No. 288

In the Court of Appeal of Guernsey

(Civil Division)

The 6th day of July, 2001 before Christopher Simon Courtenay Stephenson Clarke, Q.C., presiding; David Arthur John Vaughan, Q.C. and Patrick Stewart Hodge, Q.C.

TRINITY INVESTMENTS LIMITED
AND
CHARROTERIE DEVELOPMENTS LIMITED — Vendors/ Appellants

v.

LONG PORT PROPERTIES LIMITED — Purchaser/ Respondent

In the matter of the appeal by the above Appellants from the decision of the Royal Court on the 19th September, 2000, and their application to adduce new evidence;

THE COURT, having heard Advocates P.T.R. Ferbrache and J.P. Greenfield for the Appellants and the Respondent respectively thereon:-

i) GRANTED, by consent, the application for fresh evidence to be adduced;

ii) GAVE JUDGMENT in the attached terms; and

iii) ALLOWED the appeal, with costs.

Registrar of the Court of Appeal.

Judgment Delivered 6.7.01
arh/cofa/Trinity v. Long Port appeal Judgment

GUERNSEY COURT OF APPEAL

Before

Christopher Simon Courtenay Stephenson Clarke Q.C., presiding;
David Arthur John Vaughan Q.C.
Patrick Stewart Hodge Q.C.

Trinity Investments Limited and Charroterie Developments Ltd

v

Long Port Properties Limited

PATRICK S. HODGE, Q.C.:

This is an appeal by Trinity Investments Limited and Charroterie Developments Limited ("the Vendors") against the judgment of the Deputy Bailiff dated 19 September 2000 granting summary judgment in the action against them by Long Port Properties Limited ("the Purchasers").

The Vendors also applied for leave to adduce new evidence in the appeal. Both sides referred to that evidence in their submissions and the Purchasers consented to that application by the end of the appeal hearing.

The Purchasers raised the action which after amendment was an action for the return of a deposit of £550,000 together with accrued interest which they had paid to the Vendors in a contract for the purchase of land at La Charroterie in the parish of Saint Peter Port ("the Site"). The Deputy Bailiff granted summary judgment in favour of the Purchasers after a hearing on 4 September 2000.

The factual background

By contract dated 23 October 1999 the Purchasers agreed to purchase the Site from the Vendors for a price of £5,500,000 and to pay a deposit of £550,000, which was ten per cent of the purchase price. The contract took the form of Conditions of Sale in accordance with the standard Guernsey Bar Conditions of Sale (1997 edition). The

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contract also provided that completion would take place in accordance with the special conditions which were annexed to the contract in a Schedule of Special Conditions ("the Schedule").

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Paragraph A of the Schedule contained conditions precedent which the Vendor was required to perform. Paragraph C of the Schedule was, so far as is material, in the following terms:

"C Failure of the Conditions Precedent etc

C *Should the Vendor fail to discharge the Conditions Precedent set out in paragraph A (above) and the Purchaser not have waived the Conditions Precedent set out in paragraph A (above) by 27 June 2000 ...these Conditions of Sale shall be null and void and the deposit and all interest accrued shall be returned to the Purchaser."*

The conditions precedent in paragraph A of the Schedule included the following:

"A Planning

D *(i) The Purchaser shall obtain all necessary approvals, consents, permissions or licences of the Island Development Committee, its Building Control Department and any other committee or body of the States of Guernsey or Parish Authorities without any conditions which may make the development materially more expensive or difficult to perform than normal in respect of plans for the construction upon the Property of:-*

E *(a) residential accommodation with a net saleable floor area of not less than 58,000 square feet and comprising 71 two-bedroomed apartments and 9 one-bedroomed apartments, together with car parking spaces for 100 cars; and*

(b) office accommodation with 37,500 square feet of net lettable floor area and 180 car parking spaces ("the Permissions")

F *the whole substantially in accordance with the Permission in Principle granted by the Island Development Committee in respect of the Property and dated 3 August 1999 as attached at Appendix 1; and the Vendor shall procure the assignment to the Purchaser at Completion of all plans, drawings, designs, permissions and other rights of whatever nature which the Vendor may hold in respect of the Permissions and shall assign to the Purchaser any intellectual rights or copyrights which the Vendor may have in respect of any of them."*

G Condition Precedent (ii) provided that the Vendor shall instruct the professional team to design the development. Condition Precedent (iii) provided as follows:

"The Vendor shall instruct the Professionals to prepare or assist and advise in the preparation of all plans, drawings and all planning and other applications necessary to obtain the Permissions."

H Condition Precedent (iv) provided that the Vendor shall meet the cost of instructing the Professionals in order to obtain the Permissions.

Finally, Condition Precedent (v) was in the following terms:

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"The Vendor and the Purchaser shall jointly instruct the Professionals in order to obtain the Permission as expeditiously as possible. No party shall undertake nor refrain from undertaking any activity the effect of which would be to frustrate or
B *delay the obtaining of the Permissions and all parties shall mutually co-operate in order to obtain the Permissions as expeditiously as possible."*

These were the relevant provisions in relation to the application for summary judgment. In debate it was suggested that the word "Purchaser" in paragraph A(i) was an error and should read "Vendor" so that it was the responsibility, or at least the primary
C responsibility, of the Vendor to obtain the "Permissions". Advocate Ferbrache did not seriously contest this suggestion. In view of the structure of paragraph A(i) and its relationship with paragraph C, I am satisfied that the correct word at the start of paragraph A(i) is "Vendor". Advocates for the parties agreed that in Condition Precedent (v) the word "Permission" in the second line should be "Permissions". I proceed on that basis.

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The Royal Court Civil Rules, 1989

Rule 17 of the Royal Court Civil Rules, 1989 ("the 1989 Rules") provides for an application for summary judgment. It states:

"17(1) The Plaintiff may, at any time after inscription of the action on the Role des Causes a Plaider, apply to the Court for summary judgment against the
E *defendant.*

(2) The grounds of the application shall be that the defendant has no defence –

(a) to the plaintiff's claim, or to any particular part thereof; or

(b) to the claim or part thereof except as to the amount of damages claimed."

F Rule 20 of the 1989 Rules provides:

"*Unless on the hearing of the application under Rule 17 the Court dismisses the application, or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other resason to be a trial, the Court may give such judgment against the defendant on the claim or part thereof as the Court think fit.*"

G Advocate Ferbrache's authorities before the court included the decision of this court in the case of *The Monument Trust Co Ltd v Gaudion and Gaudion*, 22.GLJ.45 and 81, in which this court held that the way in which the Supreme Court of England and Wales interpreted the former Order 14 of the Supreme Court Rules should apply in the interpretation of Rule 20 of the 1989 Rules. The test which this court is to apply therefore is whether we are satisfied not only that there is no defence but also that there is no fairly arguable point to be argued on behalf of the Vendors. See *Anglo-Italian Bank v*
H *Wells* (1878) 38 L.T. 197, Jessell M.R. at p.201.

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The decision of the Deputy Bailiff of 19 September 2000

The learned Deputy Bailiff, after a hearing on 4 September 2000 gave summary judgment in favour of the Purchasers on 19 September, ordering the return of the deposit and accrued interest.

He held that there had been a failure by the Vendors to perform the conditions precedent in the Schedule. He held, first, that the Vendors had failed to obtain a bornement from the parish authorities by the cut off date of 27 June 2000.

Secondly he decided that the Vendors had failed to obtain the approval of the Island Development Committee of details of five elements of the proposed development which were required by the planning conditions imposed by the permission in principle dated 3 August 1999 which is referred to in Condition Precedent A(i) or in the planning permissions obtained in June 2000. Those elements were the means of ventilation of the car parking areas, the surfacing materials to be used on any paved or metalled areas and a comprehensive landscaping scheme (conditions 6, 11 and 12 of the *permission in principle*), the bin storage areas (condition 13 of the planning permission of 22 June 2000 relating to the residential development) and the site levels and boundary treatments on the western boundary of the site (condition 5 of the planning permission of 22 June 2000 relating to the office block). The learned Deputy Bailiff held that each of these five conditions was an "approval" which Condition Precedent A(i) required the Vendors to have obtained by 27 June 2000.

Thirdly, the learned Deputy Bailiff decided that the planning permissions obtained in June 2000 did not provide for the contractual mix of development specified in Condition Precedent A(i). The permissions which were granted authorised the development of 60 two-bedroomed apartments, 7 three-bedroomed apartments, 4 three-bedroomed apartments with a study and 9 one-bedroom apartments.

The Appeal

In addressing this court, Advocate Ferbrache challenged each of the three grounds on which the learned Deputy Bailiff had held that there was no issue or question in dispute which ought to be tried.

As the second and third grounds of the learned Deputy Bailiff's decision can be considered shortly, I deal with them before turning to the more complex issue of the bornement.

The second ground:

Advocate Ferbrache argued that five conditions in the planning permissions which required details of the specified elements of the development to be approved by the planning authority were not "approvals" in terms of Condition Precedent A(i) but were, as they appeared to be, conditions contained within approvals. The text of that Condition

Precedent referred to both approvals and conditions and showed that the parties to the contract saw them as different. He argued, correctly in my view, that it was common for a detailed planning permission to contain conditions which required the approval of details of the development at a later date. He also pointed out that there was a factual dispute between the parties as to whether the Purchasers envisaged starting work on site very shortly after 27 June 2000 or had still to place the building contract, which they had suggested would be a design and build contract.

In reply Advocate Greenfield argued that the failure of the Vendors to obtain the detailed approvals required by these conditions meant that the Purchasers were not able to assess the viability of the proposed development as Condition Precedent A(i) envisaged before the cut off date of 27 June 2000. The detailed planning permissions obtained in June, by not resolving these matters failed to comply with the requirements of the Condition Precedent which treated such conditions as approvals to be obtained before the cut off date.

For my part I am not persuaded by this argument. Condition Precedent A(i) makes a clear distinction between the approvals and the conditions contained in the approvals. It is most unlikely that the parties contemplated in October 1999 that the detailed planning permissions which the development required would not contain conditions which required the developer of the site to obtain subsequent approvals of details. For example, the condition in the detailed permissions for both the residential development and the office block which required approval of the external materials to be used in the construction of the buildings, surfacing and hard landscaping is a familiar requirement in a detailed permission. Such a condition could have a much more significant impact on the costs of a development than several of the conditions on which the Purchasers relied in their argument.

Accordingly I do not construe Condition Precedent A(i) as meaning that the Vendors required to have obtained the planning authority's approval of all the details which conditions in the *permission in principle* and the detailed planning permissions required either at the start or in the course of development.

The third ground:

Advocate Ferbrache submitted that there was a clear factual dispute between the parties as to the Purchasers' requirements for the configuration of the development. The Condition Precedent required a development of not less than the specified square footage of net saleable floor area in the residential scheme. The permission obtained achieved that requirement. Although the permission exceeded the requirement for the numbers of two-bedroomed apartments by allowing the construction of three-bedroomed apartments, it did not prevent a configuration of 71 two-bedroomed apartments and 9 one-bedroomed apartments as stipulated. In addition it was clear from the correspondence which the Vendors produced to the court that the Purchasers' surveyors and project managers were aware of and sanctioned the professional team's application for a larger residential development. I refer to the letter of Dennis Walker Welham & Co Ltd ("DWW") dated 14 February 2000. This, Advocate Ferbrache submitted, was a mandate from the

Purchasers to apply for additional accommodation which could be altered later to suit their requirements. We were also referred to a letter dated 4 April 2000 from the Purchasers to Dandara Island Homes Limited which said that the viability of the residential scheme was questionable without the extra residential floor area. Advocate Ferbrache said that the documents supported a case that the Purchasers had waived any requirement of a fixed configuration which could not be exceeded.

In reply Advocate Greenfield took the stance that the Condition Precedent meant what it said. The Vendors was required to obtain a permission which referred to the stipulated number of two bedroomed apartments. The Condition was a condition precedent. DWW's co-operation with the submission of a larger scheme had been motivated by a wish not to breach Condition Precedent A (v), which required the Purchasers to co-operate with the Vendors.

It is clear that the parties intended that a failure to fulfil the Condition Precedent entitled the Purchasers to bring the contract to an end. But it cannot be said that it is not arguable that the requirement for a configuration of the residential development was breached just because the permission did not specify that precise configuration. By changing the use of the room from a bedroom to a study, the permission could be made to comply with the contractual configuration. In any event the Vendors have advanced an arguable case that the Purchasers waived any requirement that the apartments were not to have more than two bedrooms. Accordingly, in my opinion, summary judgment should not have been given on this ground.

In these circumstances it is not necessary to address Advocate Ferbrache's submissions as to the adequacy of the learned Deputy Bailiff's reasons.

I turn therefore to consider the bornement.

The first ground: the bornement

A bornement is a permission which a developer must obtain from the Constables and Douzaine of the parish where the building is to be within 9 metres of a public road. The bornement approves the alignment of the building in relation to the road and can include conditions. We were referred to section 36 of the Ordonnance ayant rapport a la Construction de Maisons, Salles Publiques et Batiments et au tracement de Routes et Chemins of 1931 (as amended).

Advocate Ferbrache advanced four arguments on this ground.

First, he submitted that it was not open to the learned Deputy Bailiff to have decided the application on this point as the Purchasers had not pleaded failure to obtain the bornement as a failure to fulfil the condition precedent. He pointed out that the Purchasers' Cause Reformee did not refer to the bornement but stated that the full particulars of the alleged failures to satisfy the condition precedent were contained in the

DWW report and addendum. Neither the report nor the addendum referred to the failure to obtain the bornement. He accepted that the affidavit dated 14 July 2000 by Mr Billson on behalf of the Purchasers referred to a further list of failures to obtain permissions and that that list (dated 13 July 2000) contained bornement licences as the first item. Nonetheless, he submitted, the Vendors had been taken by surprise. Their expert report (the Downey/Cooil report) responded point by point to the DWW report and did not refer to the bornement. He also referred to Mr Clancy's second affidavit, which was produced in support of the application to adduce further evidence. In that affidavit Mr Clancy, a director of the Vendors, stated that he and his colleagues had understood from examining the documents lodged by the Purchasers for the summary judgment application that the Purchasers did not treat the bornement as an important issue. When the Purchasers relied on the bornement in their application the Vendors had been taken by surprise. Mr Ferbrache referred the court to the White Book (The Supreme Court Practice) at paragraphs 14/2/6 and 18/7/11 in support of the propositions that the pleadings should contain averments of all material facts and that any defect or omission in the pleadings could not be remedied by affidavit evidence.

In response, Mr Greenfield argued that the Vendors had not taken any pleading point before the Deputy Bailiff but had been able to address him on the issue of the bornement. He submitted that the Vendors should not be allowed to take the point now. Even if Mr Clancy had been surprised, the Vendors' advocate had investigated the matter. If the Vendors had taken the point the Purchasers would have amended their pleadings and the same result would have followed.

Mr Ferbrache's second argument was that the Purchasers were entitled to a trial so that they could lead evidence that the parties to the contract saw the bornement as a formality and that what they thought was material was the planning permissions. The documents which he produced, by consent, as fresh evidence vouched the proposition that the Vendors had obtained the bornements without difficulty in this case although after the 27 June cut off date. They also vouched the assertion that bornements were straightforward to obtain.

He referred the court to Lord Hoffmann's guidance on the interpretation of contracts in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at pp.912-913. In particular he emphasised the principle that a contract should be interpreted against the matrix of fact. Lord Hoffmann stated:

"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

We were also referred to dicta of Lord Hoffmann in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at pp.391-392, in relation to the meaning of the words "actually paid" in a reinsurance contract.

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From this Advocate Ferbrache argued that the court could not interpret Condition Precedent A(i) without hearing evidence of the factual matrix. In particular the Purchasers proposed to lead evidence that bornements were usually granted as a matter of
B course and that they had been granted in this case. He offered to prove that the parties in October 1999 and thereafter regarded the bornement as a formality and thus unnecessary in relation to the obligation under Condition Precedent A(i).

His third argument, which flowed from his argument in relation to the factual matrix was that the only approvals which the Vendors required to obtain by 27 June 2000 were those which might contain conditions which could make the development more expensive than
C normal. As a bornement could not contain such conditions, it was not within the contemplation of the parties as a necessary permission but was a formality which one would expect to be outstanding as at 27 June 2000. He suggested by reference to the heading of the condition precedent that all that the parties envisaged was that the planning permissions would be obtained.

D In response, Advocate Greenfield argued that the bornement was a permission which was necessary for the construction of the development. On the plain words of the condition precedent the Vendors had to obtain that permission before 27 June 2000. It was wrong to suggest that the condition precedent was concerned only with planning permissions. It referred to approvals from the Building Control Department and to approvals of Parish authorities. The only approval required of the parish was the bornement. The bornements, which the Vendors adduced as additional evidence, showed that conditions
E were imposed by the constables and douzaine in consultation with the Public Thoroughfares Committee. The parties could not assume that the bornement would be granted unconditionally.

Finally, Advocate Ferbrache argued that the obligation to obtain the bornement was an obligation imposed by the contract on both the Vendors and the Purchasers. Even if it
F were the Vendors which had the obligation to obtain the approvals under Condition Precedent A(i), the Purchasers were under a duty to instruct the professional team and to co-operate to obtain the permissions expeditiously. The Purchasers not having done so, they could not now found on their own wrong. He referred the court to *Alghussein Establishment v Eton* College [1988] 1 WLR 587 at p.594 and *Levett v Biotrace International plc* [1999] ICR 818 in support of this proposition.

G For my part, the pleading point which the Vendors take would have been a good one if they had raised the point before the Deputy Bailiff and if they have suffered prejudice. It appears, however, that after receipt of Mr Billson's affidavit of 14 July 2000 and the revised list of outstanding approvals, Mr Downey of Dandara Jersey Limited (which is a company associated with the Vendors) telephoned the Constable's Office on 26 July 2000 to ascertain whether there had been any instance where the Constable and Douzaine had refused to grant a bornement. I infer from that that the Vendors were alive to the
H possibility that the Purchasers might raise an argument founding on the failure to obtain a bornement. At the hearing before the learned Deputy Bailiff the Vendors' advocate asserted that obtaining a bornement was a formality, which is the argument repeated in

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this court. This court has had access to the documents which the Vendors have proferred to vouch that assertion. For my part I am prepared to proceed on the basis that the parties in October 1999 considered that the obtaining of a bornement was a formality. Accordingly I see no need to determine the appeal relating to this ground on the pleading point.

In relation to the second argument on the construction of the contract, it may be important to recall that Lord Hoffmann in *ICS Limited v West Bromwich Building Society* was addressing the understanding of the reasonable man who had the background knowledge of the parties at the time of the contract. The actions of the parties after the date of the contract are not relevant. See *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners* [1970] AC 583. It is also important to recall that Lord Hoffmann was considering the meaning that the reasonable man with such knowledge would give to the words used in the contract. In *Wickman Machine Tool Sales Ltd v Schuler A G* [1974] AC 235, Lord Simon of Glaisdale approved the following passage from Norton on Deeds:

"... the question to be answered always is, "What is the meaning of what the parties have said?" not "What did the parties mean to say?" ... it being a presumption juris et de jure ... that the parties intended to say that which they have said."

This is a helpful reminder that the task of the court, after the *ICS* case as well as before, was and is to construe the contract and not to ascertain what the parties meant to say. The construction of an agreement should be capable of resolution shortly and cheaply. See *Prenn v Simmonds* [1971] 1 WLR 1381, Lord Wilbeforce at p.1383. Evidence of parties' subjective intentions and of their later actions is not relevant. As I have said, I am prepared to construe the contract on the assumption that both parties believed at the date of contracting that the bornement would be a formality. Advocate Ferbrache did not suggest that the Vendors would lead any other relevant evidence.

Against that background, it appears to me that what Condition Precedent A(i) required was that the Vendors obtain from the Island Development Committee, the Building Control Department and the Parish authorities all approvals that were needed to allow the development to be constructed on the Site. It also required that such approvals did not contain conditions which might make the development materially more expensive or difficult to perform than normal.

I find the construction which links the word "necessary" to the assessment of the potential onerosity of the conditions unconvincing. It was suggested that the only permissions which were necessary before 27 June 2000 were those which might contain conditions which could be more than normally onerous. The reference to "any other committee or body of the States of Guernsey or parish authorities" was, it was submitted, a catch all in case between October 1999 and June 2000 new powers of control were granted to such bodies. I am not persuaded that this is correct. The bornement could contain onerous conditions. There is, so far as I am aware, no precedent in recent years for the enhancement of the powers of parish authorities in relation to development. A much more straightforward interpretation of the words of the condition precedent in its context is that it envisaged that the planning permissions, building control consents and

bornements would be obtained by 27 June 2000. The fact that parties thought that the obtaining of a bornement was straightforward does not militate against this construction.

I consider therefore that Condition Precedent A(i) required the bornement to be obtained by 27 June 2000. It was not obtained by that date.

There is one other matter which I require to address in relation to the bornement issue. In a new submission which was not advanced before the learned Deputy Bailiff, the Vendors submit as a fallback argument that Condition Precedent A (v) imposes duties on the Purchasers and that the Purchasers by failing to perform such duties caused or contributed to the failure to obtain the necessary bornements. The Vendors submit therefore that the Purchasers cannot found on their own failures to invoke the condition precedent.

In my opinion it is clear from the terms of the paragraphs of Condition Precedent A that the primary duty to instruct the professional team and to obtain the relevant permissions rested on the Vendors. In addition it is difficult to make sense of Condition C of the Schedule of Special Conditions if that were not the case. Nonetheless, Condition Precedent A (v) imposes at least residual duties on the Purchasers. The first sentence provides:

"The Vendor and the Purchaser shall jointly instruct the Professionals in order to obtain the [Permissions] as expeditiously as possible."

This at least requires the Purchasers to provide the Professionals with instructions as to their wishes when required to do so. The second sentence of the condition provides:

"No party shall undertake nor refrain from undertaking any activity the effect of which would be to frustrate or delay the obtaining of the Permissions and all parties shall mutually co-operate in order to obtain the Permissions as expeditiously as possible."

Advocate Ferbrache suggested that if the Purchasers on receipt of the planning permissions and building licences on about 22 June 2000 were aware that the Vendors had failed to obtain the bornements and failed to alert the Vendors to their oversight, the Purchasers would not have performed their obligations under this provision.

I do not think that it would be appropriate to comment on whether or not the Purchasers have failed to perform any obligation imposed by this condition and whether that failure caused the Vendors not to fulfil the conditions precedent. It is sufficient that the Vendors have raised the issue and may be in a position to make averments in relation to it in their defences. In view of this I think that I cannot be satisfied that there is no fairly arguable point to be argued on behalf of the Vendors.

For these reasons I would allow this appeal.

C.S.C.S. CLARKE, QC: I agree.

D.A.J. VAUGHAN, QC: I agree.

ADVOCATE P.T.R. FERBRACHE: Sir, I'd ask for costs.

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ADVOCATE J.P. GREENFIELD: I don't think I can resist that, sir.

B C.S.C.S. CLARKE, QC: The appeal will be allowed with costs.

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