

MISCELLANY

Traversing the minefield of the law of contract

1 A recent judgment by Le Cocq, Deputy Bailiff, in *Smith v Jersey Oak Ltd*¹ shows that it is possible successfully to traverse the minefield of the Jersey law of contract. The facts of the case can for these purposes be shortly stated. The plaintiffs bought a large property of which part had been leased back to the vendor for a number of years. That arrangement, although largely informal, had been successful. In 2016 the vendor's lease came to an end, and negotiations began with the defendant company for a new lease. Proposals were set out in which, *inter alia*, the defendant's principal stated—

“We are also proposing to run a business which is much more considerate of your privacy and the fact that the property is on the same site as your home . . . Whilst the location and the layout are less than ideal for a retail premises [*sic*], I feel that we can make this work for us . . . [A number of specific proposals were then set out as to the defendant's intentions “with your consent of course”]. This proposal has been prepared in the knowledge that the buildings are next to your home and that minimal disruption, safety and privacy *etc.* are strong considerations . . . We are keen to ensure that our use of the property . . . is in a manner which is harmonious with your home”.

2 A lease expiring in 2022 based upon the original lease with the vendor was signed in March 2017. No lawyers were involved. In a very short time the parties fell out. Aggressive and rude behaviour was alleged against the principal of the defendant. It constructed a marquee in breach of planning laws, and a 14 ft. fence which obscured the plaintiffs' view of the sea. The plaintiffs' order of justice alleged *inter alia* that it was an express or implied term of the lease that the defendant would conduct a cottage industry which would have little or no effect upon family life, and that the scale of commercial activity exceeded the plaintiffs' anticipations. Fraud was alleged, including *dol par reticence*, such that there was a *vice de consentement* and that the lease was void. The plaintiffs also sought cancellation of the lease.

¹ [2019] JRC 054.

3 The court first considered the law relating to implied terms, and referred to *Grove v Baker*² where Pothier's rules for the interpretation of contracts had been considered in conjunction with a judgment of the Court of Appeal in *Sibley v Berry*.³ In that case, Le Quesne, JA had referred to the English case of *Liverpool City Council v Irwin* and applied a *dictum* of Lord Wilberforce.⁴ The Deputy Bailiff correctly stated that the court was bound by the Court of Appeal judgment, as indeed was the court in *Grove v Baker*. He continued that *Sibley* "appears to rely entirely upon the English approach to implied terms contained in *Liverpool v Irwin*". That is no doubt so, because the court is in general limited by the authorities to which it is referred by counsel. In fact, however, the Court of Appeal had built to an extent upon the foundations of Pothier. Although not referred to Pothier's rules of interpretation of contracts, the court was referred to a different passage⁵ in relation to which Le Quesne, JA stated—

"This doctrine, which is stated there by Pothier in his own terms, could also be stated in the categories of implied terms more familiar to an English lawyer."⁶

The appearance of reliance upon the English approach is deceptive. In the event, the court, applying *Grove v Baker*, determined that the expressed obligation to respect the family home did not imply that the defendant principal's conduct had been a breach of contract—

"It must be shown . . . that it is necessary to imply the term in order to ensure that the contract is not futile, inefficacious or absurd."⁷

Such was not the case. The plaintiffs might in retrospect have wished to express additional terms, but it was not open to the court to re-write the lease.

4 The court next considered whether the breaches of the terms of the lease which it found to exist were sufficient to warrant the cancellation of it, acknowledging that, if there were *vices de consentement*, no question of cancellation would arise, the lease being void *ab initio*. In considering whether there was fraudulent conduct, the court considered

² 2005 JLR 348.

³ 7 July 1987, unreported; 1992 JLR N-4.

⁴ [1977] AC 239; where parties to a contract have not fully stated its terms, the court having established them may complete the agreement.

⁵ Pothier, *Traité des Obligations*, Part II, Ch. 3, para 212.

⁶ 7 July 1987, unreported, at 10.

⁷ *Grove v Baker* 2005 JLR 348, at para 17.

the leading case of *Steelux Holdings Ltd v Edmonstone*¹ where the court stated that fraud was a flexible notion and that silence could in certain circumstances amount to fraud (*dol par reticence*). The court also referred to the cautionary words of Birt, Deputy Bailiff (as he then was) in *Toothill v HSBC Bank plc*² where he doubted that there was in Jersey law a positive duty of disclosure in pre-contractual discussions. Having found that the plaintiffs must have understood to a very large extent what the defendant intended to do with the site, and what was meant by the term “cottage industry”, the court found that there was neither *dol* nor *dol par reticence*.

5 Finally, the court considered the authorities relating to the cancellation of a lease.³ It was found that a number of breaches of contract had taken place but the court was content to order the rectification of all unauthorised works. The breaches were not sufficiently serious to order the cancellation of the lease. The case is a useful analysis of the relevant case law and jurisprudence.

Centenary of the Sex Disqualification (Removal) Act 1919

6 On 23 December 1919, not quite six months after the signing of the Treaty of Versailles bringing World War I to an end, the Sex Disqualification (Removal) Act 1919 received Royal Assent. The Act remains on the United Kingdom statute book, now supplemented by many more pieces of legislation combatting inequality and discrimination.

7 Section 1 of the Act provides that—

“A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation, or for admission to any incorporated society (whether incorporated by Royal Charter or otherwise) . . .”

¹ 2005 JLR 152.

² 2008 JLR 77

³ Pothier, *Traité du Contrat de Louage* (1821 ed. at 354), *Bailhache v Williams* 1968 JJ 1067, *Le Cornu v CI Heat Pump Bureau Ltd* 1991 JLR 197, and *Fort Regent Development Committee v Regency Suite Discotheque and Restaurant Ltd* 1990 JLR 321

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Section 2 (now repealed and replaced by later legislation), provided that women were to be permitted, for the first time, to be admitted as solicitors.

8 By s 3 nothing in the statutes or charter of any university was to preclude university authorities from providing for the admission of women.

9 It seems extraordinary today that such legislation ever had to be made, let alone just 100 years ago. It is therefore serendipitous that the centenary of the 1919 Act coincides with the announcement on 2 September 2019 by the Lieutenant Governor of Guernsey that the next Deputy Bailiff will be Advocate Jessica Roland of Maurant Ozannes, in succession to Richard McMahon who becomes Bailiff. She will take office in May 2020. We wish Advocate Roland every success in her new role. The announcement has been received warmly.

10 Meanwhile, Guernsey is looking to introduce far-reaching anti-discrimination legislation which is currently at the public consultation stage. It is proposed that a combination of the Irish and Australian legislation would provide the best model to work from to meet Guernsey's needs. The protected grounds would comprise age, carer status, disability, marital status, pregnancy or maternity status, race, religious belief, sex, sexual orientation, and trans status. The proposals have already generated lively debate. The technical draft proposals can be found here: <https://www.gov.gg/CHttpHandler.ashx?id=120055&p=0>.

11 The world has moved on a long way in a century.