th day of April, 2006 before David Arthur John Vaughan, Esquire, C.B.E. Q.C., presiding; The Right Honourable Sir Charles Mantell, P.C., and Sir de Vic Carey.

F R PROPERTIES LIMITED (Appellant)

v

ANTHONY WILLIAM SKIPTON (Respondent)

In the Matter of the Appeal from the decision of the Royal Court dated 11th July, 2005;

THE COURT, having on 6th April, 2006, heard Advocates P.T.R. Ferbrache for the Appellant and J.D. Loveridge for the Respondent thereon, this day GAVE JUDGMENT in the terms attached hereto, DISMISSED the Appeal and AWARDED COSTS to the Respondent, at the standard recoverable rate, both in this Court and in the Royal Court.

K. H. TOUGH
Registrar of the Court of Appeal.

**Approved Text
7.11.06**

**IN THE COURT OF APPEAL OF
GUERNSEY**

Between F R PROPERTIES LIMITED Appellant

-V-

Anthony William SKIPTON Respondent

7th April, 2006

**Before: David Arthur John Vaughan Esq CBE QC, Presiding
 The Right Honourable Sir Charles Mantell
 Sir de Vic Carey**

Vaughan J.A.

1. This matter concerns the proposed sale of two properties, namely “Skyline Flats”, St George’s Esplanade and 4 St George’s Esplanade, both in St Peter Port by Anthony William Skipton (“the Vendor”) and their proposed purchase by F R Properties Limited (“the Purchaser”).
2. The Conditions of Sale, which were in the Guernsey Bar Conditions of Sale (1997 Edition) form, were dated 7 November 2002 and were signed by or on behalf of both parties on that date. They consisted of both General Conditions and Special Conditions. The purchase price for the properties and the contents was agreed to be £1,070,000 and the deposit to be paid was to be 5% of that price, namely £53,500. The completion date was to be the 29 April 2003. It was common ground that the deposit had been paid by the time the Conditions

of Sale were signed. It was also common ground that according to the law of this jurisdiction, time was of the essence of the contract.

3. It was an express condition of the Conditions of Sale that the Purchaser was to be given the right to withdraw in certain defined circumstances, namely:-

“G Right to Withdraw

Completion is subject to the Purchaser having the right to withdraw from these Conditions of Sale by giving notice in writing to the Vendor or the Vendor’s Agents before 5:00 pm on the date stated in the Special Conditions as being the Operative Date that the Purchaser:-

(Finance)

- (i) has not received finance facilities satisfactory to the Purchaser enabling the Purchaser to complete conveyance of the Property and purchase the Contents (for which the Purchaser undertakes to make immediate application);*

(Survey)

- (ii) it is not satisfied with a survey report in respect of the Property (for which the Purchaser undertakes to give immediate instructions);*

(Matters)

- (iii) it is not satisfied with a report of Property Matters prepared by the Purchaser’s advocate or Surveyor,*

(Licence)

- (iv) has not received written confirmation from the Housing Authority that a licence satisfactory to the Purchaser will be issued on Completion to enable the Purchaser to occupy the dwelling forming part of the Property (for which the Purchaser undertakes to make immediate application. Such right to be exercisable only where any of the words set out in Special Condition 1 have not been deleted and initialled by both the Vendor and the Purchaser. If any word has not be deleted and initialled then the clause following such words as set out above shall apply. Should the Purchaser have such right and serve*

written notice of withdrawal on the Vendor or the Vendor's Agents before 5:00 pm on the Operative Date then these Conditions of Sale shall be null and void and the Deposit and interest accrued shall be refunded immediately to the Purchaser. Should no such written notice of withdrawal have been received from the Purchaser before 5:00 pm on the Operative Date then the Purchaser shall conclusively be deemed to be satisfied and shall be bound to complete conveyance of the Property and purchase of the Contents”.

4. By the Special Conditions in this particular transaction, as the matters relating to finance, matters and licence had been deleted, it was only the condition relating to survey which gave the Purchaser the right to withdraw. It was expressed in the Special Conditions that “The Operative Date is day of 2002”. Evidently when drafted the day and the month had been left blank so that both could be inserted in writing at the time of the signature, although the year had been typed or printed in the Special Conditions. In fact, at no time was the date or month inserted by the parties or their agents or the year altered.

5. The dispute arose because the Purchaser, although the Conditions of Sale were signed on the 9 November 2002, did not instruct a surveyor until some date in early January 2003, which by no stretch of the imagination can be in accordance with the undertaking to “give immediate instructions”. Problems were then encountered in obtaining access to the properties. The survey, which was later described as not being a full survey, but being “geared to give you initial advice”, was carried out on 24 March 2003. In a letter dated 28 March 2003 from Stillwell and Co, Chartered Surveyor, to the Purchaser, the surveyor’s report indicated that both properties were in very poor condition and there would be a need for complete demolition of part of one of the properties and complete refurbishment of the rest. As a result of that report, the Purchaser, by letter dated 1 April 2003, through its Advocate, purported to withdraw from the contract and sought to recover the deposit and interest incurred and further sums in accordance with the Special Conditions of Sale.

The Vendor's Advocate for his part by letter dated 3 April 2003 denied that the Purchaser had a right to withdraw on the basis that that right expired after 31 December 2002, which he contended was the Operative Date.

6. The Purchaser brought proceedings against the Vendor seeking to recover the deposit and consequential payments to which he claimed he was entitled, on the basis that as the precise date of the Operative Date had not been completed in the Special Condition, that meant that the Completion Date, namely 29 April 2003, was the proper date until which date it had the right to withdraw, according to Condition G (ii). The Vendor for his part contended, as before, that the right expired on 31 December 2002.
7. The parties agreed that a preliminary issue should be placed before the Royal Court and agreed it in the following terms:-

“Were the Conditions of Sale dated 7 November 2002, subject to a survey being obtained by 29 April 2003”.

7. That preliminary issue was unfortunately drafted and did not describe the issue between the parties. The real issue was whether a right to withdraw following a survey expired on 31 December 2002 or 29 April 2003. However, it is clear from the Skeleton Arguments of both parties that the case was argued on the proper basis as set out above and the Judgment of the Lieutenant-Bailiff Hancox was delivered on the proper basis. It is also unfortunate that the Act of Court following that Judgment, repeats the mistaken drafting of the preliminary issue. For my part I am clear that the effect of the Judgment of the Lieutenant-Bailiff was that the exercise of the right of withdrawal, following receipt of the survey report which the Purchaser did not consider to be satisfactory, had to be exercised by 31 December 2002. It is against that Judgment and against the finding in respect of that date that the Purchaser appeals.
8. The Lieutenant-Bailiff in his Judgment dated 11 July 2005 concluded that:-

- (i) The court does have power to imply a term in a contract in an appropriate case, and in so doing he relied on authorities relating to implication of terms to give business efficiency to a contract.
- (ii) That the appropriate date to imply was 31 December 2002, not because as a matter of construction that is the last date available in the year 2002 (as Mr Loveridge for the Vendor contended, as he does in his Respondent's Notice), but because that was the reasonable time to imply after the making of the agreement for obtaining the survey.

9. Mr Ferbrache, for the Appellant, in his Appeal contends that the appropriate date is the date of completion, namely 29 April 2003, and that:

- (i) The Lieutenant-Bailiff was not entitled to refer to authorities on implied terms which had not been cited to him, namely the well known cases on implied terms of *Reigate and Union Manufacturing Company (Ramsbottom) Limited v Elton Cop Dyeing Company Limited* [1918] 1 KB 592 and *Luxor (Eastbourne) Limited and Others v Cooper* [1941] AC 108. In so contending he relies on the decision of the Court of Appeal (England and Wales) in the *Sheridan v Stanley Cole (Waynefleet) Limited* [2003] 4 All ER 1181, and he contends that a material injustice had occurred in this case, as a result of the Lieutenant-Bailiff's reliance on those cases and the doctrine of implied terms which had not been relied on by either Advocate or referred to in the course of argument.
- (ii) The Lieutenant-Bailiff was wrong in contending that the Operative Date was intended by the parties to be a different date from the Completion Date because if so there would be no margin of time within which a purchaser could consider the report and decide whether to withdraw, and on which he relied on cases such as *Smith v Butler* [1900] 1 QB 694, *Aberfoyle Plantations Limited v Khawpian Cheng* [1960] AC 115 (PC) and *Total Gas Company*

Marketing Limited v ARCO British Limited and others [1998] 2 Lloyds LR 209 (HL), all of which cases were cited to him.

- (iii) The Lieutenant Bailiff was wrong to imply terms into the contract in the circumstances of this case when a preliminary issue of law was being decided, for an implied term could only be implied in such circumstances as a result of hearing evidence and making findings of fact which would involve a full hearing and witnesses.
- (iv) If the appeal were allowed on the second ground the preliminary issue should be decided in the way contended for by the Appellant, but if on the first or third ground the matter be set down for hearing before another judge.

10. Mr Loveridge for the Vendor contends that this case should not be decided on the basis of implied terms but a matter of construction and that the proper construction of the clause providing for the Operative date, given that it referred to 2002, could only be 31st December 2002.

11. I agree with the contentions of Mr Loveridge. I consider that this is indeed a question of construction and not of implied terms. This is also clear from a case such as *Total Gas Company* [Supra]. It is also clear from the authorities cited above and in particular *Aberfoyle Plantations* [supra] that:

- “(i) *when a conditional contract of sale fixes a date for the completion of a contract then a condition must be fulfilled by that date,*
- (ii) *when a conditional contract fixes no date for completion of the contract then the condition must be fulfilled within a reasonable time,*
- (iii) *when a conditional contract of sale fixes whether specifically or by reference to the date fixed for completion the date by which the condition must be fulfilled then the dates they fixed must be strictly adhered to and the time allowed is not to be extended by reference to equitable principles”.*

12. The question here is not whether a date is fixed by reference to a specified date for completion of a contract, nor whether the date for completion of the contract is not specified, but whether the condition must be fulfilled by a date

which, although specified as the Operative Date, has not been fully defined. In that situation it appears to me clear that that is a matter of construction. In accordance with the principles set out above then if that construction provides a date, then the condition must be satisfied by that date and cannot be extended. The question here is whether the Operative Date has been indeed been fixed.

13. It appears to me to be self evident that the Operative Date must be some date prior to the Completion Date, not least because there must have been intended to be some time which should elapse between the date of withdrawal and the intended date of completion, for as a matter of practice it would have been wholly impracticable for withdrawal to be on the same date as the intended date for completion bearing in mind the matters that needed to be performed before completion. In addition the fact that notice of withdrawal could be served at any time prior to 5.00 p.m. on the Operative Date is wholly inconsistent with the fact that completion in this jurisdiction would have taken place before the Conveyancing Court at 9.30 in the morning of the Completion Date. The Operative Date could not possibly be after the time of completion.
14. Moreover the fact that the Purchaser undertakes to give “immediate instructions” under General Condition G, whether in relation to finance, survey or licence, would indicate that the Operative Date, which applies to all three matters, was intended to be at relatively early date in relation to the completion date, particularly as time is of the essence of the contract. Accordingly I consider it clear that it was intended that the Operative Date should be a date which was relatively early in the period between contract and completion.
15. Accordingly in all the circumstances I consider that Mr Loveridge is correct in his contentions that, as the Operative Date is expressed to be at some undefined date in 2002, that indicates that the date for withdrawal had to be a date in 2002 and accordingly I consider as a matter of construction that 31st December 2002, being the last date of 2002, is the appropriate date for the

Operative Date by which the withdrawal had to be communicated, and not the date for completion.

16. It therefore follows that although I do not agree with the Lieutenant Bailiff's approach on the basis of implied terms or on the basis of a reasonable time after the contract, I agree with his conclusion that 31st December 2002 is indeed the Operative Date but as a matter of construction, as Mr Loveridge contended. It is that date which, adapting the wording used by Lord Slynn of Hadley in *Total Gas Company* (Supra), is the date most in accordance with the presumed intention of the parties as the date by which the condition had to be fulfilled. After that date the contract became unconditional and the purchaser was bound to complete. It follows therefore that that date had to be strictly adhered to and could not be extended by reference to any equitable or other principles.
17. Accordingly I would reject the Purchaser's contentions in its appeal that the Operative Date is 29th April 2003 and accept the Vendors contentions as advanced in his Respondent's Notice. It therefore is not necessary to consider further the bases on which Mr Ferbrache advanced his case, namely failure to refer to authorities, implied terms, or the necessity of finding facts.
18. It therefore follows that I would decide the preliminary issue in the following terms:

"The notice of withdrawal following a survey which was not satisfactory to the Purchaser had to be given in writing to the Vendor or his Agents before 5.00 p.m. on 31st December 2002".

19. I consider the appeal should be dismissed.

Sir Charles Mantell J.A.: Yes, I would agree and dismiss this appeal.

Sir de Vic Carey J.A.: I agree.