Contract for building works. Requirements in Guernsey law for the formation, cancellation or variation of contract, and court's jurisdiction to moderate penalty clauses.

[2024]GRC001

IN THE ROYAL COURT OF GUERNSEY
ORDINARY COURT

Between:

LINDA EVANS

Plaintiff

-and-

GUERNSEY BUILDING RENOVATIONS LIMITED

Defendant

Before: Her Hon Hazel Marshall KC Lieutenant Bailiff, sitting alone

Hearing Date: 13th October 2023
Judgment given: 13th October 2023
Written judgment handed down: 4th January 2024

The Plaintiff appeared in person

The Defendant appeared by its Director Mr Artur Filipczak,
assisted by his wife Mrs Helena Filipczak as a McKenzie Friend

Legislation, cases and materials referred to

Legislation:

Trading Standards (Fair Trading) (Guernsey) Ordinance 2023

Cases:

Guernsey

Smith v Carey Olsen [2020] GRC 061,

Jersey
Wightman v Cathcart Properties Ltd (1970) JJ 1433,
Lyndon v Hopkinson, (1991) Jersey Royal Court (unreported No 052)
Selby v Romeril [1996] JLR 210
Dohr v AI Airports International Ltd and another [2015] UKSC 67
England and Wales
L'Estrange v F Graucob Ltd [1934] 2 KB 394
Cavendish Square Holdings BV v Talal El Makdessi [2015] UKSC 67

Textbooks and materials:

Pothier:	*Treatise on the Law of Obligations or Contracts* 1761 Part 1 Ch 1 Art 1, Part II Ch. 5 Art 1 Fifth Princ.
Evans:	*Pothier on Obligations* (1806 Translation) Vol 1
Chitty on	*Contracts*
Dawes	*A Brief History of Guernsey Law*, Jersey Law Review February 2006,

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J U D G M E N T

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1. On 13th October 2023 I gave an *ex tempore* judgement in this case, after a hearing in which both parties were unrepresented. I indicated that I would provide a written judgment subsequently, which would elaborate on (but not change) my reasons. This is that judgment.

The Claim

2. By this action, Ms Linda Evans makes a claim against Guernsey Building Renovations Limited (**"GBR**"). This is a construction company which is, effectively the business of Mr Artur Filipczak. He is the sole director of the company. As a result, the Defendant has generally been referred to as "he" in the case, because it has been more natural to refer to Mr Filipczak himself, and I do so, where natural, in this judgment. Ms Evans claims repayment of the whole of a sum which she paid as the deposit (although it was sometimes also called an "*advance*") on building works in a contract which she and Mr Filipczak on behalf of GBR, both signed on 30th September 2022.

3. Ms Evans signed the contract document that evening, and then paid, by a series of bank transfers, £31,503 which was 20% of the specified costs of the building works. The contract was for the construction of a substantial extension to her house, to change a garage into a bathroom and possibly for further roofing work, but at any rate, it was for quite extensive building works. Ms Evans then discovered, a day or two later that she had some bad medical news, and she did not feel able to continue with the contract. So she immediately contacted Mr Filipczak, I think, by WhatsApp rather than an email, to say that she could not continue with the contract and she needed to cancel it. At that stage, she said that she felt she could not carry on at all.

4. GBR/Mr Filipczak claims that, as a result, and in the events which have happened, it is entitled to retain the sum of £31,503 that Ms Evans had paid, but Ms Evans says that in all the circumstances, that is incorrect, and she is entitled to recover it. Indeed, she claims back the whole of the £31,503.

5. I should say, at this point, that the parties are not legally represented. I understand that both of them have had assistance from qualified lawyers in preparing documents but neither of them has legal representation for the purpose of this court hearing, and no lawyer has ever been on the record as representing either of them. Ms Evans appears entirely on her own, presenting her own case. Mr Filipczak, as the defendant's Director, is entitled to speak on behalf of his company. However, he is

Polish and he has appeared with a degree of assistance from his wife, Mrs Filipczak, who speaks, (she says, and I think this is right) somewhat better English than Mr Filipczak does himself. She has come with him today, though, to support him as what is known as a "*McKenzie Friend*." This is a function simply of support and assistance, helping him, as a litigant, to deal with, or find, relevant papers, possibly to assist by reminding him of points to make, or sensible questions to ask, and suchlike but it is not actually representing him, and does not entitle her to address the court.

6. Thus, I have before me two litigants in person who therefore, quite understandably, have not been able to assist me on any of the actual legal points that arise in this case. As a result, the court has had to do its own research without relying on qualified assistance; it would have been entirely disproportionate to ask for an *amicus curiae.* I therefore carried out, of my own motion, the research which I concluded was necessary in order to arrive at a correct appreciation of Guernsey law principles in this area of law, and their application in the circumstances in this case. There is a remarkable dearth of Guernsey reported authority, or modern commentaries, in the area of Guernsey contract law.

7. Ms Evans' claim in her Cause is made as follows. After reciting the facts, she claims that she should have her money back because

> (i) the £31,503 was paid to GBR solely for the purpose of purchasing materials and none had been purchased; alternatively
>
> (ii) GBR has, in the circumstances, been unjustly enriched at her expense because she received no benefit under the contract, alternatively
>
> (iii) GBR, through Mr Filipczak varied the contract to reduce the scope of the works and, separately, to return the deposit, but had breached that varied contract by refusing to engage in discussions about the return of the deposit, or alternatively
>
> (iv) GBR/Mr Filipczak promised to return the deposit knowing that she was relying on having some or all of it returned because of her unfortunate circumstances, and it was unjust that GBR should go back on that promise.

8. GBR's pleaded defences are relatively simple. It claims first and foremost that it is entitled to retain the entire deposit moneys under the terms of the contract. As an alternative, it is claimed that GBR is entitled, at least, to retain £13,000 of that sum, because the contract was varied to cover reduced works for a price of £65,000, so that GBR was therefore entitled to retain 20% of that sum. That is not a plea that has actually figured greatly in the arguments that the parties have put before me today, but it is necessary to consider this point, in the light of what happened between them.

The main issues

9. To keep things simple for the parties, and after doing some research, I identified three stages in the enquiry which the court would have to make. I identified these to them, in advance of the hearing, so that they could consider what they would wish to say to the court on each topic.

> (1) The first question is what is the true meaning and effect of the contract signed by Ms Evans with GBR on 30th September 2022? In particular, as I will come to, this is with regard especially to Clause 5.5(c), which makes statements that are material to the question of whether the deposit can be recovered or not.
>
> (2) Assuming Clause 5.5(c) does entitle GBR to retain all or some of the £31,503 paid by Ms Evans, was that entitlement varied or abrogated by the parties' actions, agreements and dealings with each other on or after 4th October 2022 (which was the date when Ms Evans told Mr Filipczak that she felt unable to proceed) up to the commencement of her action, on 23rd February 2023? It has been suggested that there was a binding agreement concluded as to variation of the contract, which was either by an agreement for a compete cancellation (and return of the deposit as if it had never been made, therefore), or to substitute works to the

value of £65,000 for the original works agreed, which would then have required a deposit of £13,000 as a 20% deposit, meaning that only the balance of the £31,503 (£18,503) was refundable.

(3) Lastly, if GBR is apparently entitled, under the terms of a binding contract, to keep any such sum as above,

(a) is the court able, as a matter of law, to intervene to vary or reduce any such contractual entitlement of GBR to retain such sum, but also

(b) should it do so?

10. As regards the third point, my research shows that the Guernsey law which would govern the contract, certainly at the time of the contract in September 2022 (I will refer further to this at the very end of this judgment) is derived from the *coutume*, or the old customary law of Guernsey, and that such law is regarded as being reliably sourced in a *Treatise on the Law of Obligations or Contracts*, written by the Jurist, Robert Joseph Pothier and published in 1761. The *Treatise* was translated into English in 1806. It says that the court does have a power to intervene in certain circumstances:

> "*The penalty stipulated in a case of non-performance of an obligation by a party to a contract may when excessive, be reduced and moderated by the judge"*

see Part II, Chapter 5, Article I, Fifth Principle. I discuss this later, where it arises.

11. Before I go on to that, however, I should record the relevant history of what took place between the parties. I take these facts broadly from the chronology prepared by Ms Evans, the pleaded case prepared by Ms Evans and the defences which Mr Filipczak has likewise prepared, ("*the pleadings*").

The history

12. On about 18th September 2022, Ms Evans requested a quote for carrying out this fairly substantial building project from GBR, and she received certain detailed quotations from Mr Filipczak on 25th September 2022. On 30th September, she met with Mr Filipczak at her own house and they discussed the content of the quotations, and I think some amendments were made to them. That resulted in a contract being signed that evening, ie on 30th September 2022 ("***the Agreement***.")

13. Whilst there was then an Agreement as to the specified works there was also an understanding that the scope of the works might be somewhat reduced in practice, because Ms Evans was nervous about whether she could in fact undertake the entirety of the works. (All this is admitted in the pleadings). What was actually said in the email or WhatsApp messages that were exchanged at that time was that Ms Evans had said to Mr Filipczak by an email in the morning of Friday 30th September,

> *"Thanks for getting these to me* [that is the quotes that he sent]. *Just to confirm, the remaining quotes could change if, say, the roof timbers are added as opposed to replaced? Also plasterboarded upstairs but probably not skimmed. If you are okay with some of these changes as we progress thru the job, Artur, I am more than happy to sign a contract….."*

and some other practical matters were mentioned. Mr Filipczak emailed back,

> "*Hello, Linda. Excellent. With the quote, you can change how you want as we go. Like we say yesterday, you are the boss and I am just getting paid for what we do*."

Then there was obviously a meeting arranged because Ms Evans emails back,

> "*Yes, that's fine for this evening. I will be home by 5.30pm"*

and, at the end she says,

"*I was speaking with the scaffolder yesterday and he said all scaffold companies are required to have a drawing now! All about the money, Artur."*

I find that this is evidence of Ms Evans' concerns about money, although those emails were exchanged before the contract.

14. Both parties agree about the written contract then entered into, and there is a copy of it in the bundle of documents which Ms Evans prepared for the court. It is a "*Building Works Agreement*" made between Guernsey Building Renovations Limited and Ms Evans.

15. Now, as to the origins of that contract, Mr Filipczak says this was a form of contract which he had paid money to have prepared by lawyers, some time previously, and it was his standard form of contract. He amended the original form on occasions to make slight changes, and he had also amended it in the light of experience, he said. It is a business-like document which contains various clauses but I need only read, the significant ones.

The September 2022 Agreement

16. The contract first sets out who the parties are. That has been typed in, so the names were not filled in into a standard model form; this document was prepared specifically for this contract. It then gives some definitions in a very formal legal manner. It basically says (Clause 2) that the agreement is made when it has been signed, and the "*Services*" which it describes will continue unless terminated in accordance with Clause 11 of the contract, or by being completed and payment made. The "*Services*" are the specified building construction services, and any mutually agreed addition, extension or variation thereof. The precise Services are defined as those described under a "*proposal*" of 29th September 2022 provided by GBR to the client and set out in Schedule 1 to the contract, and there is indeed, a Schedule of that date appended to the Agreement, which describes various items of work, set out as a specification of particular items which are then priced up.

17. Moving through the contract, there are the usual terms that I do not need to read out, about responsible work and the parties' reciprocal obligations and so forth but there is a very important clause at Clause 5, headed "Charges and payments". It reads

"*In consideration of the provision of the Services by GBR, the client shall pay the Charges.*"

The Charges are previously defined as the sums which are payable for the Services set out in the Schedule. There are provisions for varying those sums where different services are provided, invoices to be provided for the works specified in the Schedule, and when the client is to make payments. Then at Clause 5.5, it says,

"*Without prejudice to any other right or remedy that it may have, if the client fails to pay GBR any sum due under this agreement on the due date:*

(a) "The client shall pay interest on the overdue sums…..

(and I need not elaborate on that) and

"(b), "GBR may suspend and shall have no obligation to perform all or part of its services until payment has been made in full"

and then, comes a sub-clause which is very important:

"(c) If the agreement, for any reason, is terminated by the client, 20% of the deposit is not refundable, if two parties agree to terminate this contract then after final accounts are prepared by GBR, GBR refund the difference, if any".

This clause is at the heart of the dispute between the parties.

18. I do not need to refer to further clauses about compliance, subcontracting, property rights and assumption of risk and suchlike but I do need to refer to Clause 10.1, headed *"Indemnity":*

> *"The client shall indemnify GBR against any loss or damage which results from the client's breach of this agreement or failure to abide by any of its terms."*

19. Mr Filipczak points out this clause and it is material to the dispute as regards the question of loss that has been suffered, because he says that, as a result of the cancellation that was effected by Ms Evans, GBR suffered loss.

20. There is then a specific provision relating to termination, of the kind often found in a building contract, dealing with breaches of contract through non-cooperation, and not remedying breaches when notified of them but they are not material here and have not been relied on.

21. I do need to refer to Clause 14, which says:

> *"If any dispute arises in connection with this agreement, the parties agree to enter into mediation in good faith to settle such a dispute and will do so in accordance with the CEDR Model Mediation Procedure. Unless otherwise agreed between the parties within 14 days of a notice of a dispute, the mediator will be nominated by CEDR."*

That clause plays a peripheral part in this dispute, and its wording lays down a fairly wide scope for the potential mediation of disputes between the parties.

22. Clause 16 is quite important. It says,

> "*Variation. No variation of this agreement shall be effective unless it is in writing and signed by the parties or their authorised representative."*

This is a very common kind of clause, providing certainty. One knows where to find a contractual term. It is either contained in this agreement, or has to be found in some other signed written form.

23. I should, I think, also refer to Clause 17 dealing with "*Waiver*". At 17.1 it says,

> "*A waiver of any right or remedy under this agreement or by law is only effective if given in writing and shall not be deemed a waiver of any subsequent right or remedy*"

and at 17.2:

> *"A failure or delay by a party to exercise any right or remedy provided under this agreement or by law shall not constitute a waiver of that or any other right or remedy nor shall it prevent or restrict any further exercise of that or any other right or remedy."*

I do not need read any more.

24. Then, as to "*Rights or Remedies*", Clause 18 says,

> *"The rights and remedies provided under this agreement are in addition to and not exclusive of any rights or remedies provided by law*"

thus confirming that if there are other rights or remedies outside the terms of the contract, they will still apply.

25. I do not think I need read further clauses. There is an "*Entire Agreement*" clause at 20, which basically says that the parties agree that the agreement which they have signed is the whole of their agreement and there are no other warranties or representations or understandings or suchlike which apply, but are not contained in the written agreement. None of the remaining clauses is material.

26. We then come to the Schedule. The Schedule refers to "*Services*." These are to be

> "*As per the estimates provided on 30th September 2022 (attached to the contract)"*

(I have already referred to those), and

> *"any additional work, service or future work will be quoted separately"* .

The next material provision is that the timetable is said to be 35 weeks, but

> *"Timeframes and dates of delivery provided for guidance only. GBR makes no guarantee that the services will be performed within the timeframe specified above and it will only commence the work on receipt of a deposit, if applicable, and when an agreement has been signed between GBR and the prospective client."*

At the foot of that, page, relating to *"Charges"* it says,

> *"£31,503 of deposit required to be paid in advance, Fallow* [sic] *by* [blank] *weekly payments for the period of work on-site and materials provided special order paid in full after service has been provided to client".*

27. I have referred to all the potentially material details. Otherwise the contract is a fixed costs quote as appears from the further provision on the next page of the Schedule, and payment terms are to be every Saturday and so forth. There are then the signatures of Mr Filipczak on behalf of GBR and Ms Evans on her own behalf.

28. With the Schedule, there was an invoice which was provided by Mr Filipczak, and that is in the papers. It was actually dated 29th September 2022 but nothing turns on that. It says,

> "*Invoice for 20 % advance on roof and extension. Payment due by 30th September*"

and under "*Service*," it says

> "*20% advance on roof works and extension as per provided quotes. Price, £31,503"*

and it gives bank details, etc.

29. That is the invoice which Ms Evans then paid, by instalments, over what was, in effect, a weekend. It is agreed that she paid £20,000 on 30 September, £10,000 on 1 October and the odd £1,503 on 2 October 2022.

Subsequent events

30. What then happened was that Ms Evans sent Mr Filipczak a WhatsApp message, which has been provided by a copy from Mr Filipczak's phone, at 7.46am in the morning on Tuesday, 4th October, saying:

> *"Morning, Artur. I've had some bad news since last night and I can't go ahead with the job. I'm so upset about it I can't really talk but if you want me to, I will call you. I'm really sorry to let you down and I'm devastated I can't go ahead. You know how long I've been wanting this done. Thank god you haven't ordered any materials to start and at least you can move onto your other jobs without any loss to you. Please will you return my deposit as I need the money ASAP. Again, I'm sorry to cancel."*

31. That WhatsApp message did not get a response. In the evening, Ms Evans sent an email, saying

> "*I have been calling you following my message earlier this morning. Can you please call me"*

That evening, at 6.49 pm, Mr Filipczak responds,

> *"Good morning, Linda. Apologies, was on the roof. We get it done last night. Weather get worse and we going away for break."*
>
> "*I saw your message. I am pretty sure you have good reason if you cancelling. Shame as I was quite excited work with you on it as just you were book for winter. Anything I can help you with? Maybe you can do half project or you cancelling for good?"*

32. There was no immediate response to that but there was a further email from Ms Evans, as to which the date is not perfectly clear, which says,

> *"Morning, Artur. I wasn't sure you were still in Guernsey or had left already. I'm sorry, I can't go ahead with the renovation. It's very disappointing for me to say the least. Artur, I can't go into detail but it's for medical reasons. There is nothing I can do about it. I need all my money, Artur, and can't see anything changing for the foreseeable future. I wish things were different and I can't apologise enough."*

33. There was then a phone conversation between the parties. They both agree that there was such a phone conversation which took place on 6th October. There is a slight disagreement as to the precise details, although a lengthy discussion on the phone is admitted. Ms Evans says that Mr Filipczak said that he had spent the entire deposit on materials and labour. She says this surprised her as it had only been a few days since she had made the bank transfer, but then he said, "I will get all the money back within a two to three week period, at the very latest, October."

34. Mr Filipczak, in his evidence, agrees that there was a discussion and he agrees he did say that he had spent money on materials and labour. He also said in oral evidence that he might have said something about a two or three week period to pay the money back, but he is not sure about having given any particular date, and in fact he does not think he did give a date. He agrees that he did not provide any evidence of what the money was spent on at the time, and Ms Evans has not had such information. He says, that as far as that was concerned, there was no obligation in the contract to provide any details of his invoices, and so he did not see that he had to do so.

35. It appears that, at that stage at any rate, Ms Evans was under the impression that Mr Filipczak was agreeing to return the deposit to her within some period and actually by the end of October but she knew (she agrees) that he was going on holiday. Mr Filipczak accepts this; he was going to Poland. He said that in the course of that visit he was intending to remortgage his house there and (he said in evidence) if he had been successful in doing so, he would have repaid the deposit at the time because he was willing to do so. But this did not happen.

36. In fact, with there being no further communication, Ms Evans waited until 24th October (because she had understood that the work on her project was supposed to begin on 22nd October, so Mr Filipczak would have been back by that time) and she asked then for an update on the return of her deposit. This was by another WhatsApp message which was on the 24th October at 9.03 am, saying,

> "*Morning, Artur. Hope your holiday was good. Could you give me a call when you have a free moment please. Thank you*"

She chased this saying

> "*Artur, I need to speak to you."*

but she did not receive a reply on that day.

37. She then repeated at 8.25 am the following morning:

> "*I need to speak to you. I may be able to work something out for the extension."*

She says that in the meantime, she had been feeling very bad about it all, and having discussed it with her family she thought that maybe she could go ahead with a reduced version of the contract at a lesser cost, which would therefore release, some of the deposit money. This was what she wanted to discuss. Mr Filipczak came back and said, *"*

> *"Good morning, Linda. I just got back yesterday. Sorry missed your phone call. I will call you again after four. If you work out, it would be brilliant,"*

Later that evening, 25th October, Ms Evans responded,

> "*Artur, I will call you early tomorrow morning*."

38. That was on 25th October. There was then a phone call on 26th October 2022, and it is agreed in the Cause and the Defences that, at that stage, the parties agreed to rework the contract to just build the extension and make the structure watertight, prepare the garage for conversion to a bathroom and replace the flat roof covering. However, Ms Evans said that she could only spend a total of £65,000 and Mr Filipczak said that that would be more than enough to get all that done.

39. Ms Evans asked for the return, therefore, of £18,503, which would leave Mr Filipczak with £13,000, which she understood would be the standard 20% deposit amount for a £65,000 job, which was agreed. She says, in her witness statement

> *"Artur agreed to return the £18,500 but I will have to wait two weeks as he said he was expecting the money from Poland from remortgaging a property he owns there".*

Mr Filipczak also agreed, as I understood his evidence that there was some kind of agreement at that stage. He was unclear, in evidence, though, as to whether he thought this was actually binding or was really still part of negotiations but, at any rate, he said - and he said quite specifically - that he did not agree a date by which the specified repayment of the £18,503 only would be made on the basis of that being the difference between the deposits on the new potential contract works and the old.

40. Ms Evans says, though, that her understanding was that she would be getting a new replacement contract. Again it is not clear whether Mr Filipczak really understood that or whether he thought this could be dealt with simply by crossing points out of the existing contract, but that was not, to Ms Evans' way of thinking, the right way of proceeding. She expected there to be a proper further agreement because, in her view, Mr Filipczak had already agreed to cancel the previous contract, and as this was therefore not on foot, a new contract in a proper form would have to be entered into.

41. Ms Evans did not hear anything else but she waited until 9th November to chase matters up, therefore waiting, in effect, until the two weeks for her receipt of, at least, the balance of the deposit had expired. On 10th November, Mr Filipczak responded, saying that it would be a further two weeks before he could pay her owing to a bank delay, and he said that he would amend the contract with the reduced work to £65,000.

42. Ms Evans replied that she would sign a new contract once the £18,503 had been repaid to her. It is important to look at the words that were actually used on this occasion. On 9th November Ms Evans wrote:

> "*Hi, Artur. I haven't received your money yet, so if you can send me over the excess deposit. I've got the scaffolding company waiting for me to arrange the scaffold over the garage."*

Mr Filipczak replied the following day at 8.22 am saying:

> *"Good morning, Linda. Not receiving yet but all accepted. I believe it will take max two weeks and I can pay you back. Also, over the weekend, I will amend the contract to £65,000. You still going for it, right? As with work for kitchen renovation, it will take me into next week and by Monday I can start yours."*

43. So, at that stage there was all but an agreement that reduced works would be done, with Mr Filipczak saying he would amend the contract and professing a belief that he would be able to pay back the money apparently, from the WhatsApp messages, referring to the "*excess*" deposit that Ms Evans has referred to in her own message.

44. On 10th November at 12.31 pm, Ms Evans responded to this, but in a manner that might have been unfortunate. She said:

> *"Artur, until I get the £18,503, I cannot commit to another contract. I have explained to you that I need a lump sum returned to me before I can move forward. You promised me a return of all my money by the end of last month and now a further delay for the amount above"*

So, in effect, she is saying that there had previously been an agreement, in her eyes, for a return of the whole deposit, but now she is only asking for the excess deposit back, with a view to moving forward on the reduced works contract - but Mr Filipczak is still delaying in paying even that back, and she is not willing to go forward with the reduced works contract until she has actually got the excess deposit back.

45. Mr Filipczak then replied,

> *"Hi, Linda. I have delay on bank but now all sorted out and should have it in max two weeks."*

However, nothing more then happened.

46. On Thursday, 17th November, Ms Evans replied saying, "

> *"Here is my account details"* [which she gave]. *"Please deposit the money as soon as possible. I'm really wanting something to happen here, Artur"*

but, again, nothing happened. On Thursday, 24th November, she sent a further WhatsApp:

> *"Artur, can you please respond to my message. I'm beginning to see you no longer want or can do this job and, if so, you need to tell me. I will expect an answer by tomorrow morning, Artur."*

but she received no reply.

47. Now Mr Filipczak says that when he got the message saying, "*Artur, until I get the £18,503, I cannot commit to another contract"*, he interpreted this as Ms Evans saying she was not going to enter into another contract with him at all; he thought she was trying to get her money back but she was not guaranteeing she was going to commit herself to the reduced works contract. Therefore, in his eyes, she had not gone forward as she had promised she would, (he all the time saying that he would pay her back but needed time to do so) and consequently his view was that they reverted back to the original contract, which, he believed, entitled him to keep the entire £31,503 of the original deposit. However, it is right to say that he did not respond and explain all of this, and his view, at that time.

48. Nothing was actually, therefore, sorted out and Ms Evans was very concerned. She wrote an email about the unreturned deposit on 30th November, saying,

> "*Further to our correspondence, the last of which was 10th November and to which I have not received a response from you"*

*t*hough this may not be entirely accurate.

> *"Despite your repeated promises to return my deposit, the money has not been received into my account. I urge you to pay me the sum of £31,503 within seven days, ie by 7th December. If this amount is not paid into my account by that date then I will have no choice but to issue court proceedings against you without further notice. If I am successful in the proceedings, I will likely receive an order that you pay any costs which I have incurred in those proceedings. I look forward to hearing from you as a matter of urgency"*

and she gave her bank details.

59. Mr Filipczak interpreted this as a rather aggressive letter, which is not surprising, given the reference to taking proceedings. Notably, however, Ms Evans was now referring to the return of the entirety of her deposit, and not just payment of the "excess."

60. Mr Filipczak replied to this, on 4th December in an email saying

> *"Please be advised that I am in the process of arranging the funds and paying your back deposit "* [which might mean "*paying back your deposit.*"] *"However, it will take longer than seven days considering that we enter the Christmas period when everything is slowing down. In addition to the above, I thought that we agreed to proceed with the half of the project, therefore the deposit returned to you should be half the original amount, £15,000. Please can you confirm accordingly. Please note that as per our building agreement, the deposit is non-refundable. However, as a goodwill gesture, long-term good relationship between you and the company, I decided to not follow this clause and pay the deposit back. Deposit is taken in advance to secure building works. As I booked the time to conduct the building services for your site, I turned down other projects and now I am left without the income. I'm aware that this is my issue, however I would appreciate if we could come to some agreement, set up a fixed, reasonable period when I will be able to meet the deadline and return the half of the original amount of the deposit. Please note that all legal proceedings are based on the signed building agreement. I would like to avoid this long and unnecessary route, especially when the building agreement includes the clause about deposit being non-refundable."*

61. Thus, the battle lines were effectively drawn at that stage. I note here, though, firstly, that Mr Filipczak is inconsistent as to whether or not he is going to pay the whole deposit back. He appears to say that he decided not to seek to enforce the original agreement but to pay the whole of the deposit back, but then he goes on to the question of the subsequent "reduced" contract, which he calls the "half " of the project, but he does not use the figures accurately; he treats it as roughly a half and then suggests that therefore he should repay only £15,000. It is not clear, exactly what Mr Filipczak is saying should happen, except that he is obviously indicating that he wants to avoid legal proceedings. He does, though, claim to rely on the terms of the building works agreement being that the deposit itself is non-refundable. I have already looked at the relevant clause, and will have to come back to that below, but what is clear here is that Mr Filipczak is asserting, at this stage, that he does not have to repay any of the money.

62. Subsequently, on 14th December, Ms Evans contacted CEDR, applying Clause 14 of the contract.. She then reported to Mr Filipczak that:

> *"They have come back to me and informed me that you are not registered with them but they can still offer mediation. They've offered three mediations and I've selected Kandola Amrit as he has extensive experience in building and construction disputes. He is available December 28th - 30th. Fees for the service are £500 and this is to be met equally by both parties. An invoice will be sent out to both parties and must be paid prior to booking confirmation. Please confirm at your soonest so we can proceed."*

There are other emails which Ms Evans has exhibited to show her engagement with CEDR in order to try and arrange the mediation. She says she did so because she was trying to comply with the terms of the contract. She regarded the situation as a dispute, and considered that therefore she was obliged to seek to refer it to mediation.

63. She still did not get any response to that, but the following day, on 5th December, Ms Evans sent an email saying:

> *"Thank you for your email. I'm willing to extend the payment deadline for a further seven days, ie* to *14th December, for the full deposit. This will be a final date and will not be extended further."*

So she is there maintaining her view that in fact she is entitled to have the full deposit back.

64. After that, nothing further seems to have happened until 16th January 2023, when Ms Evans wrote an email to Mr Filipczak:

> *"It has been three weeks since my last email (attached)"* [I think that is the one I have just referred to] "*and I have had no response from you. This issue must be resolved either through a nominated mediator or the local courts. Again, Artur, I respectfully urge you to reply at your soonest."*

65. It seems to have been as long as 23rd February 2023 before Mr Filipczak did reply to Ms Evans:

> *"Can you provide me with your bank details in order to start repayment of your deposit. GBR Limited can afford a first instalment in the amount of £5,000 due to the lack of projects until the end of April, as your project should last until April, followed by £5,000 within the next three months. After April, GBR Limited starts a new project and aims to pay the rest of the deposit by the end of the summer."*

66. At that stage, therefore, Mr Filipczak had apparently forgotten or overlooked that Ms Evans had, in fact provided her bank details, firstly, in a WhatsApp message fairly early on and, secondly, in the email that she sent to him on 30th November 2022. But again, nothing further then happened and there was a further chase by Mr Filipczak on 3rd March 2023 in which he wrote:

> *"Further to my previous emails, please can you provide me with your bank details. Once again, apologies for not being able to pay the full amount, however, as advised earlier, your project has been booked until the end of April, therefore the company did not have any projects booked until then. As per my previous email, my intention to pay the deposit back is based on our longstanding relationship. I am not following the agreement signed by both parties, GBR Limited and you, which indicates that in the event of a cancellation of the project, you will not be able to recover the deposit. I look forward to receiving your bank details."*

It was then that Ms Evans started these proceedings.

The action

67. In fact, as details of the claim were put forward to the court in February 2023 (court forms were issued then), the emails that I have just read out may well have been after the issue of proceedings. As a litigant acting in person, Ms Evans needed permission to proceed, and she was granted this provided she put in a proper statement of the details of the claim. The Bailiff reviewed the claim and being satisfied that it was appropriately formulated, he allowed her to proceed. The claim was tabled on 10th March 2023, with defences being tabled on 14th April 2023.

68. There was a Réplique on 26th May and a Duplique on 9th June. I do not need to refer to the specific terms of these except to record that it was only at this stage that the question of the true interpretation of the forfeiture, or retention clause, (Clause 5.5 (c)) emerged, although it may be only in Mr Filipczak's own witness statement that he raised the point that, although the document itself actually says that "20% of the deposit" is not refundable, what he actually meant by that was that "the 20% deposit", (ie referring to the whole £31,503) was not refundable. He himself understood it that way, and that is what he therefore understood the contract to mean.

69. There were then, in August 2023, witness statements, which broadly set out the parties' slightly different versions of the facts that I have described above. The hearing of the case was scheduled for 13th October and it has come on before me as I have already indicated.

70. For completeness, I should mention that there was an application by GBR, a few weeks before the trial to postpone the trial. This was on the grounds that GBR had discovered that while it (and he) expected GBR to have legal representation, it was not able to do so because its lawyers had declined to act because of unpaid fees. GBR sought a three month postponement, which I refused to allow because it seemed to me that there was no indication that a postponement would enable GBR to obtain legal representation, because it appeared that GBR was trying to obtain either free representation, or representation on a very much reduced fee basis, and there was just no evidence to suggest that this would ever be made available. I took the view that the matter had gone on long enough already, and it ought to be decided. I therefore refused an adjournment, and the trial has come on before me today.

Matters for decision

71. I have already indicated the three stages of the necessary enquiry, above. They give rise to the questions which I will now set out, and then answer, in turn.

(1) What was the true meaning and effect of the contract of 30th September 2022?

72. The law is quite clear in principle. A written contract that is signed by both parties is the governing law between the parties. This is embodied in the French maxim "*la convention fait la loi des parties*" which is the basis of Guernsey contract law. That point was considered and confirmed fairly recently in a lengthy case that has no direct application here, namely *Smith v Carey Olsen* [2020] GRC 061. In that case, the Bailiff confirmed that this is the basic principle of Guernsey contract law. What had happened was that a client who had contracted with a firm of advocates for legal services had signed a contract which said that he would bring any proceedings against the law firm for any complaints which he had about their services, within three years of the work being done. He had not appreciated this and, thinking that the normal six year period of limitation applied, he had brought proceedings out of time. The Bailiff held that, unfortunately, none of the arguments that Mr Smith had advanced as to why he should not be bound by the relevant clause assisted him, because a party is bound by what he signs. The Bailiff cited the well-known English case of case of *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 to this effect.

73. Therefore, I start from the point that the fundamental question is; what did the contract that was signed between these parties actually say? And I look to see whether that is clear or whether there is really any doubt about it. If there is some doubt about it because the words are ambiguous, then it may be that I have to consider and interpret what that meaning was.

74. Therefore, of course, I look at Clause 5.5(c) of the agreement. What that clause says in terms, is that

> "*If the agreement, for any reason, is terminated by the client, 20% of the deposit is not refundable."*

By obvious and inevitable implication, therefore 80% of the deposit <u>is</u> refundable. There is no ambiguity that I can see about that at all, taking the meaning of the words as they are written. It is absolutely plain that the deposit referred to is the sum of £31,503 (even though that is referred to as an

"advance" in the invoice), as it is also quite plain from the general terms of the schedule that this £31,503 is the sum that is being thought of as "the deposit". Therefore, the document is saying that it is 20% of such sum which is not refundable if the client terminates the contract.

75. A question about this might perhaps be said to arise, because I do accept that, in principle, it is very common for a deposit as a whole not to be refundable, and Mr Filipczak says that he meant that the whole 20% was not refundable, and it is an unfortunate result of his English not being that good, that when he made this amendment, or this insertion, in this clause for himself, he did not get the wording quite right. He might, therefore, say that must have been perfectly obvious to Ms Evans that what he meant, in fact, was the whole of the 20% was not refundable, and therefore she cannot rely on the literal wording of the agreement because she must have known, or she should reasonably have known, what he meant to say, so that it would be taking unfair advantage, therefore, for her to treat it as meaning only what it actually says, when he meant, and Ms Evans must have known that he meant, something different.

76. I have examined this proposition having heard Ms Evans' oral evidence.

77. Now I should say at this point, that both parties gave evidence before me. Both parties took the oath and said that they would speak the truth, the whole truth and nothing but the truth and I am quite satisfied that both parties adhered to that oath, and both told me the truth as they saw it. Where they disagree, there may be different perceptions of what went on, but I accept that these were and are entirely sincerely held. So I am quite satisfied that each party was telling me the truth as he or she saw it, and I accept the evidence of each of the parties in principle unless I conclude that they must be mistaken, because some other evidence, or just plain common sense, suggests this.

78. Ms Evans told me that, when she realised she was going to have to terminate this agreement, because of what I infer was an adverse medical report that she received (on Monday, 3rd October, it would have been), she spoke to a friend because she was very worried. First of all, she says that when she had looked at the contract, before signing it, she did skim it fairly fast. It was at the meeting with Mr Filipczak and she felt that there was a bit of a rush because she knew he was going away. She wanted things to be finalised and she knew that he wanted it too.

79. It was quite a long document but she did look through it. She looked at the things that she thought were quite important. She said that she noted the term itself - Clause 5.5, although - and I consider this to be a mark of her being honest and candid in her evidence - she said that she did not then stop and think about exactly what it meant. She noted, though that there was, as it were, a non-refundable aspect to the deposit that was mentioned in the contract at 5.5(c), but she did not stop and work out carefully for herself what it actually meant at the time; she just noted that a material clause was there. What concerned her more at that time, she said, was the point about the timetable being 35 weeks, which she thought was an awfully long timetable and must be exaggerated, although I think she said that Mr Filipczak had said it might not take that long. She also said that she realised now that with the amount of work that was envisaged, it might be quite reasonable that it should take that long but, at the time, those were the points that concerned her, including the actual amount of the deposit (which was at the foot of the schedule, ie the £31,503) and the payments that were to be made, followed by a blank number of weekly payments for the period of work on site and materials provided, etc. That was the clause to which she paid most attention.

80. So those having been the points that she was concerned with at the time of signing the contract, when she realised that she was going to have to cancel the contract, she was worried as to what she had signed, and she talked to a friend because she was in a panicked state. The friend had pointed out Clause 5.5(c) to her and had said to her "It says that, in fact, if you terminate, he is going to be entitled to keep 20% of the deposit" (in other words, about £6,300). So she formed the view, then, that if she could get Mr Filipczak to agree simply to cancel the contract, (in effect to tear the whole thing up as if it had never happened) that would be best, but if she could not get him to rescind the contract or cancel it in that way, then she might have to agree that he was entitled to keep about £6,300 - but that was the worst case, in terms of what she was committed to in the contract. She says that was what

was said to her by her friend, the night before she told Mr Filipczak. Ms Evans says she was extremely concerned and upset about signing a contract and then having to say: no, she could not go ahead with it, but she had to do that. That, therefore, was the state of mind in which she WhatsApped Mr Filipczak the following day, 4th October. She says that when she got his response, which was effectively, "*Oh, well, I accept you must have a good reason for it and, yes, I will pay you the deposit back*," she thought that he had agreed to cancel the contract completely, and was therefore agreeing that she could have the whole of her deposit back. That was the basis on which she proceeded thereafter. Her understanding was that they had reached an agreement, in effect, to cancel the contract itself.

81. Mr Filipczak says, as already mentioned, that his understanding of the contract was that it was the whole of the deposit that was not to be refundable if Ms Evans terminated it, and he gave reasons for this . He explained, in evidence to the court, that the point of the "*deposit*," which is in fact an advance, is that it secures the work that is going to be done; it compensates him at that time for monies that he will have to pay, and possibly have to pay then and there, for materials or labour, depending on the agreements that he makes with his suppliers and sub-contractors. It also compensates generally for the office overheads that he incurs, the rent, rates, insurance, and suchlike, on his offices during the period while the work is being done. It also compensates, (in a sum which I think he was putting at about 6% of the contract price, although his evidence was not perfectly clear) for meeting his own wages because he has got to live from the money that is brought in to the company from the contract. So he says that the reasonableness of allowing 20% of the whole contract sum to be kept by him is to ensure that he has got the security that he will not be out of pocket, - or GBR will not be out of pocket, - in respect of all those matters; that is why it was and is justified.

82. I have to look at this on the basis of what the parties agreed. As I have said, in Guernsey law, the terms of the agreement bind the parties, and in my judgment, the agreement itself is quite clear, in its words, that it is 20% of the "deposit", (meaning, here, 20% of the £31,503) which is the sum that is "not refundable" in the event of a termination by the client. I cannot see any circumstance in the evidence which suggests that Ms Evans is not entitled to rely on that term as it was written, or that she ought not to be able to say that that is what she took the contract to be at the time. She may not have paid great attention to the effect of that term at the time but that does not disentitle her from relying on it. She obviously knew, and thought to herself that she was signing up to what was written there, and would be bound by it, and equally, so would GBR. There is absolutely no suggestion from the evidence that Ms Evans knew, or reasonably should have known, that Mr Filipczak believed that the contract document said, or meant, something different from the natural meaning of its actual words. I cannot see anything in Ms Evans' conduct which suggests some reason why Mr Filipczak's undisclosed belief as to the meaning of the contract should be given precedence over what it actually said. I hold, therefore, that the meaning of the contract was exactly as its words said, and Clause 5.5(c) entitles GBR to keep only 20% of the deposit sum upon the termination of the contract as has happened.

(2) Was the 30th September agreement canceled or varied?

83. Having found that the contract in fact provided for a retention by GBR of £6,300 odd (only) in the event of the termination which happened., the question I then have to decide, therefore, is: is, did that contract continue in existence or did it actually get superseded by either a cancellation agreement or an agreement for a varied contract?

(i) The Law

84. This is a question of law: what is necessary, in Guernsey law, to effectively cancel or vary a contract which has previously been made. Since the original contract "makes the parties' law" ("*la convention fait la loi des parties*") the answer must be that it needs acts which are sufficient to amend that "*loi des parties*" effectively, in other words it requires, in principle, a further contract effective to supersede the original one. I have found no direct statement to such effect in Guernsey authority, but it is a logical proposition from first principles, and it is supported by two decisions in Jersey law, which is

persuasive in Guernsey, namely *Wightman v Cathcart Properties Ltd* (1970) JJ 1433, and *Dohr v A1 Airports International Ltd and another* [2015] JRC 047.

86. The making of a binding contract in Guernsey law requires four elements. I take this proposition from cases, and the most clear expression that I have been able to find is again a Jersey case, *Selby v Romeril* [1996] JLR 210. The four required elements of a valid contract in the Channel Islands jurisdictions are capacity, consent, *objet* and *cause*.

87. First, the parties have to be capable of making a binding contract, meaning broadly that they have to be persons of legal capacity. Generally that means being adults of sound mind. Second, their consent must be apparent, and there must not be any matter which vitiates that apparent consent, such as fraud or misrepresentation. No question would arise as to either of these requirements here.

88. The two other elements do require examination in this case. The third element - "*objet*" in French - relates to the subject matter of the contract, and that this must be clear. It refers therefore to the subject and the intention of the agreement and whether this is ascertainable with sufficient certainty. If the subject matter is the cancellation of the 30th September contract, that is fairly precise; there is more room for uncertainty if the issue is variation.

89. The fourth element is "*cause"* in French. This being literally "*cause*," it is sometimes described as a sufficient cause or reason for the obligation to be performed. It needs more explanation here.

90. In English law, in broad terms (sufficient for the discussion here), for a contractual promise to be binding as such, it must be supported by "consideration" given by the promisee, ie the person seeking to enforce the promise. "*Consideration*" is either a benefit given to the promisor, or a detriment incurred by the promisee, in each case as a "*quid pro quo*" for the promisor's promise. There is thus a reciprocity of obligation; one promise "*buys*" the other, and creates a binding engagement. English common law then proceeds to mitigate the inconvenience or unfairness of this basic principle in particular situations, first by allowing the enforcement of a gratuitous promise made under seal (ie in a deed), and second by the operation of estoppels, generally created under doctrines of equity where the operation of the basic principle would work such unfairness that the courts of equity regarded this as unconscionable.

91. Whilst *cause* in Guernsey law has the same function as English law consideration, namely being the magic element which makes a promise contractually binding, it is emphatically not the same thing as "consideration": see *Whiteman v Cathcart Properties Ltd* (1970) JJ 1433 at 1441. It needs to be, and is, a wider concept, first because Guernsey (and Jersey) law do not have the concept of a deed, whereby a promise undertaken with due solemn formality (the affixing of a seal, with intent to be bound) will make a gratuitous promise binding, and second, because the relevant English law estoppels which mitigate the position (proprietary estoppel and promissory estoppel) are equitable doctrines of English law, and not part of Guernsey customary law. *Cause* thus did not develop with any connection to English law doctrines but out of Norman law, and with more affinity, therefore, with French law.

92. *Cause* therefore embraces the situations in which the customary law has come to regard it as right to allow that a promise should be enforced, as to which, plainly the making of a contract is the paradigm. It has been described, consequently, as a sufficient reason to hold the relevant promise to be binding. In Pothier's Treatise at Part I, Section I Article 1 [3], considering what a contract is, it is apparent that what is looked for is a promise which is "*made with the intention of … giving the party to whom [it is] made the right of demanding its performance."* Unsurprisingly, the presence of consideration in the English law sense is likely to be seen as sufficient "*cause*;" the incurring of mutual and reciprocal obligations is, objectively, a very good reason for assuming that each party gave its promise intending it to be enforceable. However, as the key appears to be the intention (to be bound) of the party making the promise, *"cause"* can then extend to matters which would appear to demonstrate this, rather than stopping, simply, at an objective assessment of the intended function of an agreement derived from reciprocity of the obligations undertaken. It can extend to wider and less concrete matters, such as the existence of a family relationship, or a relationship of responsibility, from which it may be inferred

that the promisor intended his promise to be enforceable. The existence of "*cause*" then becomes very dependent on the facts of the case.

93. Whether it would ever extend to the enforcement of a totally gratuitous promise between parties at arm's length appears to remain an undecided question in both Guernsey and Jersey law. It would seem, though, that there would have to be some discernible independent element which would induce the court to hold that such a promise was enforceable by the volunteer promisee, but whether the correct legal analysis is that this is achieved by some objectively assessed element in the particular case, or whether it is, rather, a finding that the promisor subjectively did intend his promise to be binding is not really clear. Of course, the former approach can, as a matter of evidence, lead to the latter, in which such intention is inferred or even imputed, rather than found as fact in itself.

94. The upshot, though, is that whilst the requirements for "*cause*" in Guernsey law, and for "consideration" in English law will frequently produce the same result on the same set of facts (which is not surprising as two civilised systems of law seeking to deal with the same legal question are very likely to reach the same conclusion even if by a different route), one cannot simply apply the principles of the English law of consideration, and assume that this is the case. It behoves those lawyers who, like myself, have been initially trained in English law principles, and to whom, therefore, the enforcement of a gratuitous promise not under seal is intuitively heretical, to keep this difference in mind.

(ii) Discussion

95. With this introduction, therefore, I move on to consider the basis on which it could be argued, in this case, that the Building Works Agreement made on 30th September 2022 was either cancelled or varied by the parties' subsequent conduct.

(a) Was the 30th September Agreement canceled?

96. As stated above, this requires the finding of, in effect, a valid contract between the parties to that end. Whether the agreement was cancelled in law depends on whether, when Mr Filipczak said in his email to Ms Evans, "*Well, okay, I accept that you have to cancel*" and effectively led her to believe (as I think he did lead her to believe) that he was agreeing to pay the whole of the deposit sum back, that created a binding agreement between them that he would pay it back in any event, either immediately, or at least within a reasonable time (because that is what would normally be implied if no specific time was actually stated).

97. The *objet* of such a contract - its subject matter and intention - is pretty precise, and would therefore have the required certainty, if that was what was agreed. The crucial question, therefore is: was there sufficient "*cause"* to support such a binding agreement by Mr Filipczak?

98. But as to the question of "*cause*" for Mr Filipczak's suggested promise that GBR would simply treat the contract as being cancelled, what was the actual reciprocity that Ms Evans gave for that? It is very difficult to see that there is any at all. Ms Evans was bound by the contract to perform the obligations which she entered into, in return for GBR performing its obligations. She asked for her obligations to be cancelled completely, without her doing or giving anything in return. It could perhaps be said that she was agreeing to release GBR from its obligation to carry out the works, but from GBR's point of view, this is unrealistic, as she was effectively asking GBR to forgo the opportunity to earn the contract sums, and further, to forgo any contractual right to keep the deposit in that situation. Ms Evans was not really giving anything that I can see in respect of the requested cancellation, the essence of which amounts simply to Mr Filipczak (or GBR) giving up all their contractual rights for nothing.

99. Neither does it seem to me that Ms Evans submitted to any detriment in return for this promise, nor suffered any disadvantage in reliance on it. She had, upon the meaning of the agreement as I have found it to be, a right to the return of 80% of the deposit. She did not, of course say to Mr Filipczak, "*Well, actually, you only have to pay me £25,200 back, of course*" because she naturally wanted to

recover all her money if she could. She simply took it, no doubt with relief, that Mr Filipczak was actually willing to rescind the contract in its entirety and pay her the whole deposit back. But whether she is entitled to regard that apparent willingness as enforceable is a different matter.

100. For it to be found that there was a binding agreement between both parties to cancel (ie not to perform) the 30th September Agreement, one would have to find sufficient "*cause*" to make this binding from the fact that Mr Filipczak made the statement or promise which he did. Does it appear that he intended it to be binding and enforceable? Looking only at the statement which he made and the circumstances mentioned above, in my judgment, it falls short of this. It was a quick reaction, and plainly not a particularly considered one, certainly initially. It does not have the flavour of being a solemn promise which Mr Filipczak was intending, at the time, to create an obligation which was contractually binding on GBR, even if he had the generous intention of doing what he said. It does not seem to me, and I so hold, that the mere making of this apparent promise to repay the whole of the £31,500 deposit demonstrates sufficient *cause*, by way of serious intent that it should be binding, whether found subjectively, or imputed objectively.

101. (I would add, and it is convenient to do so, here, that there is also, in any event, probably not sufficient certainty about the offered repayment being proffered as an unconditional obligation, although this might be regarded as lack of *objet* rather than absence of *cause*. That is evidenced by the fact that Mr Filipczak was plainly saying, on any basis, as part of his dealings with Ms Evans, that he would repay the money if and when GBR could do so. He said: "It depends on my remortgaging my property" and so forth. There was, therefore, an element of qualification about his agreement to say: "yes, he would repay it," carrying the undertone of "*try and repay it*." This ties in with the fact that he says, and he said at times, that he was really only doing it as a matter of good will. This all supports the lack of intention to be bound by this new obligation, as a binding engagement.)

101. Was there any matter more extraneous to the mere promise in its immediate circumstances, which might constitute such *cause,* ie indicating that Mr Filipczak really did intend, or should be held to have intended, that promise to be contractually enforceable? The obvious candidate as such a factor was the possible replacement agreement, for lesser works at a reduced price of £65,000. There are two possibilities, namely, (a) whether the prospect of Ms Evans entering into such a subsequent contract was sufficient *cause* for Mr Filipczak's promise to cancel the 30th September Agreement as a free-standing obligation? or alternatively (b) whether the actual negotiations themselves between the parties amounted to a sufficient contract, in Guernsey law, to vary or supersede the terms of the original 30th September Agreement? (This latter is, in fact the second question here, namely that of variation rather than cancellation.)

102. As to these possibilities, there is Jersey case law which suggests that a continued relationship between the parties might amount to sufficient *cause* to make binding one party's promise to accept a lesser obligation in substitution for an existing, greater one. In *Lyndon v Hopkinson, (*1991) Jersey Royal Court (unreported No 052) a builder who had done some work on a project was persuaded to reduce his prices because his client said, "I cannot afford to pay you because the bank will not lend the money to me". The builder continued the works on that basis. It turned out that this was not a true statement; it was just something the client had said. Consequently, the builder was held entitled to reinstate the original prices and to recover these.

103. The court apparently considered that there was sufficient *cause* in the "*continuation*" of the contract at the lower prices, to make that agreement on the builder's part enforceable by the client. The fact that the builder was at least going to be able to continue the project for a lower price, and would not have the problem of having to try to extract higher prices from someone who said they could not pay, constituted *cause,* either because those benefits provided a good reason why he had accepted to be bound only to receive the lower prices, or perhaps because there was a perceived advantage in preserving the continuing goodwill of the relationship generally. It was the fact that the varied agreement had been achieved by the customer telling a lie which made the promise unenforceable against the builder, through being "*cause fausse*" (false cause). The notable point, though, is that the result was not decided on the basis that the builder's promise was never enforceable at all.

104. That case has obvious similarities to the position here, but it is different. In that case, the builder agreed to accept a reduced payment for works he had already embarked upon, (though on a false basis), whereas in this case, the works had not been commenced at all, (although money had been paid) and the alleged promise was simply, in effect, to tear up the agreement.

105. I have already held that the mere statement by Mr Filipczak that he would pay the deposit back was not enforceable in itself, owing to absence of *cause.* The question then becomes: was the anticipation of a substitute contract for lesser works sufficient *cause* for Mr Filipczak to be prepared to bind himself to repay the whole of the deposit in any event. Without deciding that such a matter could never amount to *cause* in a situation such as this, I conclude that, in this case, it did not; for much the same reasons as stated in [100] and [101] above. In other words, it does not appear to me that Mr Filipczak intended, or should be taken to have intended, his willingness to pay back the deposit to be contractually enforceable by Ms Evans in any event, because he valued the mere chance of maintaining her goodwill, or her entering into a lesser contract with him.

106. In my judgment, whilst the benefit of maintaining the goodwill of a client could constitute *cause* sufficient to make a gratuitous promise binding in certain circumstances, such as, perhaps, where there is an ongoing relationship of a series of contractual engagements, and consequently a contractor is looking specifically to carry on other relationships, the situation here is different; this was a "one-off" contract. It might well have been the case that if Mr Filipczak had actually got another contract, from Ms Evans, he would have agreed to release the rest of the deposit from the first contract, but Ms Evans' case is that there was no such further contract, and that Mr Filipczak simply agreed to return the whole of the deposit money independently of that and she is therefore entitled to insist on its return. However, in my judgment, (although I accept that I have not heard extensive argument on this because the litigants are unrepresented and I am working from my own researches) even in Guernsey law, where *cause* will have a wider scope and application than would the corresponding English law concept of "*consideration*", I do not think that the prospect of such a substitute contract provided sufficient *cause* to mean that Mr Filipczak's suggested promise to return the deposit was binding on him, (or, more accurately, on GBR).

107. For the above reasons, therefore, I am not satisfied that, there was a binding promise by Mr Filipczak that the £31,503 deposit would be returned to Ms Evans unconditionally, and there was nothing here that displaced the terms of the 30th September 2022 Agreement up to that point.

(b) Was the 30th September 2022 Agreement varied or superseded?

108. So the next question - which perhaps is not actually relied on so substantially as I had originally thought - is: was there an agreement for a substitute contract in the shape of the "*half-contract*" (as Mr Filipczak put it), for reduced works to the value of £65,000, which was, by agreement between the parties, intended and effective to vary or supersede the original contract which they had made? This is a question of the effect, in Guernsey law, of the subsequent negotiations which took place between the parties, and in my judgment the answer is "*no*" because the parties simply never got there.

109. There was never sufficient certainty, in my judgment, about what works were actually going to be done under such a "*reduced scope*" contract. The alleged agreement was deficient in *objet.* Indeed, Ms Evans says she expected to have quotations in the same way as she had had with the previous agreement, and I cannot see that it is possible to derive from the previous agreement, any sufficient certainty as to what works within that specification were agreed to be included, or even were objectively likely to be included. It is highly likely that such specifications would have required amendment. At the end of the day, the parties never reached a sufficiently certain agreement.

110. They also never fixed an actual final price because all that happened is that Ms Evans said that she "*could only go to £65,000*", and Mr Filipczak said, in effect, "*Yes, work such as you are looking at could be done for that sum*", but he never actually put a precise figure on it. It was therefore, at best, only a maximum figure, not a price. The parties never agreed an actual price. Furthermore, Mr Filipczak also recognised that he needed to amend the contract. In the WhatsApp message he sent at

the end of November, he says *"Tonight, I will be amending the contract*." So Mr Filipczak appears to have envisaged - quite rightly - that there needed to be a proper document with sufficient details in terms of the works that were to be done and, no doubt, the actual sums to be paid - and this was needed in order to make a binding contract for reduced works which would supersede the original contract.

111. Now, the eventual *impasse* which occurred between the parties may, unfortunately, have arisen because of a misunderstanding. Because of the emails where Ms Evans kept pressing for the deposit back even though Mr Filipczak was saying that he would pay it out of good will but only when he could, Mr Filipczak began to doubt whether Ms Evans did actually intended to enter into a reduced scope contract with him at all. When she said that she wanted the £18,000 balance of her deposit back before she could commit to another contract, he thought that meant that she wanted the money back but she would not necessarily give him another contract. He was suspicious because of her emails. Ms Evans says that, because of the way Mr Filipczak was behaving, she began to think he was trying to keep all the £31,500 deposit she had paid, and somehow treat this as being a deposit on the later contract that she was going to enter into, but he would still be purporting to collect the payments that would be inserted in that contract.

112. I should say that Mr Filipczak explained that the way the contract works when he takes a deposit or an advance, is that he does collect weekly payments; he collects them on the basis of the value of the work that he has actually done in the week that is to be paid for but he adds that up and then deducts 20% of that sum to take account of the part of the deposit that is attributable to the claimed sum. He treats the deposit, therefore, as an advance of part of that particular amount invoiced for payment. (That procedure, ie treating the deposit as a *pro rata* advance, also makes sense in respect of how the deposit would be dealt with if an illegitimate termination occurred during the performance of the contract, because it would impact on the amount of the deposit that could still be retained under Clause 5.5(c)).

113. At any rate, though, the parties, at that stage, appear to have regarded each other as being hostile or going back on the good will under which they were trying to work out a substitute agreement. Ms Evans was wanting a formal agreement and trying to push Mr Filipczak into doing something towards finalising a reduced scope agreement and at least handing her back the £18,000 which would not be needed, but was doing so by pressing for the whole of the deposit back. Because Ms Evans was demanding the whole of her deposit back before she would sign a reduced scope contract, Mr Filipczak was becoming suspicious that in fact she had no intention of actually contracting with him at all, and he was therefore digging his heels in and not paying anything back, coming to rely, then, on what he believed to be the terms of the deposit retention in the Agreement, namely that GBR could keep it all.

114. But for whatever reason, I find that there was no sufficient substitute contract concluded between the parties which in any way varied or superseded the original 30th September, Agreement, which I have held was not cancelled.

115. I would add that there is also, on any basis, the further point, that any actual binding agreement to vary, or even cancel, the terms of the 30th September Agreement had, by the terms of that Agreement, to be made in writing signed by the parties. There was plainly no such document. Even if there had been some apparently binding promises, therefore, it is not clear that this qualification was fulfilled. Deciding that point would require argument about the effect of WhatsApp messages and emails, and whether they constituted "*writing*" and qualified as being sufficient "*signed*" to be effective as a discharge or variation of the 30th September Agreement, and this point has simply not been argued. However, this does not matter in practice because, as I have said, in my judgment, there simply was not even an oral, verbal or unsigned, concluded agreement, at all.

3. Is Ms Evans entitled to recover the whole or any part of the deposit paid under the 30th September 2022 Agreement?

116. The final question is, therefore: is GBR still entitled to keep the deposit monies? These were £31,503 paid over under the Agreement but I have held that the Agreement itself provides that only 20% of

these, ie £6,300.60, is not returnable. In principle that means that GBR has to pay back £25,202.40. Does it have to pay back any more?

117. Now Guernsey law on this point is again, not necessarily the same as English law. The fact that the two jurisdictions may not have precisely the same rules and principles has already been illustrated by the difference between *cause* in Guernsey law and "*consideration*" in English law, as mentioned above.

118. In general principle, there is a distinction in the law of contract between a penalty, and a forfeiture. A party's first, and primary, obligation is to perform his contract, but if the contract provides that if one party breaks the contract, he will pay a specified sum to the other party, that creates a "*secondary*" obligation to pay that sum. If the court is of the view that the sum is a "*penalty*" then it will not enforce the payment.

119. Now, strictly, a penalty - that is: an obligation to pay a sum of money if one breaches a contract - is not the same thing as a forfeiture. A forfeiture occurs when a party has already paid an amount of money, or given over some property, and the counter-party says that, because the contract has been broken, he is entitled to keep the money or property, but the paying party seeks to recover it back. The difference is thus whether the wronged party is suing for the money which he claims should be paid, or is being sued to make him return money he has already received. The latter is what is happening in this case. Clause 5.5(c) of the 30th September Agreement is a forfeiture clause, rather than a penalty clause. But it can be seen that the ultimate effect of both situations is very similar.

120. The English law of penalties was recently considered in the case of *Cavendish Square Holdings BV v Talal El Makdessi* [2015] UKSC 67. It drew attention to the different and rather refined distinctions, in English law, between penalties and forfeitures. These had arisen because of the historic development of these laws, where the law of penalties had been enforced by the English common law courts but the law of forfeitures - or, more accurately, relief from forfeitures - had been developed, and developed rather more elaborately, in the courts of equity and this had resulted in somewhat complicated distinctions after law and equity were effectively fused, and both administered by the one Supreme Court of Judicature, pursuant to the English Judicature Acts 1873-5.

121. Guernsey law did not develop against any such background, although, as already noted, it would not be surprising in principle if, at a general level, its rules were similar to those of English law. However, there may be more direct reason for similarities, in this case.

122. The standard practitioners' text book on the English law of contracts is Chitty on *Contracts*. Advocate Gordon Dawes, in a learned article entitled *A Brief History of Guernsey Law (*Jersey Law Review, February 2006,) points out (see paragraphs 50 - 52,) that this key textbook had its genesis in about 1824, when Mr Chitty wrote various treatises recording aspects of English contract law. Importantly, at that time, both French and English jurists such as Mr Chitty had resort, in some degree, to the work of Pothier, whose *Treatise on the Law of Obligations and Contracts* had been published in 1761 but only relatively recently translated into English, in 1806. Advocate Dawes points out that many of the subsequent commentators on contract law, including Mr Chitty clearly drew on materials and principles to be found in Pothier's work.

123. I conclude, from the above, that this is not an area of law where the Guernsey court either can, or even should, look to modern English law as a reliable expression of the corresponding principles in Guernsey law, but that I should, rather, look to what appears to be the underlying principle applicable in Guernsey law, which is likely to be found from interpreting Pothier.

124. Thus, Pothier says in his *Law of Obligations* (to be precise, in Part 2, Chapter 5, Article 1, Fifth Principle), as translated:

> "*The penalty stipulated in cases of non-performance of an obligation may, when excessive, be reduced and moderated by the judg*e."

He continues that this is deducible from a decision of the jurist Dumoulin whose opinion was that a penalty was a substitute for damages, and would therefore be excessive if it exceeded the general law (laid down in the *Code* of Justinian 's *Institutes: De sentent quae pro eo quod interest*) that damages awarded should be moderate and should not exceed double the value of the thing which was the primary obligation (although there is then some discussion as to whether and how far this might apply to consequential losses). He goes on to comment that the contrary view (namely that if you sign up to something, even an excessive penalty, then you are bound by what you signed, and the court will not intervene) was the view of the jurist Azon, but opines that Dumoulin was to be preferred, for being more in accord with principles of reasonable moderation in the assessment of damages.

125. I do not think that Pothier would have distinguished between a "*penalty*" and a "*forfeiture*" as the considerations involved are entirely similar. Pothier's stated approach therefore says that if I conclude that this contractual term has the character of a penalty, even though it is being enforced by way of a claim for relief from forfeiture, I can, and should consider whether it should be moderated, by looking at its effects relative to the amount of damage actually being suffered by the party not in breach.

126. How does that apply in this case? I have the difficulty here that I have actually got no clear supporting evidence of the amount of loss that Mr Filipczak says has been suffered by GBR. There is no independent evidence of the payments that he says he gave to buy materials and engage the labourers he was going to employ. In his oral evidence, he said that he agreed with Ms Evans in the 6th October telephone conversation, that he could probably recover the amount paid for materials. That would leave the monies that he said he paid to the subcontractors - the tradesmen from Manchester whom he habitually engaged. He had paid them money, and getting that back might take a bit of time, but he mentioned that to Ms Evans at the time.

127. He was asked - and I see no reason to doubt his honesty on this, because he said: yes, he had got his payments for the materials back, so he had not suffered that loss - but also, he said he had not got the payment to the sub-contractors back, and that it was £5,000. In addition, he pointed out that he had losses in respect of contributions to his overheads and his own ability to pay himself his wages out of the monies that should have been coming in under this contract. He said that at the end of the day, he had not got any replacement work until April, and, as can be seen from one of his emails, he said at the time that he has got another project from April or May, which he relies on for saying that he will then be able to repay the deposit, or some part of the deposit, to Ms Evans. That was in one of his later emails - I think, after proceedings had been commenced - but he was adamant in his evidence, that he had had no work during this period at all and consequently his company, and effectively therefore him, had lost all the money that it would have earned from Ms Evans' paying the amount of £153,000 under this contract, and the security for at least getting some of that back lay in being entitled to keep this £31,500, paid up front.

128. I have already held that that is not, of course, what the contract actually meant, and it is only £6,300.60 that the contract entitles GBR to keep. Also, as I have said, I have no evidence other than the unsupported word of Mr Filipczak about the losses he says GBR has suffered, and whilst I am in no way saying that I doubt Mr Filipczak's actual honesty, there is nothing to support his simple assertions. There is no documentary support for the £5000 figure he says he paid to get over his labourers, although I note that this is still below the £6,300 (odd) figure which the contract says he is entitled to retain.

129. I also have no evidence at all of the extent of overheads and wages to which this cancelled contract might have made a contribution that GBR would otherwise be losing, and which would therefore mean it was reasonable for additional damages to be claimed. This is all because Mr Filipczak simply has not put any such evidence in. This is perhaps understandable and explicable because of his view of what the Agreement meant, but such evidence ought to have been produced, in case he was not correct. I feel unable (because in my experience it would give rise to a lot of argument about whether such items were really losses or not) to attribute anything very much to this aspect of the alleged losses which Mr Filipczak says justified the forfeiture of the amount of the deposit monies in practice, on any basis.

130. Then, there is the point about GBR having no substitute work. This is what Mr Filipczak says and as I said, whilst I am not suggesting that he was lying about this, it is reasonable that people take an active stance to try to minimise, rather than just claim, any losses that they suffer as a result of any breach of contract. I put it to Mr Filipczak, that in fact he should have been able, surely, to get work, and indeed Ms Evans put it to him in her questions; surely, with the state of building work in Guernsey being such that everyone is crying out for people to do things, it would have been possible to get work? What he said in answer to that was, that was all very well in relation to projects where you had several people being employed but his company does not have employees apart from him and one other; he brings in individual tradesmen as subcontractors, for particular jobs. Trying to secure work quickly on that basis was not possible. He reiterated that the first time for which he could secure a work project of a size which he regarded as appropriate to take on, was in April or May of 2023.

131. He said he had cancelled another job in order to do Ms Evans' job, a point which, obviously, was unfortunate (and if it were true, it was rather hard on the person whose work he cancelled). He then went back to try and get that contract reinstated but, by that stage, the customer had decided he did not want to go ahead at all. Mr Filipczak gave another instance of a contract in relation to a cancellation clause but I think that was probably a general comment rather than an example of a contract that foundered during this time. Again, all this is assertion, rather than being supported by any corroborating evidence, and I have to say that on the balance of probabilities, I find it very difficult to be persuaded that the full amount of Mr Filipczak's actual losses from not carrying out Ms Evans' project, and reasonably seeking to minimise these as far as possible, were actually suffered at a level which would justify as much as £31,500 being withheld.

132. I do accept, in the light of Mr Filpiczak's evidence, that GBR/Mr Filipczak suffered <u>some</u> losses as a result of Ms Evans' cancelling this contract. In the end, doing the best I can, the conclusion that I have come to is that the correct and reasonable position as between the parties, is that the term that 20% of the £31,503 deposit should be retained is in the nature of a penalty, but is a penalty which I should not disturb.

133. This is because it is a written contractual term and because it would, to my mind represent realistically fair compensation for the likely reality of the losses which Mr Filipczak/GBR would sustain from Ms Evans' seeking to cancel the contract after it had been made. I am also satisfied that this is not likely to be an unrealistic representation of the amount of true losses which GBR, will actually have suffered in practice, through acting on Ms Evans' assertion, by entering into the Agreement, that she was going ahead with this contract, and which it was entitled to rely on from the period from the Friday evening (30th September 2022) until she informed Mr Filipczak on the Tuesday morning (4th October 2022) that she could not go ahead. From that point onwards, GBR really ought to have tried, reasonably, to find alternative work to try to minimise actual and potential losses. In particular given Mr Filipczak's mistaken understanding of the contract, I am not satisfied that it did so. I consider that efforts actually to replace the income from Ms Evans' project ought to have borne more fruit than they appear to have done; I am unable to accept that there was no job or jobs which GBR would reasonably have been able to obtain and undertake until April or May of 2023. I appreciate that these were the winter months but no doubt jobs involving internal works can be done then. GBR is only entitled to enforce the 22nd September Agreement on that basis.

Decision

134. So, in the end, my decision is that GBR must repay to Ms Evans 80% of the £31,500 deposit that they received, ie £25,202.40. They were obliged to do that under the terms of the Agreement as I find them to be. Implicit in that is an obligation that that sum should be paid back within a reasonable time. GBR and Mr Filipczak have obviously had more than a reasonable time since that ought to have happened, by now. I will therefore give judgment for GBR to repay that sum of money to Ms Evans.

Miscellaneous

135. For completeness, I need to make three further points.

136. First, if the true reading of the contract had been that the whole of the £31,500 was stipulated to be non-refundable, then my conclusion would have been that I should intervene on the basis of the law as stated in Pothier, and on general principle, to moderate the effect of that term. I would then have come to the conclusion that the true measure of damage which GBR had suffered, on the evidence that has been produced to me, could be regarded as reasonably represented by the amount of 20% of the deposit, and that was all I could be satisfied on the balance of probability, was a proper sum to treat as being recoverable losses, for the same reasons as above. The result would therefore have been the same.

137. Second, I also draw attention to the fact that this case has been decided under the general law of contract in Guernsey, and on the basis of the law as it stood before the coming into force of the *Trading Standards (Fair Trading) (Guernsey) Ordinance 2023*. This Ordinance came into force on 2nd October 2023, and under Part II, which deals with "*unfair contract terms*", one would have had to look to see whether such a term as Clause 5.5 (c) was "*unfair*" or not. A clause that provides for a penalty in a consumer contract (which this would be) is expressly said by the Ordinance (see Schedule 2) to be a term which is possibly unfair and therefore the court is given the jurisdiction to moderate it. That, though, is a statutory intervention. I am not applying that Ordinance because I am applying the previous law, the general law of Guernsey, and I make no comment as to whether the result would be the same if that Ordinance were applicable.

138. Third, I am aware that whilst I have dealt directly with the Defendant's (GBR)'s contentions noted at [8] above, I have not dealt with the way in which the Plaintiff, Ms Evans pleaded her case (noted at [7] above). For the avoidance of doubt my answer to each of these points is as follows:

(i) There is no evidence that the deposit sums were paid simply for the purchase of materials, and this is not a term of the 30th September 2022 Agreement;

(ii) GBR has not been unjustly enriched, because the reason why Ms Evans received no benefit under the contract was because she herself chose to repudiate it. Insofar as any question of unjust enrichment arises, this is dealt with under Issue (3) above, and the treatment of clause 5.5(c) as a penalty or forfeiture clause;

(iii) There was no agreed or enforceable variation of the contract in the manner submitted by Ms Evans (see my findings under issue (2) above);

(iv) Ms Evans' reason for her need to recover her deposit monies did not give rise to any injustice in GBR's declining to return it, because such need was not induced by anything done by GBR.

Summary of conclusions

139. So that is my decision. In this rather long judgment I have considered, I think, everything that I should have considered, and I have in effect dealt with the contentions raised above by each party albeit according to my own analysis of the material issues. In summary, I have held that:

(1) The meaning of the 30th September 2022 Agreement (Clause 5.5(c)) was that if the contract were cancelled, GBR was entitled to retain 20% of the prepaid deposit of £31,503, not the whole of it;

(2) Mr Filipczak's promise to repay the whole of the deposit monies was not a binding engagement to cancel the 30 September 2022 Agreement, for want of *cause.*

(3) The parties' subsequent conduct did not amount to a variation of the 30 September 2022 Agreement for want of certainty or *objet.* It never progressed into being a contractual variation, but remained in the stage of negotiations.

(4) Clause 5.5(c) of the 30 September 2022 Agreement is a forfeiture clause and in the nature of a penalty, and the court therefore has jurisdiction to moderate its effect if that is excessive. However, the court finds that this clause, in its true meaning, was a not an unrealistic assessment of likely actual losses which would be suffered by GBR in the case of a premature termination of the contract and is equally probably not an unrealistic assessment of losses actually suffered in fact. As a matter of its judgment and discretion, therefore, the court declines to interfere.

(5) In the result there will be judgment for the Plaintiff for the return of 80% of the deposit, namely £25,202.40.

140. Finally, I am grateful to the parties for explaining everything and, as I have said, I do accept that each party was giving me evidence of the facts as they saw them, and as they thought was right. I have come to the conclusion, in the end, that, as it were, Ms Evans was slightly more right than Mr Filipczak was but that is just a natural consequence of my evaluating the evidence as I have seen it.

Hazel Marshall KC

Lt Bailiff