Judgment 36/2008 Daniel v Gover – Royal Court (Civil Action File 1221) – 11 November 2008

Action for recovery of debt – before Deputy Bailiff and Jurats – Royal Court (Reform) (Guernsey) Law, 2008 – Deputy Bailiff retired with the Jurats and reasoned judgment delivered – judgment incorporated the directions given by the Deputy Bailiff and the findings of fact found by the Jurats – burden of proof – defendant had asserted that the plaintiff had agreed to waive the loan – held that as respects that specific assertion the burden of proof lay on the defendant – on any other issue in the case the burden of proof lay on the plaintiff – held that there had been no agreement to waive the loan and judgment awarded to the plaintiff

IN THE ROYAL COURT IN THE ISLAND OF GUERNSEY

Civil 1221

The 11th day of November 2008 before Richard John Collas Esquire, Deputy Bailiff and Derek Michael Le Page, The Reverend Peter Gerald Lane and Michael Henry de la Mare, Jurats

GRAHAM DANIEL

Plaintiff

v

ANTHONY THOMAS GOVER

Defendant

Whereas on the 31st of October 2008 the Court tried the action of the Plaintiff against the Defendant in the sum of FIFTY FIVE THOUSAND FOUR HUNDRED AND SIXTEEN POUNDS AND SIXTY SIX PENCE (£55,416.66) and whereas the court heard the evidence of the said Plaintiff and Defendant and heard submissions from Advocates M. G. A. Dunster and P. Richardson counsel for the Plaintiff and Defendant respectively and whereas the Deputy Bailiff retired with the Jurats in accordance with Section 14(2) of the Royal Court Reform Guernsey law 2008, the Court this day handed down its reasoned judgment as required under Section 16(1) of the said Law and

1. Found for the Plaintiff.
2. Directed that the Deputy-Bailiff would hear any application for costs and would also hear any application for interest accrued since the commencement of these proceedings if that cannot be agreed. Any such applications to be lodged in writing and tabled at the Interlocutory Court on Friday 21 November.

S M D ROSS
H. M. Deputy Greffier

Approved Judgment
11 November 2008

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Between **GRAHAM DANIEL** **Plaintiff**

and

ANTHONY THOMAS GOVER **Defendant**

JUDGMENT

Date of hearing: 31st October 2008

Judgment handed down: 11th November 2008

Before: Richard John COLLAS Esq., Deputy-Bailiff and Jurats D M Le Page, P G Lane and M H De La Mare

Advocate for Plaintiff: M G A Dunster
Advocates for Defendant: P Richardson

Cases, texts and statutes referred to:

1. The Royal Court (Reform) (Guernsey) Law, 2008
2. The Royal Court (Reform) (Guernsey) Law, 2008 (Commencement), Ordinance 2008
3. Halsbury's Laws of England, Fourth Edition, Contract, para 947
4. *Mountford v Harper (1847) 16 LJ Ex 184*
5. Phipson on Evidence, 16th Edition, paras 6-06 and 6-08
6. Chitty on Contracts, 29th edition, paragraph 22-001
7. *Cherkas v F and P Barretta, 12 May 2000* (English Court of Appeal)

Royal Court (Reform) (Guernsey) Law, 2008

1. This is the first civil case to be heard by the Royal Court following the enactment of The Royal Court (Reform) (Guernsey) Law, 2008 ("the 2008 Law"), which came into force on 29th October when the States approved The Royal Court (Reform) (Guernsey) Law, 2008 (Commencement), Ordinance 2008.

2. Further to Section 14(2) of the 2008 Law, the Deputy-Bailiff did not sum up to the Jurats in open Court, but instead retired with the Jurats. This is the reasoned Judgment of the Court as required under Section 16(1) of the 2008 Law.

3. When we retired, the Deputy Bailiff reminded the Jurats of their respective roles. The Deputy-Bailiff is the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact.

4. The Jurats were directed to take account of all the evidence presented to the Court; the oral evidence of the Plaintiff and the Defendant, who were the only two witnesses to give evidence; and the documents produced to the Court. It was for the Jurats, and not the Deputy-Bailiff, to decide what evidence they accept and what evidence they reject or of which they are unsure. Although the Deputy-Bailiff reminded the Jurats of aspects of the evidence, he directed them that if he appeared to have a view of the evidence, or of the facts, with which they did not agree, the Jurats were to reject his view. The Jurats were directed to take account of the arguments and speeches they had heard, although they were not bound to accept them. The Jurats were further directed that they were entitled to draw inferences, that is to come to common-sense conclusions based on the evidence that they accept, but that they may not speculate about what other evidence there might have been or allow themselves to be drawn into speculation.

5. The Deputy-Bailiff directed that the standard of proof is the civil standard of the balance of probabilities and that to establish something on the balance of probabilities means to prove that something is more likely so, than not so. His directions on the burden of proof are set out later in this judgment.

6. In this Judgment findings of fact are the unanimous findings of the Jurats, unless the Judgment says otherwise.

7. We have taken account of the requirements of Section 16(5) of the 2008 Law, namely:

> *"A reasoned judgment in civil proceedings in which the Jurats (and not the Bailiff alone) are sitting shall contain –*
>
> *(a) the Jurats' findings and decisions,*
> *(b) any dissenting findings or decisions made by different Jurats,*
> *(c) the identity of the Jurats making dissenting findings or decisions,*
> *(d) the Bailiff's findings, decisions and directions of law and procedure, and*
> *(e) the application of his findings, decisions and directions of law and procedure to the facts.*
>
> *In this section "the Bailiff" means the person presiding over the proceedings."*

<u>Uncontested evidence</u>

8. Much of the evidence was agreed or, at least, was not in dispute. We will begin by reviewing the uncontested evidence before considering that which was disputed. Page numbers cited refer to pages in the trial bundle.

9. The Plaintiff claims the sum of £50,000, representing the amount of a loan ("the Loan") and interest thereon in the sum of £5,416.66.

10. The history of the Loan begins on 12th June 2000 when Guernsey Strawberry Farm Limited ("GSF") lent £50,000 to Black Dog Trading Company Limited ("Black Dog"). GSF owned premises known as the Guernsey Strawberry Farm in St Saviour's. Black Dog was its tenant and operated the business conducted at the Strawberry Farm.

11. At that time the Plaintiff was the sole owner of GSF. At some time, we were not told when, but prior to May 2006, the Defendant acquired a 76% shareholding in Black Dog and Mr John Archer, the finance director of the Defendant's group of companies, acquired the other 24% which he held on behalf of the Defendant's family.

12. The Plaintiff described himself as an experienced businessman operating mainly in the UK where he was a director and shareholder of companies employing over 1,000 people. He is also a director of 4 or 5 Guernsey companies most of which owned investment properties and he has been involved in a number of property developments in Guernsey. He said that he always documented agreements and acted on the advice of his lawyers and accountants although that was challenged by the Defendant who said the Plaintiff did not always record matters in writing.

13. The Defendant was also a businessman and has been involved in a number of businesses in Guernsey.

14. On 25th May 2006, GSF, Black Dog and the Defendant entered into a Novation Agreement (page 4 and again at page 16) whereby, inter alia, the Defendant undertook "*to perform the obligations, assume the obligations and otherwise be bound by the terms of the loan (as varied herein) in every way as if he had at all times been party to the Loan in place of* [Black Dog]" (paragraph 1.3 of the Novation Agreement).

15. Paragraph 1.4 provided as follows:

> *"1.4 [GSF] and Mr Gover hereby agree that the terms of the Loan shall be varied as follows:-*
>
> *(i) The repayment date for the Loan shall be 1st March 2024 or such earlier date as Mr Gover may elect in writing or immediately without further notice on the happening of any of the events referred to in paragraph (iv) below (the "Repayment Date");*
>
> *(ii) The Loan shall be repaid in full in one bullet repayment on the Repayment Date to the account of Mr G Daniel (or his heirs, successors or assignees) as may from time to time be notified by Mr G Daniel or on his behalf and may be prepaid at any time by Mr Gover in*

accordance with paragraph (i) in full but not in part;

(iii) The Loan shall accrue an interest in the sum of £5,000 per annum until the Repayment Date which shall be payable in 12 equal monthly instalments of £416.66 on the first day of each month by standing order to the account of Mr G Daniel (or his heirs, successors or assignees) as may be notified by Mr G Daniel or on his behalf to Mr Gover from time to time.

(iv) If:

(a) Mr Gover fails to pay any amount due under this Agreement on the due date or on demand, if so payable;

(b) Mr Gover fails to observe or perform any of his obligations hereunder;

(c) the Lease is terminated or assigned by BDT or Mr Gover ceases at any time to hold not less than 75% of all the issued share capital in BDT;

(d) Mr Gover defaults under or commits a breach of any other agreement he has relating to borrowings or indebtedness of any kind or of any guarantee he may have given;

(e) Mr Gover's affairs are declared "en etat de desastre" or any form of distress or execution is levied or enforced against any of his assets or he becomes unable to pay his debts as they fall due;

(f) anything analogous to (e) occurs to any company of which Mr Gover is the majority shareholder or any steps are taken against or for the winding up of any such company;

then, at once or at any time thereafter, GSF may declare the Loan to be immediately due and repayable whereupon it shall become so due and payable together with all accrued interest thereon."

16. Also on the 25th May 2006, GSF assigned the Loan to the Plaintiff in consideration for the sum of £1. Notice of the Assignment was given to the Defendant on the same day (pages 23 and 24). The combined effect of the Novation Agreement and the Assignment was to replace the debt due from Black Dog to GSF with a debt due from the Defendant to the Plaintiff.

17. At the same time, the Plaintiff sold his shares in GSF to a third party. He explained that the reason for transferring the Loan out of GSF was because it was repayable on demand and the new owners could have demanded repayment especially if, as he suspected, there was a planning opportunity. If Black Dog had been unable to pay, the new owners could have closed down the business. The Defendant said that at the time the Plaintiff told him he was doing him a favour.

18. The Defendant set up a standing order to pay the sum of £416.66 monthly to the account of the Plaintiff, as required under the Novation Agreement, with effect from 1st July 2006 (page 26).

19. The Defendant failed to pay the interest due in August 2006 although he said he was not aware of that failure until much later. All other payments were made until he stopped paying interest in April 2007 but no payments have been made since that date.

20. In April 2007 the Plaintiff agreed with the Defendant that he would buy a property known as the Northerners Hall, near Nocq Road, St Sampson's. The property had been purchased in March 2005 by GSF Holdings Ltd ("Holdings"), a company owned by the Defendant (page 96). Conditions of Sale were executed in the form of The Guernsey Bar Conditions of Sale (1997) Edition and dated 16 May 2007 (page 110). The Conveyance was completed on 5th June 2007; the purchaser was a company wholly owned by the Plaintiff and which had been formed for the purpose of acquiring the property. The consideration expressed in the conveyance and in the Conditions of Sale was the sum of £330,000 receipt of which was acknowledged by the vendor in the conveyance.

21. The central issue in dispute in this case is whether that was the full consideration or whether the true price was £380,000 of which £50,000 was "*to account for any monies due under the Novation Agreement*" as the Defendant pleaded in paragraph 6.2.2 of his defences (page 13).

22. At the time of the purchase of the Northerners Hall, planning permission had been sought to demolish the building and construct an underground car park and four flats. The Plaintiff said he was interested in the building because he believed a change of use would be granted from a social use class to residential. He said he was not interested in the Defendant's plans because they would not be profitable. He considered the existing building was sound and would not have to be demolished, saving £100,000. Also, he saw no need to build an underground car park and would thereby save another £100,000 because the proposed car park would have been below sea level. So, he was interested in the existing structure in the expectation that planning consent would be given for a change of use.

23. At the end of January 2008, the planning application was rejected. The Plaintiff said he was not surprised because he had been told that the plans would not be approved until the development of the adjacent Leale's Yard had been finalised.

24. By letter dated 18th March 2008, Advocate Dunster, acting on behalf of the Plaintiff, wrote to the Defendant demanding immediate repayment of the Loan, together with £5,416.66 by way of arrears of interest which had accrued (page 15). The letter stated the Plaintiff was entitled to declare the Loan and accrued interest to be immediately due and payable in accordance with paragraph 1(iv) (which we have taken to mean 1.4(iv)) of the Novation Agreement.

25. These proceedings were issued in March 2008.

26. We also heard about an earlier action the Plaintiff had instituted against the Defendant for recovery of a debt of £5,000. The £5,000 debt arose when the Plaintiff sold his shares in GSF in May 2006. At that time Black Dog was paying rent at the rate of £11,000 per month. In respect of the month when the sale took place, Black Dog offered several cheques to a total of £11,000 of which £6,000 was duly paid. The Defendant had said he could not pay the balance of £5,000 until the end of the month by which time the new owners would have set up a new bank account. As the purchasers did not want to take the benefit of the rent arrears and the Plaintiff wanted to ensure that he received the £5,000, the Defendant altered the cheque to make it payable to the Plaintiff rather than GSF. The cheque was later stopped. The Plaintiff said he was annoyed so he issued proceedings for £5,000. The Defendant offered to pay by instalments and the action was adjourned so he could do so. The Plaintiff said he received two payments of £1,000 each. The Defendant did not remember whether there were two or three payments but he said he accepted the Plaintiff's evidence that there were only two. By then the Plaintiff said he had incurred £2,000 in legal fees and as they had reached agreement over the Northerners Hall he was willing to cut his losses by agreeing to withdraw the proceedings on condition that the sale was completed. A Settlement Agreement was signed dated 16 May 2007 whereby he agreed to withdraw the claim for £5,000 (page 30). Clause 3 thereof said:

> *"This Agreement shall not come into force until the sale of the property known as the Northerners Hall, between GSF Holdings Ltd as Vendor, of which the Defendant is a Director, and the Plaintiff as Purchaser, as set out in the Guernsey Bar Conditions of Sale attached hereto, has taken place."*

Disputed evidence

27. We will now review the evidence which is disputed by one or other of the parties.

28. They disagreed as to when they first met. The Plaintiff said he met the Defendant when he acquired his shareholding in Black Dog. The Defendant said they first met when he owned La Quinta Hotel and the Plaintiff came to eat in the Hotel. The Plaintiff asked him then if he would like to buy the Strawberry Farm. He was not interested at that time and it was some 3 or 4 years later when he bought Black Dog. He also then guaranteed the payment of the rent together with a Mr Ken Smith. The meeting at La Quinta Hotel and the discussion at that time about buying the Strawberry Farm was not put specifically to the Plaintiff in cross-examination. The Jurats do not attach any significance to this issue. They accept the parties had a cordial business relationship as befits a normal landlord and tenant.

29. The main dispute concerns the purchase price for the Northerners Hall. The Plaintiff said the price was agreed during a meeting in his study at his house in April 2007. In cross-examination he said that there had been some previous telephone discussions about the property but said they had not gone into any great detail. At the April meeting he offered £330,000 subject to looking at the building and the plans. The Plaintiff said that after inspecting the property and the plans, he decided on the 3rd May to buy it.

30. The Defendant agreed there was such a meeting and agreed that he then handed over the plans and the keys to the building so the Plaintiff could inspect it. He said that at

the April meeting there was some chit-chat but not a heavy discussion; the Defendant was in a hurry to leave for England.

31. For his part, the Defendant said that the price had been discussed and agreed during a telephone conversation before the April meeting. He told the Plaintiff he wanted £400,000. The Plaintiff denied that the Defendant ever told him he wanted £400,000 although someone else had told him that the Defendant was holding out for that price. The Defendant said the Plaintiff's initial offer was £370,000 or £375,000 and after many minutes on the telephone they agreed on £380,000. He said the deal was £380,000 minus the £50,000 so £330,000 was to be paid. The deal was also to include the £5,000 debt.

32. The Defendant said that he asked the Plaintiff about the £50,000 debt at the April meeting, that the Plaintiff said that it was personal between the two of them and that because there was a tax advantage to the Plaintiff it would not be recorded in writing. The Defendant said he did not realise there was a congé advantage. He was happy to trust the Plaintiff. Any tax advantage was a matter for the Plaintiff, nothing to do with him.

33. He said he could not have sold for £330,000 because of the debts he owed. The bank who had the only registered charge were owed about £200,000; he later learned that the actual figure was just over £206,000. There was an outstanding sum owed to the Northerners Sports Club of £45,000 although they later agreed to accept £30,000. He owed £50,000 to a friend who expected £30,000 from the sale and £25,000 to another friend. There was also the debt of £50,000 owed to the Plaintiff.

34. The parties also disagreed as to how often they have spoken since the sale was completed. The Plaintiff said there were three telephone conversations in August 2007 when the Defendant phoned to enquire whether planning permission had been granted. He said that in the last of those conversations, on Friday 31st August, the Defendant also asked to be reminded of the price he had paid for the Northerners Hall because he did not have the documents. The Plaintiff told him it was £330,000. He said that he thought it was very strange that the Defendant was asking.

35. The Plaintiff did not ask about the arrears of interest that had accrued during any of the August telephone calls. Nor did he ask for repayment of £50,000 which he could have demanded because the interest was in arrears. Furthermore, he did not ask when the Defendant would pay the sum of £25,000 which the Defendant had promised to pay out of the proceeds of sale of the Vazon Bay Hotel as a part repayment of the Loan.

36. On 2nd September 2007 the Plaintiff left the Island to go to Spain. He later went to Canada and said he spent up to six months of every year away from Guernsey. He explained that the reasons he did not instruct his Advocate to demand the loan and the arrears until March 2008 was because of his absences from Guernsey and also because £400 per month was not a significant sum to him.

37. The Plaintiff denied the Defendant's assertion that he took action because he was disappointed that the planning application had been refused. He said he was not

disappointed at the refusal for the reasons he had given which we have set out earlier in this judgment.

38. The Defendant said they had many more conversations both before and after 31st August 2007, in which he offered his help in relation to the planning application. He described one conversation when they met face to face outside the Court building before the planning application was rejected. He said the Plaintiff told him then that he was going to write another stiff letter to the IDC. The Plaintiff did not mention such a meeting in his evidence. It was not put to him specifically in cross-examination although he was cross-examined in general terms about how often they had met.

39. Jurat Le Page asked the Defendant about a document that appears in the trial bundle at page 144. The Defendant said it appeared to be in the handwriting of his Finance Director, John Archer. Jurat Le Page was interested in the handwritten note because it refers to the purchase and sale of the Northerners Hall and states:

> "*sold 380k – 50k to G Daniel re [Strawberry Farm] net price 330k sale price*".

40. The author of the note did not give evidence. The note is undated. The Deputy-Bailiff directed the Jurats that if they decided the note recorded something the Defendant had said to Mr Archer then it was hearsay and inadmissible as proof of the contents of the note. If the note was admissible the Jurats were to consider carefully the evidential value of the note.

41. The note reads, in part, "*Stoneworkers Hall – purchased 3yrs ago*". The Defendant's company, Holdings, bought the property by conveyance dated 10th March 2005 so the inference is that the note was written in 2008, probably around the time these proceedings commenced. The Jurats concluded that it would be of no evidential value, even if it was admissible. Accordingly, they have disregarded it.

Advocate Dunster's submissions

42. On behalf of the Plaintiff, Advocate Dunster submitted he was a businessman who does things properly, in writing and through Advocates. It was inconceivable that he would agree to waive a loan of £50,000 informally.

43. The Novation Agreement, the Notice of Assignment of the Loan and the Settlement Agreement were all in writing and paragraphs 5.1 and 5.3 of the Novation Agreement require any waivers or variation of Agreement to be made in writing. If the Defendant's claim was correct, why was the waiver of the Loan not reduced to writing?

44. In June 2007, the debt owed was not £50,000 but £51,666.64 including accrued interest.

45. Neither in the conveyance of 5th June 2007 nor in the Advocate's conveyancing file is there any mention of the waiver of the Loan.

46. The certified extract of the minutes of the Board of Directors of Holdings recording the decision to sell the Northerners Hall does not mention the waiver of the Loan.

47. The Plaintiff took the trouble to record in a Settlement Agreement the compromise of the £5,000 debt. Why would he not do the same over a £50,000 debt? Furthermore, when preparing that Agreement there was the opportunity to include the £50,000 debt if they had agreed to waive it.

48. The agreement to compromise the £5,000 debt was between the two of them in their personal capacities and so separate from the conveyance of the Northerners Hall between their two companies even though the Settlement Agreement was linked to completion of the conveyance.

49. The £50,000 debt was also personal to the two parties and separate from their companies. Furthermore, the Defendant was not the sole owner of Holdings. He owned only 76% of the shares.

50. The Northerners Hall was conveyed in March 2005 for £300,000. Why should its value have jumped to £380,000 two years later when all that had happened was that planning applications had been turned down?

Advocate Richardson's submissions

51. On behalf of the Defendant, Advocate Richardson submitted that these two businessmen live in a different world from that described by the Plaintiff. They treat themselves and their companies as one and the same; they do deals on the shake of a hand. In their world documents often do not mean what they say or do not record the whole picture. The Defendant had described other monies he had borrowed or lent to friends without any documentary record of the loans.

52. He argued that the assignment for £1 of the Loan of £50,000 plus nearly 30 years interest at 10% did not represent the true value of the transaction.

53. He urged the Court to look at what happened and the surrounding circumstances as it was inevitable that neither of the parties would change their case under cross-examination.

54. He mentioned the previous discussions between them about the sale of the Northerners Hall and an offer of £390,000 received by the Defendant. He said it was inconceivable that someone like the Plaintiff would pay £330,000 to the Defendant if the latter owed him £50,000 plus arrears of interest.

55. He asked why the Plaintiff settled the £5,000 debt if, at that time, he was owed over £50,000.

56. In their conversation after completion of the conveyance, he asked why the Plaintiff would not have asked about the debt and the interest if it was still outstanding. He said there was no adequate explanation as to why the Plaintiff had delayed taking action until March 2008.

57. He submitted that the event which sparked the action was the Plaintiff's disappointment at the rejection of the planning application.

Advocate Dunster's reply

58. Advocate Dunster replied to those submissions. He said each of them was wrong and collectively they were wrong and he contradicted each of his contentions.

Burden of Proof – Deputy-Bailiff's Directions

59. Counsel disagreed as to where the burden of proof lay in relation to the Defendant's assertion that they had agreed to waive the Loan as part of the agreement over the sale of the Northerners Hall. Advocate Dunster submitted the burden was on the Defendant to show that a waiver had been agreed. On the other hand, Advocate Richardson submitted that it was an essential part of the Plaintiff's case that he had received no money and so the Plaintiff had the persuasive burden of establishing that fact; the Defendant having led evidence of the waiver, it was for the Plaintiff to disprove it.

60. The disagreement only became apparent during closing speeches so the Deputy-Bailiff invited both counsel to make a further written submission on the burden of proof only. Both counsel responded and the Deputy-Bailiff is very grateful to them both.

61. Advocate Richardson relied upon Halsbury's Laws of England, Fourth Edition, Contract paragraph 947:

> *"A payment may be proved either by the production of a receipt or by other evidence from which the fact of payment may be inferred."*

He also cited the authority of *Mountford v Harper (1847) 16 LJ Ex 184* as further illustration of that point:

> "*The mere payment to the plaintiff at the bank of a cheque drawn by the defendant in favour of the plaintiff, is not evidence that the money was paid by the defendant to the plaintiff."*

He submitted that the payment of the conveyance purchase price of £330,000 represented the discharge and repayment of the Loan.

62. The Deputy-Bailiff did not consider those authorities to be of assistance in relation to the burden of proof. Payment of the conveyance purchase price could only be a discharge of the Loan if that was what the parties had previously agreed. The issue is whether they had so agreed.

63. Advocate Richardson also cited a further extract from paragraph 947 of Halsbury's volume on Contract:

> *"and payment may be presumed from the length of time which has elapsed since the debt became due, even though it may not be barred by the lapse of time, in the absence of any explanation of the delay."*

The Deputy-Bailiff directed that it was for the Jurats to decide whether there had been an adequate explanation of any delay on the part of the Plaintiff in demanding payment of the arrears of interest and repayment of the capital sum.

64. In respect of his submission on the burden of proof, Advocate Richardson relied upon Phipson on Evidence, Burden of Proof in Civil Cases, 2005 paragraph 6-06:

> *"The burden of proof lies upon the party who substantially asserts the affirmative of the issue. If, when all the evidence is adduced by all parties, the party who has the burden has not discharged it, the decision must go against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reason."*

65. The Deputy-Bailiff directed that the affirmative issue that had to be established in the present case was raised by the Defendant namely the allegation that the parties agreed to waive the Loan as part consideration for the sale and purchase of Northerners Hall. The Deputy-Bailiff reached the same conclusion when following a further extract from Phipson cited by Advocate Dunster who submitted that the Defendant was seeking to establish a case of 'accord and satisfaction' (Chitty on Contracts, 29th edition, paragraph 22-001). He quoted from paragraph 4-05 in the 15th edition of Phipson on Evidence and it is noted that a similar passage is in the 16th edition at paragraph 6-08(a):

> *"in actions on contract, the burdens of proving the existence of the contract, performance of conditions precedent, breach and damages are all on the claimant; while the defendant has the onus of facts pleaded in confession and avoidance, e.g. infancy, release, recission, accord and satisfaction."*

Regrettably, the learned authors of Phipson do not cite any authority for the latter proposition. However, Advocate Dunster has helpfully drawn attention to the decision of the English Court of Appeal in *Cherkas v F and P Barretta, 12 May 2000* in which Buxton LJ said at paragraph 25 that it was for the defendant to establish the agreement he relied upon in his defence of accord and satisfaction.

66. Accordingly, the Deputy-Bailiff directed the Jurats that the Plaintiff had the burden of proving his case on the balance of probabilities but it was for the Defendant to prove the existence of an agreement to waive the Loan. Therefore, if the Jurats consider that, on that issue, both witnesses were equally credible and they could not decide that one case was more likely to be true than the other, they must find for the Plaintiff on that issue. On any other issue, if the Plaintiff had failed to discharge the burden of proof, they were to find for the Defendant.

The Findings of the Jurats

67. The Jurats are persuaded that the Plaintiff is a businessman who reduces to writing the agreements he enters into and acts in accordance with advice from his lawyers and

accountants. Paragraphs 5.1 and 5.3 of the Novation Agreement require any waiver of any provision of the Agreement or any variation thereof to be evidenced in writing. No written waiver of the Loan is in existence.

68. The Defendant has produced no evidence, other than his own testimony, to substantiate his allegation that the parties agreed to waive the Loan.

69. The Jurats reject the submission that the Plaintiff's documents do not mean what they say or do not tell the whole picture. Advocate Richardson placed reliance upon the Assignment of the Loan to the Plaintiff for £1. However, that Assignment was executed at a time when he was selling GSF and was waiving the director's loan due to him by the company. In all the circumstances the Jurats consider it is not surprising that the Assignment is expressed to be in consideration for a nominal sum of £1.

70. Advocate Richardson drew comparisons with the compromise of the £5,000 debt recorded in the Settlement Agreement. The Jurats view it differently. The debt of £5,000 arose in connection with a failure to pay part of the rent due on the Strawberry Farm. It was a debt due from the Defendant to the Plaintiff in their personal capacities as it arose out of failure to pay part of the rent due from Black Dog in May 2006 in respect of the Strawberry Farm which the Defendant had personally guaranteed. The original debt was not connected with the Northerners Hall and it is not suggested that the compromise of the action to recover the £5,000 debt formed part of the consideration for the sale of the Hall although paragraph 3 of the Settlement Agreement says that the Agreement will not come into force until the sale of the Hall has taken place. The Plaintiff's evidence was that it had cost him £2,000 to recover two instalments of £1,000 each and he decided not to pursue it further if the sale was completed. That is a reasonable and plausible explanation which the Jurats accept.

71. The Defendant said in evidence that he had received an offer of £390,000 for the Hall. No other details of the offer were disclosed, there was no independent proof that such an offer had been received and no other evidence adduced to show that it was indeed worth £390,000.

72. Advocate Richardson challenged the Plaintiff's case by asking why he would have paid the Defendant £330,000 if he was still owed £50,000 plus interest. In the view of the Jurats, the sale of the Hall and the debt of £50,000 were two separate transactions, they had arisen in different circumstances, they involved different parties or different corporate entities and the consideration in the Conditions of Sale and the Conveyance was £330,000 so the Plaintiff's company, Stonecutters Properties Ltd, was obliged to pay £330,000 and nothing less.

73. The Jurats do not attach any significance to the alleged delay on the Plaintiff's part in instructing his Advocate to demand payment of the arrears of interest and repayment of the capital sum. He took action well within the period of six years allowed in law. Furthermore, he had been absent from the Island for long periods. Also, he may not have been aware of the amount outstanding, or he may not have regarded it as significant; he is a man of some wealth for whom £400 per month would not be a sizeable sum.

74. The Jurats accept the Plaintiff's evidence that he was not disappointed to receive the planning refusal in January. He was expecting it because he knew the planners wanted to see finalised proposals for Leale's Yard and he did not want to develop the property in the manner proposed in view of the demolition costs and the costs of constructing the underground car park. The Jurats do not accept that the refusal of planning permission was the trigger to demand repayment of the Loan.

75. In his evidence, the Defendant said he could not afford to sell the Northerners Hall for only £330,000 in the light of the monies he owed. In the list of debts that he used to justify that claim he included the debt of £50,000. However that debt was unconnected with the Northerners Hall, it related to the Strawberry Farm and involved different corporate entities. There was no requirement to repay it at that time. In the absence of any arrears of interest or other event of default and in the absence of any demand for repayment, the debt was not repayable until the year 2024.

Conclusion

76. Having carefully reviewed all the evidence and having carefully considered the submissions of counsel, the Jurats consider that proof of payment of £330,000 could not by itself prove that the Loan had been waived unless that was what the parties had agreed. The decision of the Jurats is that there had not been such an agreement.

77. The decision of the Court is therefore to find for the Plaintiff. The Deputy-Bailiff will hear any application for costs whilst recognising that the normal order is that costs will follow the event. He will also hear any application for interest accrued since the commencement of these proceedings if that cannot be agreed. Any such applications are to be lodged in writing and tabled at the Interlocutory Court on Friday 21 November.

