10 pages.

In the Royal Court of Jersey

(Samedi Division)

135

23rd September, 1991

Before: P.R. Le Cras, Esq., Commissioner, and Jurats Orchard and Hamon

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| BETWEEN: | **Sandpiper Investments Limited** | PLAINTIFF |
| AND: | **Randalls Vautier Limited** (by original action) | DEFENDANT |

AND

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|---|---|---|
| BETWEEN: | **Randalls Vautier Limited** | PLAINTIFF |
| AND: | **Sandpiper Investments Limited** (by counterclaim) | DEFENDANT |

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Advocate D.F. Le Quesne for the plaintiff in the original action.

Advocate J.G.P. Wheeler for the defendant in the original action.

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**JUDGMENT**

COMMISSIONER LE CRAS: In 1982, the plaintiff was the owner of a Jersey company, Arden Hotel Limited (the company) which held leases on the hotel of that name which expired in October, 1989. The present dispute arises out of the terms of the agreement of sale of the company in May, 1982 and in particular as to whether a loan due to the defendants by the company was to remain in being or was to be repaid as a current liability by the beneficial owner of the company under the agreement of sale. There is also a counterclaim which arises following a calculation of the debts of the company. Mr. P. Hopkins whom we understood to be the ultimate beneficial owner of the Jersey company ran at that time a travel agency business in England through a company in which he was the major shareholder. In the course of his business, and in or about 1979 he became interested in finding a hotel to control his own beds, and, having a friend locally, he took over the lease of the Arden Hotel, which he later extended in order to increase the public bar trade, leaving his friend to run it.

Finance was provided partly by a bank overdraft, but primarily by an intercompany loan from the parent company. In addition, on the 11th April, 1980, the company consented to a bond in favour of the defendants. The company borrowed £25,000 to be repaid over the term of the lease, the repayments being linked with the proceeds of liquor sales, whilst during the term the company was to remain tied to the defendant.

There was an agreement and a bond completed by the parties. The agreement provided:

"3. (i) The consideration for the Shares shall be the sum of £55,000 subject to adjustment as hereinafter provided

(ii) (A) At completion the Purchaser shall retain from the said purchase price of £55,000 the sum of £40,000 ("the Retention Fund") which shall be dealt with in accordance with the provisions of Clause 3(iv) hereof. The retention fund shall be placed on deposit in the names of Mr. M. Le Boutillier and Mr. D. Lyons and the interest thereon shall be paid to the Vendor and to the Purchaser in accordance with their respective entitlement to the Retention Fund shown by the Completion Accounts

(B) The balance of the consideration that is the sum of £15,000 shall be payable to the Vendor at Completion

(iii) The consideration for the Shares shall be increased by an amount equal to the net current assets of the Company or (as the case may be) reduced by an amount equal to the net current liabilities of the Company as shown by the Completion Accounts save that there shall be excluded the rental due and owing from 25th March 1982 to Completion by the Company to Nedra under the Leases

(iv) (A) Immediately following Completion the Vendor and the Purchaser shall procure the preparation of the Completion Account and the auditing thereof by the Auditors and the approval and signature thereof within two months from Completion. The Completion Accounts shall be prepared in all respects on the basis of and in accordance with the accounting principles and practices adopted in preparing the Latest Accounts

(B) Within 7 days of delivery to the Purchaser of the Completion Accounts the Purchaser shall procure the payment to the Vendor of the Retention Fund having added thereto or deducted therefrom the amount by which the purchase price falls to be adjusted pursuant to the provisions of Clause 3(iii) hereof provided that if the amount falling to be deducted exceeds the amount of the Retention Fund the Vendor shall pay to the Purchaser an amount equal to the excess (hereinafter called the Retention Shortfall)."

"6. At completion the Vendor shall convene a duly constituted meeting of the Board of Directors of the Company at the offices of Messrs. Le Gallais & Luce for the purpose of transacting the following business:

(a) To appoint as additional directors of the Company such persons as the purchaser shall nominate

(b) To receive the written resignations of the present directors and secretary of the Company and the Auditors in each case without compensation of any nature whatsoever for loss of office

(c) To give notice to the Company's bankers of the retirement of the present directors and secretary of the Company and the appointment of new directors and secretary and of the cancellation of the current bank mandates and the authorisation of new ones

(d) To approve the transfers of all the said shares of the Company or such of them as may be required by the

Purchaser to the Purchaser or such other person or persons as the Purchaser may nominate and to approve the registration of such persons as members of the Company in respect of the Shares and to direct that new share certificates be issued accordingly

(e) To approve the assignment to the Purchaser of the Loan Accounts

(f) To appoint new auditors to the Company."

Whilst the bond provided in paragraph 1 that interest should be payable quarterly, whilst paragraph 4 provided:

"4: THAT if at any time the Borrower shall fail to make the payments stipulated herein, be declared en désastre, appoint a liquidator or liquidators, permit or have any Judgement taken against the Borrower in any Court, commit any act indicative of insolvency by the law of Jersey, break or fail to comply with any other clauses, conditions or obligations contained in this Bond, break or fail to comply with any of the terms and conditions of the attached Agreement, then and in any such event notwithstanding anything hereinbefore stipulated or contained it shall be lawful for the Lender to demand the immediate repayment of the said capital sum or any outstanding balance thereof and payment of any interest due thereon and this without prejudice to the right of the Lendor to recover damages for breach of the said Agreement and costs".

In addition the loan was guaranteed by, inter alia, Mr. Hopkins.

The cash raised was, we were told, used to convert and extend the public bar.

The affairs of the company did not prosper. The accounts drawn up for the period ended 31st October, 1980, show a trading loss and the company as being financed by:

"CURRENT LIABILITIES

| | | |
|---|---|---|
| Sundry creditors and accruals | | £27,186 |
| Bank overdraft | 3 | £12,372" |

And below the line by:

"SHARE CAPITAL

| | | |
|---|---|---|
| | 4 | £100 |

LOAN ACCOUNTS

| | | |
|---|---|---|
| Randalls Vautier Limited | 5 | £25,000 |
| Parent Company | 6 | £39,948 |
| Hire Purchase Company | | £ 2,852" |

The notes relating to these are as follows:-

"3. BANK OVERDRAFT

The bank overdraft is guaranteed by the directors.

4. SHARE CAPITAL

| | Authorised | Issued and fully paid |
|---|---|---|
| Ordinary shares of £1 each | £5,000 | £100 |

5. LOAN ACCOUNT:

Randalls Vautier Limited

The loan is for a period of 10 years and carries interest at National Westminster Bank base rate plus 2% less 10% and is secured by Directors personal guarantee.

6. LOAN ACCOUNT

Parent Company

This loan is unsecured, interest free with no specified date of repayment".

During 1981 because, according to Mr. Hopkins, the resident director had personal problems, the position worsened very considerably. In the spring, the defendant, through Mr. Maddison, its present managing director, had to press for its accounts: in the summer these were paid but by the end of the season there was again a deterioration with the trading account; and the interest payments also fell into arrears.

Not surprisingly Mr. Hopkins with his other interests to attend to, found it difficult to run the hotel. By May, 1982, the overdraft at the bank had increased to £35,000, the inter company loans, that is monies effectively advanced by Mr. Hopkins, increased to £111,221 and the company's position with the defendants had worsened, whilst the trade debts (not counting the loan) had, as is now agreed, increased to at least £20,000.

Very sensibly he had put the company up for sale. Having reduced the sale price to £85,000 in February, 1982, and having no success, Mr. Hopkins, again very sensibly, turned to the defendant and began to negotiate with it.

As to what happened at the negotiations there is a conflict of evidence. In his evidence in chief, Mr. Hopkins says first that he thought no interest was outstanding to the defendant on the bond prior to the negotiations, or at any rate that he was not aware of any. Second that there was considerable discussion as to the retention fund on which the defendant, not unnaturally, insisted, third that his sale figure was £55,000 which was, he said, his "bottom line" as being sufficient to pay off the bank at £35,000 and the trade creditors which he estimated at £20,000, and, fourth, that the loan due to the

defendant was discussed at the same time as the debt due to his own companies. His understanding, he said, was that he would write off the loans from his mainland company and that the defendant's loan would remain a loan to the company, which was, of course, a separate company to the defendant and would be written off by the defendant when it operated the company in whichever way it considered best; and that as a result his, and the other personal guarantees on the bond, would be released.

Mr. Hopkins agreed that the sale was not quite discussed in terms of £80,000. He was, he said, interested in a minimum figure of £55,000. He added that the defendant's loan had been discussed in the context of a sale to a third party and that it was on that basis that he had arrived at his "bottom line" figure. He advanced the view that nothing would have changed for them as they could have put in a manager, possibly his sales manager.

In his cross-examination he claimed that he did not know that the trading position was deteriorating so fast by Christmas, 1981, that the defendant was seeking cash on delivery; and as to defaults of interest said that he was not aware there was any interest owing for 1981, but rather that it was not paid by mutual agreement over a period of two months pending the sale though not overdue necessarily for that period; nor by agreement with the landlord was the rent being paid.

He claimed that the urgency for the sale was not because the company was insolvent, for he would have continued to pump money over, but because his co-director had left the Island. He had, he said, tentatively arranged for someone to run it. He had not paid the trade debts to the defendant because they were negotiating. This evidence differed from that of Mr. Laine of Nedra Holdings, the landlord of the premises, who stated that

Mr. Hopkins had come to him when he found he could not pay the rent and had explained his difficulties. He had told him (Mr. Laine) that he had had to take his children out of school.

However, Mr. Hopkins further added, in contrast to his earlier evidence, that the loan to the defendant was never discussed in any shape or form other than that the personal guarantees were to be released (as they were) as no one regarded it as a liability, although he modified this by saying that at the signing of the agreement it had already been agreed with the defendant that the loan would not be repayable. The main argument, he said, took place over the price and the retention fund which he wanted set at £20,000 and which he agreed should rise to £40,000 because they had arrived at a deadlock, even though this would leave him with a shortfall with the bank overdraft.

In answer to a question from the Court he stated that he said he was not prepared for the loan to come out of the cash price of £55,000. As to whether the loan, if immediately repayable, would be a current liability, he replied that he had never discussed that aspect, as from his point of view it never formed part of the sale price nor formed part of the agreement.

Mr. M.J. Le Boutillier, who acted for the plaintiff in the transaction, recalled discussion about the retention fund but could not recall any specific discussion about the loan due to the defendant, nor could he specifically recall how it was to be treated in the completion accounts. He confirmed however that, unusually, the defendant's lawyers had prepared the agreement.

By contrast, the evidence of Mr. Maddison for the defendant was clear and consistent throughout and was supported by that of Mr. Lyons, an English Solicitor at Crills and Mr. Andrew Le

Quesne, an employee of that firm the defendant's then solicitors.

As to the financial state of the company, Mr. Maddison's evidence afforded ample confirmation of its parlous financial state. By the end of 1981, the interest on the loan was unpaid and the trading account was overdue. He was clear that there was no undertaking by the defendant not to call in the bond.

Like Mr. Laine, he too differed from Mr. Hopkins on the latter's willingness to put more funds into the company.

As to the negotiations themselves, he said that shortly before they were concluded, the negotiations centred around the payment of the company's liabilities.

The meetings themselves were very difficult, the difficulty concerning the loan, which the vendors claimed should not be deducted from the consideration. Mr. Maddison stated that he did not accept this view. He was quite definite that the loan was to be included in the liabilities to be met out of the retention fund. He went on to say that the retention funds were to be increased to £50,000 at which point the discussions foundered, with further unpleasantness over the defendant's requirement that the loan should be repaid. They were only revived when the owner of the premises, no doubt by now anxious, agreed to provide a guarantee of £10,000 against a shortfall in funds.

This evidence was confirmed by Mr. Le Quesne who stated not only that the meetings were difficult, but that it was accepted by all parties that the whole of the retention fund would be payable to the purchasers, that everyone knew that the loan fund could be "called" and was a liability which was due then, that

the defendant could pursue the guarantors and that when this was realised it was accepted by the vendors that the loan would be deductible from the consideration. There was, he added, considerable conversation on this point.

So far as the guarantee was concerned, Mr. Laine stated that he had given the guarantee to tidy up a messy situation, as it was obviously in his interest to exchange the existing situation for one in which the defendant was the owner of the company. He had not, he said, expected to be called upon to pay under it, having been assured by Mr. Hopkins, whom he found open and honest, that the debts which he would be required to guarantee amounted to only some £20,000, well within the retention figure of £40,000. The guarantee however clearly refers back to the agreement and he conceded that he had not asked his solicitor for advice on the meaning of the phrase "net current liability".

The agreement was then signed on the 7th May, 1982, with a retention fund therein provided of £40,000 and the guarantee duly completed by Nedra, following which the guarantee by Mr. Hopkins and his co-signatories was released and arrangements were made for the bank to transfer the balance of £15,000. Subsequently it was agreed that the retention fund be held by the defendant, but in our view nothing turns on this, save the admission properly made by the defendant that if the funds had been held as envisaged in the agreement, they might well have been the plaintiff in this action. We will take this into account in assessing the burden of proof, as in our view it would be unfair to the plaintiff to be at a disadvantage on account of this concession.

We turn now to the terms of the agreement and in particular the terms which have caused this dispute. It suffices to say

that the bank overdraft and the intercompany loans were specifically mentioned and dealt with. The consideration was to be £55,000 of which, as we say, £40,000 was to be placed in the retention fund.

The clauses in the agreement which we consider relevant are:

"3. (iii) The consideration for the Shares shall be increased by an amount equal to the net current assets of the Company or (as the case may be) reduced by an amount equal to the net current liabilities of the Company as shown by the Completion Accounts save that there shall be excluded the rental due and owing from 25th March 1982 to Completion by the Company to Nedra under the Leases

(iv) (A) Immediately following Completion the Vendor and the Purchaser shall procure the preparation of the Completion Account and the auditing thereof by the Auditors and the approval and signature thereof within two months from Completion. The Completion Accounts shall be prepared in all respects on the basis of and in accordance with the accounting principles and practices adopted in preparing the Latest Accounts".

The latest accounts are those for the period ending the 31st October, 1980, (see above).

Following the signing of the agreement the defendant wrote on the 22nd June, 1982, to M. Roper & Co the accountants employed by the company and forwarded a schedule of creditors

which was subsequently amended - the subject of the counterclaim - by a further letter on the 9th December, 1982. We will deal with the counterclaim in due course.

On the 20th July, 1982, the defendant wrote to M. Roper & Co in the following terms to confirm the amounts which they claimed as being due to themselves:

"20th July 1982

M. Roper & Co.
6th Floor,
Coopers Building,
Church Street,
Liverpool L1 3EP

Dear Sirs,

re: Arden Hotel Ltd.

I write to confirm the amounts due to us by the above named company as at 31st October 1981 and 7th May 1982.

31st October 1981

| | | | |
|---|---|---|---|
| Trading account | | | 9,641.53 |
| Loan account | | | 24,590.00 |
| Loan interest - | Gross | Tax | Net |
| Quarter to 31/3/81 | 341.10 | 68.22 | 272.88 |
| " " 30/9/81 | 308.56 | 61.71 | 246.85 |
| Month of October | 161.35 | 32.27 | 129.08 |
| | 811.01 | 162.20 | 648.81 |

7th May 1982

| | | | |
|---|---|---|---|
| Trading account | | | 12,542.38 |
| Loan account | | | 23,642.00 |
| | Gross | Tax | Net |
| Quarter to 31/03/81 | 341.10 | 68.22 | 272.88 |
| " " 30/09/81 | 308.56 | 61.71 | 246.85 |

| | | | |
|---|---|---|---|
| " " 31/12/81 | 442.95 | 88.59 | 354.36 |
| " " 31/03/82 | 354.37 | 70.87 | 283.50 |
| 1/04/82 to 7/05/82 | 119.83 | 23.97 | 95.86 |
| | 1,566.81 | 313.36 | 1,253.45 |

Yours faithfully,

R. Maddison
Finance Director".

On the 26th August, 1982, Ropers wrote to Mr. Le Boutillier in the following terms:

"Our Ref: MWR/MM/A.11
Your Ref: MJLeB/MdlH/1320

M.J. Le Boutillier Esq.,
Le Gallais and Luce,
6 Hill Street,
Jersey,
C.I.

26th August 1982

Dear Sirs,

Arden Hotel Limited

We have now completed a Statement of Affairs for Arden Hotel Limited as at 7th May 1982, being the date of sale by Sandpiper Investments Limited to Randalls Vautier Limited, together with our Report based upon the requirements of Section 4a of the Sale agreement of this same date.

We are enclosing one copy thereof from which you will note that the net current liabilities of the Company amounted to £21037. As we understand it this amount falls to be defrayed from 'the retention fund' which we understand is in the sum of £40000.

We shall be pleased to furnish any further information which you may require.

Yours faithfully,

Michael Roper & Co.,
Chartered Accountants".

The statement of affairs which both sides accepted was sufficient in place of the audited accounts was dated 23rd August, 1982, and contains, inter alia, the following paragraphs:

"We have prepared the attached Statement of Affairs, to satisfy the requirement of Section (IV)(A) of the Sale Agreement dated 7th May 1982 between Sandpiper Investments Limited, Peter Hopkins, Randalls Vautier Limited, Nedra Holdings Limited, Francis Joseph Laine and Arden Hotel Limited.

This Statement has been prepared from the books, records and vouchers kept and held by the Company, sundry correspondences, and replies to circulars, together with various analyses and reconciliations carried out by ourselves. We certify the Statement to be in accordance therewith.

We further certify that we have set out the Statement to identify the information in the manner required by the Sale Agreement and that, in our opinion, this reflects the financial position of the Company at the date of sale.

MICHAEL ROPER & CO.,
Chartered Accountants.

Liverpool.
23rd August 1982

The statement itself reads as follows:

ARDEN HOTEL LTD.

# STATEMENT OF AFFAIRS

## AS AT 7th MAY 1982

| Fixed Assets: | Cost | Depr'n. | Net |
|---|---|---|---|
| Leasehold Refurbishments | 37000 | 13215 | 23785 |
| Plant and Machinery | 6429 | 2603 | 3826 |
| Fixtures and Fittings | 20312 | 8223 | 12089 |
| | 63741 | 24041 | 39700 |
| Goodwill: | | | 9442 |
| | | | 49142 |
| **Current Assets:** | | | |
| Stock in trade | | 3146 | |
| Debtors and Prepayments | | 5545 | |
| Cash in hand | | 65 | |
| | | 8756 | |
| **Current Liabilities:** | | | |
| Creditors and Accruals | | 28456 | |
| Hire Purchase Creditors | | 1337 | |
| | | 29793 | |
| Net Current Liabilities: | | | (21037) |
| | | | £28105 |

Financed by:

| Capital: | Authorised | Issued |
|---|---|---|
| Ordinary Shares at £1 each | 5000 | 100 |
| **Reserves:** | | |
| Profit and Loss Account, Adverse Balance | | (106858) |
| **Loans:** | | |
| Randalls Vautier | 23642 | |
| Parents Company | 111221 | |
| | | 134863 |

£ 28105

Peter Hopkins )
) Directors
Pauline Hopkins)

Liverpool.
23rd August, 1982".

The important point for this litigation, of course, is whether the defendant's loan is to be treated under the line as a loan or above the line as a current liability, we note at this point that the hire purchase agreements now reduced to £1337 have been placed above the line in the statement as against below the line in the latest accounts, but we have no evidence as to the reason for this.

Given the background as described by its witnesses it is hardly surprising that representations were made by the defendant to Ropers. It suffices to say that the latter have refused to reconsider their views.

In these circumstances we conceive it our task, first and foremost to decide whether the agreement and its ancillary documents sets out the terms of the contract reached by the parties or, in other words, whether the contract between them was one which was reduced to writing.

In our view there is an agreement which has been reduced to writing and our primary task, in the absence of any special considerations, must as we see it be to construe the written agreement. On the evidence there was no collateral verbal agreement, the guarantee by Nedra and the release from the guarantee operating, as it seems to the Court, as adjuncts to the main agreement. The affect of this release and the

guarantee appears to us to depend on, and be subsidiary to, the construction of the agreement.

As to the powers of the Court to intervene where an accountant has issued such a statement, Mr. Wheeler cited three cases to us. The first was Burgess -v- Purchase and Sons (Farms) Limited (1983) 1 Ch. 216 in which Nourse J. at p.225 stated:

> *"In my judgment the present state of the law can be summarised as follows. The question whether a valuation made by an expert on a fundamentally erroneous basis can be impugned or not depends on the terms expressed or to be implied in the contract pursuant to which it is made. A non-speaking valuation made of the right property by the right man and in good faith cannot be impugned, although it may still be possible, in the case of an uncompleted transaction, for equitable relief - as opposed to damages - to be refused to the party who wishes to sustain the valuation. On the other hand, there are at least three decisions at first instance to the effect that a speaking valuation which demonstrates that it has been made on a fundamentally erroneous basis can be impugned. In such a case the completion of the transaction does not necessarily defeat the party who wishes to impugn the valuation.*
>
> *Whether this will hereafter be found to be the law to be applied to speaking valuations by some higher court is not for me to say. I merely proffer the following observations. It may be that the rule can be justified on the footing that a valuation made on a fundamentally erroneous basis is no more that for which the parties have contracted than one made of the wrong property or by the wrong man or in bad faith. The possibility of there being*

*an implied term to that effect was discussed by Sir David Cairns in Baber v. Kenwood Manufacturing Co. Ltd. [1978] 1 Lloyd's Rep. 175, 181. Where the contract provides for the valuation to be fair it might often be said that there was a breach of an express term. In either event there must remain something of an anomaly in that the right to impugn a valuation for fundamental error, as opposed to, e.g. bad faith, depends solely on whether the evidence which makes the attack possible is or is not voiced by the valuation itself. The reconciliation may be that the law ought not to shrink from an anomaly where the court can see for itself a fundamental error on the face of the very exercise for which the parties have contracted. It may be that Harman J.'s analogy with trustees and directors is after all a sound basis for the rule".*

He further cited Johnstone -v- Chestergate Hat Manufacturing Co. Ltd (1915) 2 Ch. 338 at p.344:

*"A second and subsidiary point raised by the company in this entirely friendly action is whether the certificate given by the auditors makes any difference. In my opinion, if I can see that a certificate is given on a wrong principle, then I am not precluded by it from dealing with the matter. The object of such a certificate is to enable the auditors to deal with matters of account, and so on; and here on the face of the balance-sheet, and on the face of the certificate, looking at the two together, it seems to me quite clear that the auditors have proceeded upon a wrong principle".*

Finally, he cited Wright (Frank H) Constructions Ltd -v- Frodoor Ltd (1967) 1 All ER 433 at p.453 per Roskill J, pp.454 and 455:

*"The circumstances in which the court will interfere with a certificate of this kind are extremely restricted. The court will not and should not be astute to upset the decisions of those whom the parties have freely chosen to decide their problems for them. Any contrary approach would involve uncertainty and delay in ordinary every-day business affairs. Parties take their arbitrators and they take their experts (whether accountants or otherwise) for better or worse with the attendant risks of error which are inherent in the ordinary human weaknesses of any tribunal. But there are some occasions which are well defined when the court will and must interfere. Three cases which were referred to in the argument clearly lay down the principles. The first is* Collier v. Mason *(47), a decision of Sir John Romilly, M.R. In that case the plaintiff was the owner of a house called "The Firs". The defendant, having advertised for a house, negotiations were entered into between the defendant and the plaintiff which went on for some considerable time. Ultimately, it was agreed that Mr. Collier should sell and Mr. Mason should buy the house, "at such a price or sum as should be fixed by reference to Mr. B.A. Englehart, auctioneer and house agent". Mr. Englehart did his task, but the result did not satisfy the plaintiff, who thought he was getting too little. Sir John Romilly, M.R., said (47):*

> *"It is not proved that Mr. Englehart did not exercise his judgment and discretion in the best way he could. It may have been improvident as between these parties to enter into a contract to buy and sell property at a price to be fixed by another person, but that cannot avoid the contract. Here the referee has fixed the price, which is said to be evidence of miscarriage, but*

*this court, upon the principle laid down by Lord Eldon, must act on that valuation, unless there be proof of some mistake, or some improper motive, I do not say a fraudulent one; as if the valuer had valued something not included, or had valued it on a wholly erroneous principle, or had desired to injure one of the parties to the contract; or even, in the absence of any proof of any one of these things, if the price were too excessive or so small as only to be explainable by reference to some such cause; in any one of these cases the court would refuse to act on the valuation."*

*The second case, Weekes v. Gallard (48) was to much the same effect. I can read Lord Romilly, M.R.'s judgment:*

*"This is a very unfortunate case, assuming the property to be valued too low, which seems probable. But that is no defence to the plaintiff's suit. The plaintiff and defendant agreed to be bound by the valuation of two persons named in the agreement, and it is the duty of the court to enforce specific performance of such agreements. The court has really no discretion in the matter. The discretion of the court is bound, as Lord Ellenborough says, by fixed rules. In one case of this kind a house and furniture were valued at three times their value, and yet there was a decree for specific performance. The only defence to such a suit would be fraud or collusion. There is no proof here that the valuers did not value the property as fairly as they could; there is no suggestion of fraud or collusion. There must, therefore, be a decree for specific performance of the contract."*

*I can now come to more modern times, to Dean v. Prince (49). An attempt was made here, unsuccessfully as it proved, to impeach an auditor's valuation of shares following the death of the controlling shareholder in a small private company. The company's auditor valued the shares. The widow did not like the valuation and sought to challenge it. The auditor wrote a letter explaining how he had arrived at the figure, and that was made the ground for the attack. Harman, J., said (50):*

> *"It is well settled that those who have a discretion, e.g., trustees who have powers to apply income for maintenance and directors who have powers to admit members to a company, can maintain a silence in regard to the reason for their decision which the court will not oblige them to break, and that, if they do maintain silence, no action will lie against them; but if they choose, for whatever reason, to disclose the motives which impelled them to their decision, the plaintiff may come to the court to impeach those motives."*

*In the present case, Cooper Brothers have set out their reasons in document R.5, and it is open, therefore, to the defendants, if they can, to seek to upset that certificate.*

*I turn to the report of the same case in the Court of Appeal (51) where Sir Raymond Evershed, M.R., discussed the principle to be applied where a court was faced with the problem of whether or not to uphold the certificate. After quoting Sir John Romilly, M.R.'s judgment in Collier v. Mason (52), which I have already read, Sir Raymond Evershed, M.R., went on (53):*

> ***"There was some discussion before us of the proper meaning to be attached to the words 'mistake', 'wholly erroneous principle' and 'miscarriage', as used by Sir John Romilly, M.R. I shall not attempt any exhaustive exposition of that language or of the circumstances in which, in such a case as the present, the court should hold a party not bound by a valuation. For my part I think the plaintiff is prima facie entitled to succeed if she is able to show that Mr. Jenkinson, in arriving at his figure of £7 per share, made a mistake of a substantial character or materially misdirected himself in the course of his valuation."***

In the present case, although the Court has in mind the warning that it should not be astute to upset decisions of the nature taken here, it appears to us to be clear that we have a duty to enquire into the decision of the accountants in the instant case to ascertain whether or not they prepared the statement in accordance with the requirements of the agreement.

It was perhaps unfortunate that no one from M. Roper & Co gave evidence before us and their explanation in the letters which were produced before us do not appear to deal, or at any rate deal adequately with this question. In particular we do not see any explanation for placing the defendant's loan below the line and the hire purchase liabilities, which were previously below, above it.

Although Mr. Maddison is a chartered accountant, being a parti pris, we prefer not to rely on any views he may have as an expert.

We were fortunate to have the evidence of Mr. Axford, a partner in Russell Limebeer, the firm which had prepared the

latest accounts to 31st October, 1980. He was quite clear that he would have looked at all legal documents necessary for the preparation of the accounts. If he were made aware of any breach on the bond - and he was not aware of any in 1980 - he thought he would have pushed the liability above the line as a current liability. If the company were insolvent he would have treated a term loan as a current liability. If it were an inter company loan he would certainly have made enquiry, would make his own decision and would not rely on somebody else.

In addition we had the benefit of the evidence of Mr. Henkhuzens, a partner in Coopers & Lybrand Deloitte. As to the principles to be adopted, he referred us to paragraphs 22 and 10 of the International Accounting Standards 13. If liquidation of the debt were expected within one year it would be a current liability i.e. above the line.

In his view it was a question of substance over form, and in the case of a loan such as this, his first enquiry would be as to whether the creditor had agreed to a schedule of repayments (i.e. whether he had agreed to leave the loan in being for more than one year). When the loan was first made the original agreement constituted such a schedule. He would, he said, require evidence from the creditor. Here, and with the defendant, the owner, he would have to make enquiry from it. In the circumstances here, he would want to place the debt above the line unless he was satisfied it should be below.

As it occurred to the Court that this was a matter of some importance we recalled Mr. Maddison to ask whether such an enquiry had been made of him by Messrs. Roper & Co. His reply was that it had not. We accept that reply.

Under clause 3(iv) of the agreement the completion accounts are to be prepared "in all respects on the basis of and in accordance with the accounting principles and practices adopted in preparing the latest accounts" i.e. those to 31st October, 1980.

As we say, given the authorities cited above, it is clear that we have the power, indeed the duty, to interfere if the accountants have employed incorrect accounting principles.

We find that the company being in default, the bond was due and repayable on call. Given the evidence of Mr. Axford and Mr. Henkhuzens it is our opinion that the correct view on the principles adopted in preparing the latest accounts would be in preparing the statement to place the loan above the line as a current liability, unless there were good reason to place it below the line. Given Mr. Maddison's evidence, no such good reason existed, and in our view, if the accounting principles in the "latest accounts" were followed, there can be no question but that the loan should have been placed above the line as a current liability. As such it would of course be one of the liabilities to be satisfied from the retention fund.

We are in absolutely no doubt but that our interpretation of the agreement is correct and that Ropers acted on a wrong principle in placing the defendant's loan below the line.

We believe that this finding is sufficient in itself for us to give judgment in the main action in favour of the defendant.

However, it may be of assistance to the parties if we add that in our view the agreement as construed by the Court correctly sets out the agreement which the parties intended to reach.

We find it inconceivable that the plaintiff, who described himself as experienced in business, and who had signed a personal guarantee, did not know the terms of the bond nor that the company was in default on the payments due thereunder, as well as the conditions of the agreement. We are sure that he knew that all the monies due to the defendant were payable immediately.

We are equally satisfied despite Mr. Hopkins' evidence, which, as we recall, varied on this point, that the bond was discussed before the agreement was signed and that all the parties not only knew but intended that it should be repaid as a current liability, and it follows, as might be expected in such a case, that the plaintiff and others were released from their guarantee, there being no need, in the circumstances therefore to mention it in the agreement.

Quite apart from the evidence of the defendant's witnesses, and in particular that of Mr. Maddison which leads us clearly to that conclusion, we had the benefit of figures prepared by Mr. Henkhuzens. He pointed out that the accounts of the company, both at 31st October 1980 and at 7th May 1982 show substantial accumulated losses. If the substance of the transaction were the purchase of the net assets, then, excluding the parent company loan these, as shown on the statement of affairs, amounted to £4,463. Given that the consideration was £55,000 and that the net current liabilities are shown in the statement as £21,037, this leaves a balance of £33,963. If the loan to the defendant is then deducted, this would leave a balance of £10,321 which, if above the figure is in proportion to £4,463, whereas a figure of £33,963 is far in excess and quite disproportionate to the worth of the company as shown in the statement of affairs.

We may perhaps add that where there is a conflict in the evidence we prefer that of Mr. Maddison and the other witnesses for the defendant to that of Mr. Hopkins.

In our view the evidence entirely supports the Court's view of the construction of the agreement and leads inevitably to the same conclusion. Both on the construction as well as the intention of the parties as stated in the agreement the defendant must win in the main action.

We turn now to the counterclaim. The evidence was brief but we are satisfied on the evidence that the monies there claimed are due by Sandpiper Investments Limited to Randalls Vautier Limited. The plaintiff claimed that there was an estoppel. We are quite unable to accept this view. There is no evidence that the defendant had ever accepted this statement, which is signed by Mr. and Mrs. Hopkins as directors. The fact that Messrs. Ropers' fees had been paid, under pressure it would seem, is not in our view tantamount to acceptance. We find that in the circumstances the defendant was entitled to and justified in raising further queries on the accounts as they came to light.

We give judgement therefore in favour of Randalls Vautier Limited and against Sandpiper Investments Limited, both in the original action and on the counterclaim.

## Authorities

Burgess -v- Purchase and Sons (Farms) Limited (1983) 1 Ch. 216.

Johnstone -v- Chestergate Hat Manufacturing Co. Ltd (1915) 2 Ch. 338.

Wright (Frank H) Constructions Ltd -v- Frodoor Ltd (1967) 1 All ER 433.

Dean -v- Prince (1954) 1 All ER 749 CA.

Dean -v- Prince (1953) 2 All ER 636.