

COURT OF APPEAL7th JULY, 1987

Before: SIR GODFRAY LE QUESNE, Q.C., (President)  
J.D.A. FENNELL, ESQ., O.B.E., Q.C.,  
J.M. COLLINS, ESQ., Q.C.

BETWEEN Edith Dorothy Sibley (née Pavey) Appellant  
AND Peggie Leonie Berry (née Du Feu) Respondent

Advocate G. Le V. Fiott for the appellant.

Advocate G. R. Boxall for the respondent.

JUDGEMENT

THE PRESIDENT: In 1979, the respondent to this appeal bought the Rougier Guest House at Havre des Pas. She did this with the assistance of a sum of £22,000, which had been provided by a friend of hers, a Mr. Sibley. Mr. Sibley is now dead and this appeal arises out of an action by his widow, claiming repayment of the £22,000.

The original transaction was concluded orally in 1979. Evidence about this was given in the Royal Court by the respondent herself and by Advocate Gould, who acted for her in this transaction. The respondent's evidence was that she discussed with Mr. Gould the terms of Mr. Sibley's loan of £22,000. She was then asked: "Were you aware that the terms of Mr. Sibley's loan were different from the terms of Mr. Laycock's loan?". (Mr. Laycock was a gentleman who had been proposing to lend money to the respondent until Mr. Sibley replaced him as the lender.) She answered this question, "Yes Sir". "Do you know why?" The respondent answered, "Interest free and the money, the loan to be paid back on the sale of the property". "Was it not to be paid back before the sale of the property?" "No Sir". "Are you sure?" "That's right Sir". That was the evidence given by the respondent herself as to the terms of the original transaction. When Mr. Gould gave evidence he said that the respondent came to his office with Mr. Sibley and he formed the impression that there was a very close relationship between them. He went on to say, "Now Mr. Sibley was putting up funds. He was putting up the balance of the money. Mr. Sibley, by way of explanation, explained to me that he was a property owner in Weymouth, and he was quite expansive about it. I had no need to know what his property was, but he made it clear that it was substantial and I had the clear impression that he was, if not giving the money to Mrs. Berry, it was certainly to be an indefinite loan".

The £22,000 was duly paid to Mrs. Berry and the purchase of the Guest House was completed. Mr. & Mrs. Sibley came from England and assisted the respondent to run the Guest House during the summer season of 1980. In the course of the season, relations between the respondent on the one hand and Mr. & Mrs. Sibley on the other became strained, and Mr. & Mrs. Sibley returned to England at the beginning of October. Just before leaving, in

fact, on the 26th September, 1980, Mr. Sibley visited Mr. Gould. Mr. Gould's account of this visit was: "He came in and asked me if I could write to him to confirm the amount that he had lent to Mrs. Berry, that was all. It wasn't a very long meeting and I wrote to him and did just that". Mr. Gould was then asked; "Did he, to the best of your recollection, say or seek your advice in the matter of getting immediate repayment or repayment at any time?". Answer: "It wasn't suggested at all. Had it been, I would have made a note". Commissioner Dorey, who was presiding in the Royal Court, then said: "So there was no discussion at all about payment?" "Not at all Sir". "Did you consider that unusual?" "Well not really, Sir, because it fitted in with the original transaction, whereas I say he was lending the money, but certainly without any strings at all. It was so close to a gift, that I was not expecting any discussion of repayments".

As a result of that visit, Mr. Gould did write to Mr. Sibley as he had been requested. I read that letter, the terms of which are of great importance for the decision of this appeal. It is dated the 1st October, 1980.

"Dear Mr. Sibley,

I write further to our meeting on Friday last, to confirm the amounts paid by you to this office in the month of November, 1979, as follows:- On the 16th November, 1979 - £5,000.00. On the 28th November, £15,000. On your instructions, and following the arrangement arrived at between yourself and our client, Mrs. Peggy Leonie Berry, these amounts were paid to her by way of interest free loan. This loan is repayable upon the sale of the property purchased by Mrs. Berry, Rougier Guest House, Havre des Pas, St. Helier.

If you require any further information please let me know."

Mr. Sibley replied to that by a letter of the 6th October -

"Dear Mr. Gould,

Thank you for your letter re my loan to Mrs. Berry. This was very satisfactory and meets my requirements. There is, however, another £2,000 to be accounted for. I sent you a cheque for this amount on the 10th July, 1979; it was then used to pay off a debt of Mrs. Berry's on her bungalow, to allow the Rougier buy to go ahead; and her bungalow at St. Ouens was to be part security as well to cover my loan and the one she took for the balance on Rougier. If you would record this for me I would be much obliged. The final figure of my loan to Mrs. Berry would then be £22,000 interest free."

I may say that the proposal mentioned by Mr. Sibley in that letter that he should have some security for his loan was not carried out, and the loan remains entirely unsecured.

In her Answer to the Order of Justice, the respondent pleaded that it had been agreed that the loan was interest free and not due for repayment until the sale by her of Rougier Guest House. A reply was delivered. I should read some short passages from that. In paragraph two of the reply the plaintiff pleaded: "That any terms to the effect that the loan was not due for repayment until the sale of the property Rougier Guest House is of no legal validity. The defendant could organise her affairs in such a way as to ensure that there might never be a sale of the property. Any term which would have the effect of rendering the loan irrecoverable and therefore a gift, is void, in the light of the arrangement reached between the defendant and the said Geoffrey Ronald Sibley". In paragraph four the plaintiff pleaded: "That the loan is repayable on demand or failing demand on reasonable notice being given to the defendant"; and in paragraph six: "In any event it was an implied term of the agreement that the late Geoffrey Ronald Sibley was entitled on reasonable notice to require the defendant to sell the property".

The Royal Court declined to imply the term which is there set out and held that the reference in Mr. Gould's letter to sale of the property referred to sale of the realty, which sale, it was common ground, had not taken place. The Royal Court therefore dismissed the respondent from the Action.

It is convenient to deal first with two points which, before us, were taken by Mr. Fiott, upon the interpretation of Mr. Gould's letter of the 1st October, 1980. The critical sentence of that letter reads, "This loan is repayable on the sale of the property purchased by Mrs. Berry, Rougier Guest House, Havre des Pas, St. Helier.". The first point which Mr. Fiott took is upon the words "repayable upon". He pointed out that the letter reads, "This loan is repayable upon the sale of the property", not, "This loan is repayable only upon the sale of the property". He submitted that the proper interpretation of this sentence is that the loan was repayable at any time, upon reasonable notice, the event of the sale of the property merely being one event among others, upon which repayment could be obtained. In one sense it appears to me that this is right and that the loan was repayable at any time in the sense that it was open to the debtor, Mrs. Berry, to repay the loan whenever she chose. It is clear, however, that the word "repayable" is not being used in that sense in the sentence which I have quoted. The object of this sentence was to limit Mr. Sibley's right to demand repayment, and what the sentence is doing is, whatever its meaning, to define the circumstances in which the creditor, Mr. Sibley, was to be entitled to enforce repayment of the loan. Mr. Fiott contends that the express provision that he could do this upon the sale of the property does not exclude the possibility that he could also do it on reasonable notice at any other time. This does not appear to me to be a possible interpretation of this sentence. Had there been no express provision governing repayment, Mr. Sibley's right would have been to

get repayment on giving reasonable notice at any time. If the intention of the letter had simply been to say that that was his position, there would have been no need to refer at all to the sale of the property or to any other particular event. It appears to me that the only purpose of saying that the loan was to be repayable, in the sense that repayment was to be enforceable by Mr. Sibley, upon the sale of the property was to exclude his right to enforce repayment in any other circumstances.

The second point taken by Mr. Fiott concerns the following words: "upon the sale of the property purchased by Mrs. Berry". When Mrs. Berry bought the Rougier Guest House, she also bought a large number of articles in the house. Mr. Fiott submits that the property purchased by Mrs. Berry includes not only the house, but also the articles which she purchased with it. So, he says, the loan was to be repayable, not only if the house was sold, but also if these articles were sold or any selection of these articles large enough to fall outside the scope of a de minimis transaction. Now, I repeat the sentence in which these words occur. "This loan is repayable upon the sale of the property purchased by Mrs. Berry, Rougier Guest House, Havre des Pas, St. Helier". It is to be observed that the closing words of the sentence, "Rougier Guest House, Havre des Pas, St. Helier", on a natural reading are explaining the words preceding, "the property purchased by Mrs. Berry". In this context, in my judgement, the word "property" must be interpreted to refer to the house which was being bought and not to the contents which were being bought with it.

This being, in my judgement, the meaning of the letter, I pass on to the other argument which Mr. Fiott put forward. This is his argument that a term of some sort must be implied in the contract. Mr. Fiott suggested two alternative versions of the term which should be implied. The first was that the borrower, Mrs. Berry, could be required by the lender, Mr. Sibley, on

reasonable notice to sell the house, thus fulfilling the condition upon which the loan was to be repaid. The alternative version submitted by Mr. Fiott of the term to be implied was simply that the loan was to be repayable on reasonable notice. I take the second of these suggestions first, because it can be more simply considered. It seems to me impossible to imply a term that the loan was to be repayable on reasonable notice because this would be in plain contradiction of the express term set out in Mr. Gould's letter, that it was to be repayable upon the sale of the property. I have already explained what, in my view, is the correct interpretation of those words, and, as I say, it seems to me impossible to imply a term which would contradict them directly.

The other suggestion made by Mr. Fiott was that the term to be implied was that Mrs. Berry could be required by Mr. Sibley at any time to sell the house on reasonable notice. This would not actually be in contradiction of anything in the express terms of the contract, and in order to see whether it can be implied it is therefore necessary to consider what are the principles upon which terms can be implied in contracts. The leading authority on this subject in England now is the case of Liverpool City Council -v- Irwin and Another (1977), A.C. 239. I read a passage from the speech of Lord Wilberforce beginning at page 253.

"There are varieties of implications which the courts think fit to make and they do not necessarily involve the same process. Where there is, on the face of it a complete bilateral contract, the courts are sometimes willing to add terms to it as implied terms: this is very common in mercantile contracts where there is an established usage: in that case the courts are spelling out what both parties know and will, if asked, unhesitatingly agree to be part of the bargain. In other cases where there is an apparently

complete bargain the courts are willing to add a term on the ground that without it the contract will not work - this is the case, if not of "The Moorcock" (1889) 14 P.D. 64, itself on its facts, at least of the doctrine of "The Moorcock", as above, as usually applied. This is, as was pointed out by the majority in the Court of Appeal, a strict test - though the degree of strictness seems to vary with the current legal trend - and I think they were right not to accept it as applicable here. There is a third variety of implication, that which I think Lord Denning M.R. favours, or at least did favour in this case, and that is the implication of reasonable terms. But though I agree with many of his instances, which in fact fall under one or other of the preceding heads, I cannot go so far as to endorse his principle. Indeed, it seems to me, with respect, to extend a long and undesirable way beyond sound authority. The present case, in my opinion, represents a fourth category, or I would rather say, a fourth shade on a continuous spectrum. The Court here is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms. In this sense the Court is searching for what must be implied".

The present case clearly does not fall within the first of the four categories described by Lord Wilberforce, that is, the category where there is an established usage. There appears to me to be no good reason to put it within the fourth of his categories, that is, the category in which the parties have not themselves fully stated the terms. I say this because, as is apparent from the two critical letters, Mr. Sibley entirely accepted the terms as set out in Mr. Gould's letter of the 1st October, 1980. It is particularly significant that Mr. Sibley did this at a time when the friendly relationship, out of which the original transaction arose, had already broken down. Although that had happened, Mr. Sibley in his reply made no attempt to say that there was some term not expressed which had covered this eventuality.



It remains to consider whether the case can be brought within the second of Lord Wilberforce's categories, that is, the category of cases in which something must be implied because without it the contract "will not work". Lord Wilberforce himself remarked further about this category of case on page 254, "In my opinion such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less. A test in other words of necessity." He went on, on page 205, to refer to the judgement of Bowen L.J., in the earlier case of Miller -v- Hancock. In that judgement, referring to the term which, in that case, it was sought to imply, which in fact he held should be implied, Bowen L.J., said that the term to be implied was something without which the whole transaction would be futile, something the absence of which would render the whole transaction inefficacious and absurd.

If one considers these terms, necessity, futile, inefficacious, absurd, it is clear that the test to be applied is a stiff test. In order to apply it, it is important to appreciate what was the nature of the original transaction into which Mr. Sibley and the respondent entered in 1979. As I have said, it was a loan made between close friends. Mr. Gould, whose evidence I have already quoted, had the impression that if Mr. Sibley was not giving the money to Mrs. Berry, it was certainly to be an indefinite loan. As he said, when speaking of his subsequent interview with Mr. Sibley in September, 1980, he was lending money "but certainly without any strings at all. It was so close to a gift that I was not expecting any discussion of repayments".

This may appear to have been an unusual transaction, but this, in fact, was its nature. Money was being lent between close friends in circumstances in which the lender had little interest in repayment and was apparently content

that repayment might be indefinitely postponed. It appears to me to be impossible to say that in a transaction of that sort there is any necessity to imply that Mr. Sibley was to be entitled to enforce repayment on reasonable notice at any time. When once the true nature of the original transaction is grasped, it appears to me that the absence of any such right does not make the transaction futile or inefficacious or absurd, but is perfectly consistent with the nature which the parties apparently intended it to have.

Mr. Fiott addressed a further argument to us. He said that if nothing was to be implied into the contract, it would be open to the respondent, if she wished, to transfer the house to a Company gratuitously, or to give it at any time to a favourite relation, and so to prevent the loan from ever being repaid. In answer to this, Mr. Boxall drew our attention to a passage in Pothier. The passage is in his "Traité des Obligations", in paragraph 212 in chapter III of part II. Pothier there said: "C'est une règle commune à toutes les conditions des obligations, qu'elles doivent passer pour accomplies, lorsque le débiteur qui s'est obligé sous cette condition en a empêché l'accomplissement". 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. That, however, would lead to the implication, if correct, of a term quite different from those for which Mr. Fiott is contending in this case. There is no need for the disposal of this appeal for any final view to be expressed upon what term could or could not be implied in those circumstances. I mention this passage simply in order to make it clear that in my view the rejection of the implied terms which have been suggested in this Appeal does not necessarily mean that Mr. Sibley's widow would find herself with no remedy if the respondent were to give the house away, or to let it for so long a period (99 or 999 years were the examples given), as to make its sale by her practically impossible.

It appears to me, for these reasons, that the Royal Court came to the correct conclusion in holding that no term could be implied in this contract, such as to make it repayable on demand or to entitle the creditor on reasonable notice to require the respondent to sell the house. In my judgement, therefore, the appeal must be dismissed.

J.D.A. FENNELL, ESQ.,: I agree and have nothing to add.

J.M. COLLINS, ESQ.,: I also agree.

Cases cited in the Judgment.

Liverpool City Council -v- Irwin & Anor., (1977) A.C. 239.

"The Moorcock" (1889) 14 P.D. 64.

Other cases cited.

Wallis -v- Taylor (1965) 255 Ex. 344.

De Bolte -v- National Insurance and Guarantee Corporation. (1974-1976) J.J.157.

In re Vince (1892) 2 Q.B. 478.