

Judgment 40/2005

**FR Properties Limited v. Skipton – Royal
Court (Civil action file 907) – 11 July,
2005**

Land law – conditional agreement to sell realty – preliminary issue – date by which a survey was to be obtained.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 11th day of July, 2005 before Alan Robin Winston Hancox Esquire E.G.H., C.B.E., Lieutenant Bailiff; sitting alone

In the matter of:

F. R. PROPERTIES LIMITED

(Plaintiff)

and

ANTHONY WILLIAM SKIPTON

(Defendant)

Whereas on 27th June, 2005, the Lieutenant Bailiff considered a preliminary point of law in the above matter and heard thereon Advocates C. H. Edwards and J. D. Loveridge, Counsel for the Plaintiff and Defendant respectively

The Lieutenant Bailiff this day gave judgment in the terms attached hereto and

1. Answered the agreed issue in the following terms: -
“The conditions of sale dated 7th November, 2002, were subject to a survey being obtained by 31st December, 2002
2. Reserved the questions of costs

S. M. D. ROSS
Her Majesty’s Deputy Greffier

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

Between:

F. R. PROPERTIES LIMITED.....Plaintiff

And

ANTHONY WILLIAM SKIPTON.....Defendant

Judgment

1 In or about April, 2002, the parties entered into negotiations for the sale and purchase of the properties known as Skyline Flats and No. 4, St. George's Esplanade, both of which are situated in St. Peter Port. They consist of separate units in the form of flats into which these former dwelling houses were divided. They were referred to in the pleadings (and will herein be so described) as 'the said properties', there being no material difference between them for the purposes of the question of interpretation which the Court now has to decide.

2. The consideration agreed between Mr. Charman, as estate agent, (formerly the Second Defendant) on behalf of Mr. Skipton, who was the intended vendor and is now the sole Defendant, for both properties, was £1,070,000, which included £85,000 for the contents. It is not in dispute that the deposit of £53,500, being five per cent of the purchase price, was duly paid by the Plaintiff company, as purchaser, through its principals, Messrs. Holland and Granville.

3. The Agreement of Sale follows the standard form of the 1997 Guernsey Bar Conditions of Sale. The copy at TAB 7 of the Trial Bundle, apparently signed by Mr. Skipton, was expressed as being made on 15th October, 2002, which is at variance with that inserted in the copy at TAB 8. However, since Advocate Edwards, for the Plaintiff/purchaser, and Advocate Loveridge, for the Defendant/vendor, both referred to the copy at TAB 8 during argument, and that date is consistent with the 7th November, as stated in the agreed issue, I shall also refer to it for the purposes of this Ruling.

4. At all events both copies of the Agreement specified the Completion date as 29th April, 2003, which is consistent with the first letter on record from Mr.Charman to Advocate Prentice of Ozannes, and with that from Advocate Ferbrache, also of Ozannes, of 29th July, 2002, which said, *inter alia*:

"I am instructed that my client now wishes to proceed with this matter, albeit as I understand it completion will not be until 2003 in any event"

5. For the purposes of the agreed issue which the Court is called upon to decide the relevant Condition of Sale is contained in Condition G. This confers on the purchaser the right to withdraw from the sale by giving notice to the Vendor or his agents in the circumstances specified which include the following:

“(Survey)

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

6. Despite the use of the word 'immediate' no steps seem to have been taken towards arranging the survey until January, 2003, as alleged in sub-paragraph (2) of paragraph 9 of the Cause. Further delays then occurred as recited at sub-paragraphs (3) to (5) partly due to alleged difficulties in obtaining access to the properties. According to Mr. Prentice's file note at TAB 9 the Defendants were complaining that the Purchaser had been dilatory in organising the survey, which was to be, and eventually was, carried out by Mr. Russell Stillwell on 24th March, 2003. Even then it seems that full access was not afforded by the occupiers.

7. Mr. Stillwell's Report on the properties of 28th March, 2003, can by no stretch of the imagination be regarded as favourable. Despite the Purchaser's stated intention to rebuild both properties, which would only have required a Valuation Survey, it obviously took the view that it was not satisfied with the survey report. Accordingly, acting under Condition G (ii), through its Advocates, it purported to give notice of withdrawal from the sale on 1st April, and requested the return of the deposit.

8. I say 'purported', because, of course, the Vendor's contention is that the notice of withdrawal was too late. This depends on the correct view of that which was the Operative date, because, under Condition G valid notice in this respect could only be given before then. The date itself is left almost blank at the foot of the Special Conditions. Accordingly the agreed issue settled for the decision of the Court is:

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

9. Mr. Edwards has submitted that the only reasonable conclusion is that the parties, when they entered into the Agreement, must have intended that the Operative date would be 29th April, 2003. In other words that it coincides with the Completion date. Until then the performance of the contract was conditional on the survey being satisfactory to his clients. He supported his contention by reference to three impressive authorities.

10. Mr. Loveridge argued that that interpretation is not consistent with the fact that '2002' is specified at the foot of the Special Conditions; that the Operative date was not completely omitted. Thus it must have, at the latest, been 31st December, 2002. No date after that, he says, could reasonably be held to have been within the contemplation of the parties or consistent with their intentions. Consequently, since the Plaintiffs were not entitled to withdraw from the sale, his client was entitled to retain the deposit and to damages as prayed in the Counterclaim.

11. Smith v. Butler [1900] 1 Q.B 694 was the first authority upon which Mr. Edwards relied. That case concerned the sale of the lease of a public house, in which the lessor had lent the lessee £900 on mortgage. The lessee and the plaintiff subsequently entered into an agreement for the sale of the lease, the date of completion being 10th November, 1898. The contract was subject to the condition that the lessor would transfer the loan to the plaintiff/purchaser, and would accept him as mortgagor for the outstanding balance, which then stood at £850.

12. On 4th October, 1898, the parties met, when the lessor refused to agree to more than £700 remaining on mortgage. The plaintiff thereupon treated the contract as at an end. Later on the same day the lessor/mortgagee relented, and agreed to the £850 remaining on mortgage provided its existing conditions, which included reducing the debt by £50 per annum, remained. The plaintiff, nevertheless, remained adamant that the contract no longer subsisted, and sued for the return of the deposit. Bucknill J. held he was entitled to do so. This was reversed by the Court of Appeal, A.L.Smith L.J., saying at page 697:

“The question is whether the plaintiff, after the interview of October 4 had a right to say the contract was off. In my opinion he had not that right, because the defendant had until November 10, the day fixed for completion, to procure the consent of the lessor to the condition as to the mortgage.”

13. Mr. Edwards submitted that Smith v. Butler was on all fours with the instant case—there the relevant date was the 10th November, 1898, here the 29th April, 2003. With respect I do not agree that that case is necessarily on all fours, at least as to the facts. It will be observed that in Smith v. Butler there was only one possible date—the completion date—which the Court could contemplate. No date, operative or otherwise, had been left blank. If it had, then as Romer L.J. said at page 699:

“To my mind it is reasonably clear that the vendor’ (i.e. the lessee/defendant) ‘has until the time fixed for completion, or, *if no time for completion is fixed*, then a reasonable time, in which to procure the assent of the mortgage to the acceptance of the purchaser’ (i.e. the plaintiff) ‘as mortgagor.” My Italics

This passage is cited by Mr. Edwards at paragraph 17 of his Skeleton Argument, and with approval by Lord Jenkins in the second authority—Aberfoyle Plantations Ltd v. Khaw Bian Cheng (*infra*).

14. Thus, while Smith v. Butler supports Mr. Edwards’ argument that the contract here was conditional until the date of completion, it was not a case where the court was required to supply a date (as being in the reasonable contemplation of the parties when they made the agreement—in Scrutton L.J.’s words (see *infra*) ‘to give business efficacy to the contract’): it was a case in which the date was specified, and the plaintiff was held to have prematurely refused to complete.

15. A case on the other side of the line was Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1960] A.C 115, in which the completion date, by which a condition in the agreement for the sale of rubber estates in Malaya was to be fulfilled, was held to require strict adherence, so that when that date had passed, the contract was no longer conditional. The agreement was dated 8th November, 1955, and completion of the sale was stated in Clause 9 to be ‘on or before the 30th day of April, 1956’.

16. In the Aberfoyle case the vendors were immediately able to procure conveyance of 1,154 out of 1,336 acres, or some 86% of the total of rubber plantations by the date specified in the agreement for the completion of the sale. The remaining 182 acres were, however, comprised in leases from the Ruler of the state of Perak to the vendors’ predecessor. Those leases had expired on 19th June, 1950, and negotiations for new leases were in hand. The contract was conditional, in that Clause 4 provided that the vendors would obtain the necessary renewals and—

“...if for any cause whatsoever the vendor is unable to fulfil this condition this agreement shall become null and void and the vendor shall refund to the purchaser the deposit or deposits already made.....”

17. By 25th April, 1956, matters had progressed, inasmuch as the vendors were informed officially that the Ruler in Council had approved the issue of fresh leases and their name would be appropriately enrolled. Nevertheless the renewals had not been obtained by the date of completion, but on 4th May the purchaser’s solicitors wrote to the vendors’ solicitors extending the date by which the latter were required to produce the documents of title renewing the leases to 31st May. They emphasised that in giving the new date time must be deemed to be of the essence of the contract.

18. Unfortunately the condition was not fulfilled by the extended date and the purchasers sued for the return of the deposits. It was argued for the vendors that, given the surrounding circumstances, and that the agreement represented the conclusion of negotiations which had dragged on for some six years, the deadline should not be enforced, and that they should have a reasonable time (after 31st May) within which to fulfil the condition.

19. Lord Jenkins, giving the judgment, rejected this argument in a passage which Lord Slynn quoted with approval in Mr. Edwards’ third case, Total Gas Marketing Ltd v. ARCO British Ltd & Others [1998] (*infra*), at page 126:

“....their Lordships would observe that the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their Lordships to be that until the condition *is* fulfilled there is no contract of sale to be completed, and accordingly that by fixing a date for completion the parties must, by implication, be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at the latest.”

20. Accordingly, the obligation to transfer the estate, including the 182 acres, not having been performed by the extended date, the purchasers were entitled to recover their deposits. Again, that authority is not entirely apposite to the instant case because the Court was not faced with the difficult task of supplying an omission in a document which the parties would have included had they thought of it.

21. The third authority cited by Mr. Edwards was Total Gas Marketing Ltd v. ARCO British Ltd and two others [1998] 20th May, which involved contracts for the sale and purchase of North Sea Gas by Total from the defendant companies who were all licensees of the Trent Gas Field in the southern North Sea. The question arose as to whether three conditions, the first of which required the Seller (meaning ARCO and the other two defendants) to secure the relevant approvals of the Secretary of State for Trade and Industry had to be fulfilled before the date fixed for the first delivery of gas. The last condition was that the Seller became a party to that which was termed the Allocation Agreement. The second condition does not appear to have been relevant to the agreed issue.

22. The Sellers were given the option to fix the first delivery date between 15th September and 15th December, 1996. However they were also required to give notice thereof as provided in Clause 2.1 of the Agreement, which varied according to when the notice was given. The agreed issue before the House of Lords was as follows:

“Whether a condition to which a contract for the sale and purchase of North Sea Gas was expressed to be subject, but for whose fulfilment no time was fixed, had necessarily to be fulfilled before the date fixed for the first delivery of gas so that the agreement automatically terminated if not fulfilled.”

It is clear from the Speech of Lord Slynn that, on the interpretation of the contract as a whole entry into the Allocation Agreement was regarded by the parties as fundamental, since without it gas could not flow into the Bacton Delivery Terminal in order to be supplied to Total.

23. It also appears from Lord Slynn’s Speech that, in selecting the date by which this condition had to be fulfilled, once the 1st March, 1996, had been eliminated (because ARCO’s obligation up to that stage was not to enter into an Allocation Agreement, but to use its best endeavours to do so) there were four other possible dates, namely the 31st October, 1996 (as contended by Total); 15th December, 1996 (ARCO’s second choice); such period after the first delivery date as was reasonably required for ascertaining whether the Allocation Agreement would be concluded or not (ARCO’s third choice); or a reasonable period not less than twelve months from the first delivery date, which could be no earlier than 31st October, 1998 and possibly much later (ARCO’s first choice).

24. Lord Slynn, with whom the other Law Lords agreed in dismissing the sellers’ appeal, though there were some differences in the reasoning, held that the first delivery date, namely 31st October, 1996, which ARCO itself had selected was the date most in accordance with the presumed intention of the parties as the date by which the fundamental condition had to be fulfilled. As the seller, ARCO had not done so they were held not to have fulfilled the condition and so Total were no longer bound by the Agreement.

25. The Total Gas case was closer than the others to the present situation, inasmuch as a conditional contract was involved, and the Court was required to supply a date, albeit there was a choice between four, and possibly five, dates as being in the contemplation of the parties at the time they made the Agreement. In the instant case, while the parties specified the Completion date, the all-important Operative date, by which the survey condition had to be fulfilled was not inserted (apart from the figure 2002) either due to inadvertence, or because the parties deliberately left the date and month blank. I consider this last possibility as unlikely. The alternatives thus offered to the Court are the 29th April, 2003, (as Mr. Edwards contends) or the 31st December, 2002 (as Mr. Loveridge submits).

26. It is well settled that the Court does have power to supply a term in a contract in an appropriate case. The classic statement of the law on this subject was by Scrutton L.J. in Reigate v. Union Manufacturing Co (Ramsbottom) Ltd & Elton Cop Dyeing Co Ltd [1918] 1 K.B 592. At page 605 he said:

“The first thing is to see what the parties have expressed in the contract: and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time of the contract was being negotiated some one had said to the parties: ‘What will happen in such a case’ they both would have replied, ‘Of course so and so will happen; we did not trouble to say that: it is too clear.’ Unless the Court comes to such a conclusion as that, it ought not to imply a term which the parties have not expressed.”

27. Similarly in Luxor (Eastbourne) Ltd & Others v. Cooper [1941] A.C 108, Lord Wright said at page 137:

“It is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. But it is well recognised that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that ‘it goes without saying’, some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended.”

28. It is in my opinion clear that the date of Completion, when title would be delivered and the balance of the purchase price paid, was intended by the parties to be a different date from that by which the relevant condition should be fulfilled. If that were not the case, that is to say if the date of Completion was also the intended date, by which the Purchaser would express his dissatisfaction with the Survey report, there would be no margin of time within which the Purchaser could consider the report and then decide whether to exercise its right to withdraw under General Condition G.

29. Applying the above principles, under the test propounded by Lord Wright, I consider that the Court should imply a date as the Operative date in the Special Conditions. As I have indicated, I do not agree that the 29th April, 2003, as suggested by Mr. Edwards, is consistent with the material on record. Neither do I agree that the figure ‘2002’ has a controlling effect on the supposed date, as Mr. Loveridge claims. In ascertaining the parties’ intentions I consider the starting point is the Purchaser’s undertaking to give immediate instructions for the Survey. The word connotes, in the dictionary meaning, ‘occurring at once, without delay’.

30. Issue is joined on the pleadings as to the allegations regarding when Mr. Stillwell was given instructions contained in paragraph 9 of the Cause. In his letters of the 28th March and 3rd June, 2003, Mr. Stillwell does not state when he received instructions from the Plaintiff company. But it does appear from the correspondence on record that the Plaintiff did not give ‘immediate’ instructions as it had undertaken to do for reasons I will now state.

31. The earliest date arranged for the Survey, according to Mr. Stillwell’s Note (at the top of which the date ‘2/1/03’ is discernible) at TAB 13 could be 8th January, 2003. But this note is not unequivocal. The writing, which also refers to another property, 3, Cameron Place, Upper St Jacques, appears to be the same as that in which the comment:

“Inspect 10 a.m Wed. 8th”

is written. The proposed inspection could, therefore, either refer to 3, Cameron Place or to the said properties, or to all of them.

32. Shortly afterwards there is the letter from Mr. Holland of 3rd February stating that the keys were not available to enable Mr. Stillwell to gain access, and threatening to withdraw from the purchase if he did not make them so within seven days. On the other hand there is a complaint, as evidenced by Mr. Prentice's Note, to the effect that the Purchaser was 'dragging its feet'. I do not think it is proper for me to speculate on this, but even if the 8th January is taken as the date for the Survey—two calendar months after the date of the Agreement. That, in my judgment, can hardly be 'immediate'.

33. The Court has not been enlightened as to the reasons for the denial of access to the buildings. It could be that the Defendant had failed to make proper arrangements therefor, or that, immediate instructions for a survey not having been given the Vendor felt that he was absolved from doing so. Again I decline to speculate. I am, however, satisfied on the material available to the Court that it is not open to me to infer that the Operative date was intended by the parties to be as late as 29th April, 2003.

34. Neither do I consider that the figure '2002' has a bearing on the parties' intentions. The Conditions of Sale were, in one sense, a *proforma*, issued by the Bar Association, for people to insert the relevant dates. The printed figure '2002' appears in three places in the document—the date of the document, the acknowledgment of the deposit and at the end of the Special Conditions. In neither case do I consider that it constitutes a pointer as to the intentions of the parties.

35. In my judgment the correct approach to the present case is that stated in the passage from Romer L.J. at page 699 of Smith v. Butler (*supra*) which I have cited at paragraph [13] hereof—remembering that in this case it is the Operative date, and not the Completion date, which is in question. As I said, this passage was expressly approved by Lord Jenkins in the Aberfoyle case, and I am satisfied it is the correct test here, and that I should insert a date which, in all the circumstances, constitutes a reasonable time after the making of the Agreement for obtaining the Survey.

36. What, then, is a reasonable time, after the 7th November, 2002, within which Condition G (ii) should have been fulfilled? Doing the best I can on the material available to the Court, and especially having regard to the word 'immediate' in that condition, I consider a reasonable time by which it should have been fulfilled is 31st December, 2002. I am conscious of the fact that that date coincides with the submission of Mr. Loveridge, but, as I have indicated, I arrive at this conclusion by a different route from his submission in this respect.

37. I therefore answer the agreed issue thus:

“The conditions of sale dated 7th November, 2002, were subject to a survey being obtained by the 31st December, 2002.”

38. Subject to Counsel's views I propose to reserve the costs of this hearing.

A.R.W.Hancox
Lieutenant Bailiff
11th July, 2005.