

Judgment 37/2009

**Sheppard v C.I. Fire & Security (Guernsey) Ltd –
Royal Court (Civil Action File 1339) – 29 July 2009**

Loi relative aux Preuves 1865, (Article 35) – plaintiff employee’s claim for back pay and holiday pay - whether the hourly rate of pay, as stated in the written contract of employment, had been varied by oral agreement – parole evidence rule – Jurats dismissed the action with costs

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1339

The 29th day of July 2009 before John Russell Finch Esquire, Lieutenant Bailiff and Alan Cecil Bisson, and David Osmond Le Conte Esquires and Dr Susan Mowbray, Jurats of the Royal Court

WAYNE BRENT SHEPPARD

Plaintiff

v

C.I. FIRE & SECURITY (GUERNSEY) LIMITED

Defendant

In the action of the Plaintiff against the Defendant in the terms attached hereto the Court having on the 23rd June tried this action, Advocate G K Bell appearing for the Plaintiff and the Defendant Company being represented by Mr S Annetts, Director, and having given in relation to the contract of employment claim, judgment for the Defendant on a majority of 2 – 1 and in relation to the holiday pay claim judgment for the Defendant unanimously the Court this day handed down judgment for the said decisions in the terms attached hereto. No Order was made as to costs.

S M D ROSS
Her Majesty’s Deputy Greffier

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

Between

WAYNE BRENT SHEPPARD

Plaintiff

and

C.I. FIRE & SECURITY (GSY) LTD

Defendant

Case heard on: 23rd June 2009

Decision handed down: 29th July 2009

Before: John Russell FINCH Esquire, Lieutenant-Bailiff

and

**Alan Cecil Bisson and David Osmond Le Conte Esquires,
And Dr Susan Mowbray, Jurats of the Royal Court**

Counsel for the Plaintiff: G K Bell

The Defendant Company was represented by Mr S Annetts, Director

Statute referred to:

Loi relative aux Preuves 1865, Article 35

Cases referred to:

1. *Bank of Australasia v Palmer [1897] AC 540 PC;*
2. *Goss v Lord Nugent (1833) 5 Barnewell & Adolphus 58; 100 ER 713;*
3. *Mercantile Bank of Sydney v Taylor [1893] AC 317 PC;*
4. *Shogun Finance Limited v Hudson [2003] UKHL 62*
5. *Tucker v Bennett (1887) 38 Ch. D 1*
6. *Hougue Fougue Property Company Limited v National Westminster Bank Finance (CI) Limited Guernsey Court of Appeal (Civil Division) (1972)*

Textbooks referred to:

Phipson on Evidence (2005) 16th Edition, para 42-12, page 1247;
Chitty on Contracts (1999) 28th Edition, paras 12-094 – 12-097, pages 624 – 626

Decision

1. This case was heard for a day on 23rd June, 2009. The Plaintiff (hereafter “P”), gave evidence himself and called his step-father, Mr Selfe. The Defendant Company (hereafter “D”) called Mrs Annetts, a Director. The decision on the two remaining heads of claim was delivered after the Jurats and Lieutenant-Bailiff retired and it was indicated that the reasons would follow thereafter. The claim was for £3,828.00 back pay for one year (October 2007 – 2008) and three days holiday pay at £90 per day, total £270.00. The claims were contested. References to pay numbers that follow are to those in the trial bundle prepared by P’s Advocate. Documentation provided by the Defendant Company was included in this bundle.
2. D is an alarm, security and CCTV provider and P had been employed as an engineer by them since 2001. In September 2004 he was disqualified from driving for 3 years for an offence of excess alcohol. Before a person can return to the roads with a full licence after such a sentence he is required to re-take his driving test, now including theory and practice. Despite 8 attempts at the theory part, P has been unsuccessful and is therefore limited to a Provisional driving licence. Accordingly, when D kept him on after his conviction, he had to be taken to the various locations where his engineering services were required.
3. The central issue in this case was the document found at Tab B, pages 8-9 of the bundle. P’s Contract of Employment, signed and dated 12.10.2007. this is not a professionally produced document and Clause 12 reads:

“Wages per hour£12.00per week£450.00by cheque”.

4. It was common ground that P was paid £10.00 per hour, the figure applicable before the signature of this contract. There was no dispute on the dates or the figures. The other issue was £270.00 holiday pay for three days. P claimed the one year period relevant to the amount of holiday pay lasted from the date of the contract, Clause 5 of which deals with this question. He has been paid for twelve days only. When did P’s holiday year start?
5. It was contended by Advocate Bell, on behalf of P, that the Contract of Employment said £12.00 per hour so that was the rate payable, not £10.00. The parol evidence rule was also referred to, and P produced a list of authorities (the cases set out earlier) in support of the proposition that *“Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract”* (Bank of Australasia v Palmer [1897] AC 540 at 545). Alleged oral evidence, if adduced, could not vary the clear terms of a written contract. It was submitted on behalf of D that P was told in advance and also agreed at the time of the contract being entered into, that his salary would only rise to £12.00 per hour when he was back on the roads driving. P also cited Article 35 of the Loi relative aux Preuves of 1865 and suggested that evidence of negotiations was inadmissible and there was a complete agreement between the parties. D’s position in summary, was that P was told the day he was taken off the road that he would not get any rise until he was back driving and that P understood and consented to this. The Jurats set out their majority and minority findings on the facts later.

Legal Directions

6. The Jurats were directed as follows (substantially based on the principles set out in Chitty on Contracts, 28th edition, vol 1, paras 12.094 – 12.097):

- (i) The parol evidence rule, as set out in the cases cited on behalf of P was described;
- (ii) However, it is and has long been subject to a number of exceptions. In the words of Chitty, *“In particular, since the nineteenth century, the courts have been prepared to admit extrinsic evidence of terms additional to those contained in the written document if it is shown that the document was not intended to express the entire agreement between the parties. So, for example, if the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement.”* Chitty continues (para 12-095):

“It cannot therefore be asserted that, in modern times, the mere production of a written agreement, however complete it may look, will as a matter of law render inadmissible evidence of other terms not included expressly or by reference to the document.”;

- (iii) it is always open to a party to adduce extrinsic evidence to prove that the document is not a complete record of the Contract. The Law Commission in 1986 stated (para 12-097):

“.....there is no rule of law that evidence is rendered inadmissible or is to be ignored solely because a document exists which looks like a complete contract. Whether it is a complete contract depends upon the intention of the parties, objectively judged, and not on any rule of law.”

It was noted in passing, that the Guernsey authority, the Hougue Fouque CASE (Supra) permitted extrinsic evidence;

- (iv) however, the burden lies on D in this case, on the balance of probabilities, to show that any further contractual terms were agreed outside the written terms of the document.

Majority Decision

7. Jurats Bisson and Mowbray found the facts as follows, having considered the oral evidence and relevant documentation: P is not verbally fluent and lacks confidence; in court he was diffident as he was on the CCTV recording. Even though this recording was covert, it was regarded as admissible by the parties, but whilst it may have been relevant to other issues (e.g. on employment matters), it was the evidence adduced at the hearing which was most helpful. Where the evidence of P and Mrs Annetts conflicted, the majority, on the facts, preferred that of the latter. The majority finding of fact that each time P received his wages, he was forcefully (as is her wont)

advised by Mrs Annetts that the amount could be more if he was back driving. P, whilst being a person of very few words, agreed with phrases such as “*Er, I know*”. The pre-condition of regaining a full licence was agreed with P on numerous occasions before the Contract was signed and each time D paid him. The majority accept, to the requisite evidential standard, the burden here being on D, that P was told the day of his disqualification that he would not receive a rise until he was back driving for himself. P knew this throughout.

8. The Contract of Employment is not a professionally produced document. Had it been perhaps a lot of trouble would have been averted. The majority also noted Clause 11 (page 9 of the Bundle), which states:

“11 Transport – You will be supplied with a company vehicle which must be kept clean and tidy inside and out at all times.

In return, petrol will be paid for by the Company and the vehicle can be used out of working hours.”

9. The majority took the view that it was implicit from the wording that this entailed P would be the person driving it himself on the public roads. One other significant factor, it was concluded, was that P himself admitted that in the period he was getting £10.00 per hour instead of £12.00, he did “*nothing*” and did not query it throughout that period. Even allowing for his natural reticence, this does not, in the view of the majority, assist his case. The evidence of P’s step-father and co-worker, Mr Selfe, did not assist the majority in their determination.
10. The problem with the case was touched upon by Mrs Annetts in the course of evidence. There is still a “*Guernsey*” way of doing things, where written agreements are not drawn up and informality is the norm. The majority noted the amateur nature of the written agreement, and consider that generally disputes would be minimised if such things were drawn up by a qualified person. Mrs Annetts and her husband both considered that they were hard done by on the facts of this case. There is something to be said for the view as they kept P on during a three year period of disqualification and had frequently to provide a driver. D then ensured P was booked in eight times for his driving theory test, which he still did not pass. Having carefully assessed P, the majority concluded it was very unlikely he would have taken any action unless somebody else prodded him into it.
11. The majority concluded that, having preferred the evidence put forward on behalf of D and noting P’s evidence, that the burden of proving that regaining a full licence as a pre-requisite to obtaining a rise, which had to be discharged by D was met. In accordance with the legal directions given, it was therefore found that the written agreement did not embody all the terms of the Contract and that throughout P knew of the driving licence requirement.
12. In relation to the subsidiary question of the three days holiday pay, all the Jurats considered that P had failed to establish that the year ran from the date of the Contract. On the facts, it was decided it was from January and that D’s contentions were preferred. Accordingly, P had only worked for around nine months of the year and had received his entitlement.

Minority Decision

13. Jurat Le Conte would have found in favour of P on the wages claim. It was understood that the burden of showing that the written agreement did not embody all the terms of the Contract fell upon D. Having considered the evidence Jurat Le Conte concluded that P is not a strong personality and was subjected to some hectoring treatment in the CCTV, which shows he cannot really stick up for himself, or even express himself in the ordinary way. When looking at P's account and assessing D's submissions, it was not possible to say where the truth lay. It was not clear-cut. Jurat Le Conte was directed that in a situation where the probabilities were considered equal, and it was not possible to conclude either version was more likely than the other, the burden had not been discharged. Here this particular burden lay upon D and it therefore followed that P was entitled to judgment as D had not discharged the burden.

Decision

14. In relation to the contract of Employment issue, there was judgment for D on a majority of 2 – 1. In relation to the holiday pay issue, there was judgment for D unanimously.

Costs

15. No Order was made.