22 pages.

ROYAL COURT 49.
(Samedi Division)

Hearing Dates: 5th-9th October, 1992; 11th-14th, 17th-21st, 24th, 25th, 27th, 28th January, 3rd February, 1994 (Judgment reserved).
Reserved Judgment delivered: 4th March, 1994.

Before: F.C.Hamon, Esq., Commissioner
Jurat J.H.Vint,
Jurat A. Vibert.

Between:	Stanton Limited	**First Plaintiff**
And:	George Julien Louis; Sharon Margaret Louis (née O'Brien)	**Second Plaintiffs**
And:	D.O. Moon P.C. De C. Mourant K.S. Baker R.F.V. Jeune C.E. Coutanche I.C. James A.R. Binnington J.D.P. Crill T.J. Herbert and J.A. Richomme (exercising the profession of advocates solicitors and notaries public under the name and style of Mourant du Feu & Jeune)	**defendants**

Advocate P.C. Sinel for the Plaintiffs.
Advocate T.J. Le Cocq for the Defendants.

JUDGMENT

THE COMMISSIONER: The Plaintiffs in this action are a company and the sole beneficial owners of that company. Because of the way the

Order of Justice is pleaded we do not have to consider whether in Jersey Law a shareholder can recover damages as a result of the company in which he is interested having suffered damage. The point is not taken. We have an argument where the interests of the beneficial owners are said to be synonymous with the interests of the company. We shall deal with the matter as pleaded. Mr. and Mrs. Louis purchased the shares in Stanton Limited on the 15th January, 1988. That purchase gave them the ownership of a property known as "The Cutty Sark" situated on the Five Mile Road, St. Ouen. They had plans to expand and develop the property. They proceeded to do so. By the 20th December 1990, the Company had liabilities of £392,000 and assets which would depend on the saleable value of the Realty. It had become insolvent, it is claimed, primarily because of the professional negligence of Messrs. Mourant du Feu & Jeune and the partner acting for Mr. & Mrs. Louis, Mr. James Crill. The Defendants in a strongly contested action have argued (as they have pleaded) that any loss suffered was not caused by the default of the Defendants, (if there were such default) but because Mr. & Mrs. Louis over-extended themselves financially and were unable to service their obligations as they fell due.

The action of the Plaintiffs is pleaded in contract. It is not pleaded in tort. We are not prepared to depart from the pleadings. We can see on the facts of this case little difficulty in the point despite Mr. Sinel's citing to us many cases where the English Courts recognize concurrent rights of action in contract and tort. The professional relationship between Mr. Crill and Mr. & Mrs. Louis was founded on contract. There might have been a defence open to the Defendants if the tort of negligence had been pleaded. It was not and our judgment will be based on the contractual relationship established between Mr. Crill and Mr. & Mrs. Louis. The argument of both Counsel has sadly been based exclusively on English law. We need to consider that professional relationship and how the contract under it came into existence.

But first, who were those established clients that Mr. Crill was retained to advise? We need only deal with the antecedents of Mr. Louis for it was he who elected to manage the financial affairs of his family.

After leaving school, Mr. Louis joined the National Westminster Bank in Colomberie, St. Helier. He started there in 1973. He rose through the ranks until he became involved in such matters as private lending (where he had a discretion to lend up to £5,000) and commercial lending where he prepared analyses of financial propositions for guest-houses, restaurants and the like, so that management would have all the information necessary to make a decision. He moved to another branch at St. Aubin where he was assistant to the manager in a small three-man branch. He had been at the National Westminster Bank for six years when he joined the TSB Bank. When he left the TSB Bank in 1987, he was earning

£12,000 *per annum* and had gained a good insight into Bank lending although he had passed no Banking examinations. Mr. Louis from his cross-examination in October, 1992 (this case had originally been set down for one week, which was, on any reckoning, a totally impossible time period) appeared to be extremely vague as to the legal meaning of the security documentation that customers were sent by the Bank for their lawyers to sign. He appeared surprised to hear that when he had borrowed money on a property that he owned, he could not alter the property in any material way without the consent of the lender. Such an implication had not occurred to him. He had never heard of anyone being actioned for improving property so, on that basis, the question of obtaining prior consent apparently never entered his head.

We find that surprising for two reasons.

1) In 1987 (while still employed at the TSB Bank), Mr. Louis drafted a letter that he wished to send to the Economic Adviser with a view to setting up a new business to be called G.J. Louis Financial Services (Jersey) Ltd. and which would give independent financial service to islanders on the investment best suited to their needs. Mr. Louis, in his letter, spoke of the fact that for seven years of his Banking career he had dealt with *"customer financial matters in all aspects, including investment advice, private and commercial lending and insurance"*. He spoke of his *"good understanding of people's financial requirements at all levels"*.

2) Mr. & Mrs. Louis had previously signed Bonds and Guarantees which contained conditions in them. When they purchased 25, Columbus Street there was a Bond, dated 16th October, 1981, in favour of the National Westminster Bank Limited. There was in that Bond, in particular, a clause which stated *(inter alia)* that if they further "mortgaged or otherwise charged" their property then the Bank was entitled to take action against them. When they borrowed £20,000 from the Trustee Savings Bank of the Channel Islands on 26th September, 1985, there was a similar clause and also a further clause which, *inter alia*, read -

   "To keep all buildings forming part of the Borrowers' said Real Estate in a good and substantial state of repair and decoration both internally and externally and not to alter or interfere with the structure thereof nor demolish nor change the use thereof without the written consent of the Bank".

There is a diary sheet of the same date from Mr. Crill's diary where at 5.00 p.m. on that day he met with them to read over the Bond.

On the 31st January, 1986, when Mr. and Mrs. Louis were to purchase the "Riviera" Guest House the Bond that they signed had

clauses specifically prohibiting further unauthorised charges or alterations to the property. The clause, in that regard, is quite specific:-

> *"Not without the consent in writing of the Bank to demolish, modify nor alter the structure of any of the buildings forming part of the property comprised in the first Schedule hereto or any part thereof nor change the use of the same or any part thereof to any purpose other than that for which it is now used as set out in the Third Schedule hereto".*

A copy of that Bond and Guarantee had been sent to Mr. Louis under cover of a letter dated the 17th September, 1985.

3) Mrs. Louis told us that her husband was a cautious man, who always carefully checked documentation at home. She relied absolutely on his financial expertise and obviously reposed confidence in that ability. We gained the impression through listening to her that her husband was a man who necessarily took care over his paperwork. Nor must we forget the independent evidence of Mr. John Down, an experienced stock-taker (who dealt with Mr. Louis at the "Cutty Sark"), who told us that compared with the many other restaurateurs with whom he dealt, he found Mr. Louis "very very easy". All the delivery notes, all the takings, allowances, any credit notes were always ready when they were needed.

To establish whether there has been a breach of contract, we must look at events that took place in and about the completion meetings where the Louis' (through companies) sold the "Riviera" Guest House and purchased the "Cutty Sark", but we shall need to consider what Mr. Crill's retainer was.

Because any claim in this case, pleaded as it is in contract, can only be for damages for breach of contract then the Plaintiff can only recover (if he succeeds at all) the pecuniary loss which he can show that he has suffered.

What do we consider Mr. Crill's retainer in this particular case to have been?

He was dealing, at the time, with the sale of the shares in one company (the "Riviera Guest House sale") and the purchase of shares in another company ("the Cutty Sark purchase"). There were interrelated documents. Mr. Le Cocq told us that Mr. Crill's retainer was to advise on and deal with the "Riviera" Guest House sale, the "Cutty Sark" purchase and the loans with the Royal Bank of Scotland and to deal with Mrs. Loretta Daniels (the Vendor of the shares in Stanton Limited). Mrs. Daniels was to take a second charge of £75,000 after the Royal Bank of Scotland's first charge of £115,000. He was also retained (later on in the transaction) to register a loan of £30,000 with Randalls Ltd. and to correspond

with Advocate Backhurst (again at a later stage) on refinancing; he was to deal properly with proceedings commenced by Mrs. Daniels and (at an earlier stage to these proceedings) to provide measurements for proposed plans to be put in to the relevant authorities in order to enlarge the "Cutty Sark". These matters did not, of course, come to Mr. Crill at the same time. Mr. Le Cocq stressed that there was no general retainer but that after the initial share vending agreement, there were a series of specific instructions to keep alive the original contract. To understand, we have to examine what we shall call the "original retainer", before we examine those matters which came thereafter in the short life of this commercial venture.

The Original Retainer

In Midland Bank Trust Ltd. v. Hett, Stubbs & Kemp (1973) 3 All ER 571 at 573, Oliver J said:

> ***"Counsel for the Plaintiffs sought to rely on the fact that Mr. Kenneth Stubbs was Geoffrey's solicitor under some sort of general retainer imposing a duty to consider all aspects of his interest generally whenever he was consulted, but that cannot be. There is no such thing as a general retainer in that sense. The expression "my solicitor" is as meaningless as the expression "my tailor" or "my bookmaker" as establishing any general duty apart from that arising out of a particular matter in which his services are retained. The extent of his duties depends on the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do".***

The "retainer" of a solicitor is defined in Cordery's Law Relating to Solicitors (8th Ed'n) at page 49 as ***"the foundation upon which the relationship of solicitor and client rests. Without a retainer that relationship cannot come into being".*** There was in this case a retainer. The contractual relationship is not unimportant because, if there were no contractual liability, then there could only be an action in tort.

In Howard v. Woodman Matthews (1983) BCLC 117 at 121 Staughton J said this:

> ***"In general the duty of a solicitor, when his client as tenant is served with a notice under Part II of the Landlord and Tenant Act 1954, is clear. He must tell his client of the two time limits. He must also take such steps as are sufficient, in all the circumstances of the case, to ensure that if either time limit is allowed to expire without the appropriate step being taken, that is the fault of the client. By 'fault' I mean, either that the client shall have consciously allowed time to expire, or that the client shall***

have failed to exercise that degree of attention to his affairs which any person of his education and background could be expected to show. In stating the duty thus, I adopt and follow what was said by the Court of Appeal in Carradine Properties Ltd. v. D.J. Freeman & Co. 18th February, 1982 (unreported), and particularly this passage in the judgment of Donaldson LJ at p.13 of the transcript:

> ***'A solicitor's duty to his client is to exercise all reasonable skill and care in and about his client's business. In deciding what he should do and what advice he should tender the scope of his retainer is undoubtedly important, but it is not decisive. If a solicitor is instructed to prepare all the documentation needed for the sale or purchase of a house, it is no part of his duty to pursue a claim by the client for unfair dismissal. But if he finds unusual covenants or planning restrictions, it may indeed be his duty to warn of the risks and dangers of buying the house at all, notwithstanding that the client has made up his mind and is not seeking advice about that. I say only that this may be his duty because the precise scope of that duty will depend inter alia upon the extent to which the client appears to need advice. An inexperienced client will need and will be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client.'***

There was a passage in Jackson & Powell's Professional Negligence which Counsel read to us which we found particularly helpful. It dealt in general with professional liability. At 1-06 the authors say:

> ***"In practice, different professions enjoy varying degrees of success. It is not surprising if a litigating solicitor says that some of his clients lose their cases or if a doctor says that some of his patients do not recover. It is most surprising if an engineer says that some of the bridges which he designs fall down; or if a conveyancing solicitor says that some of his clients do not acquire good title to their properties".***

What of the question of contractual or tortious liability? Mr. Le Cocq brought to our attention the case of Tai Ming Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. & Others (1985) 2 All ER 947 where at 957 Lord Scarman (for this is a Privy Council case) said this:-

> ***"Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial***

relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of Banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, eg in the limitation of action. Their Lordships respectfully agree with some wise words of Lord Radcliffe in his dissenting speech in Lister v Romford Ice and Cold Storage Co Ltd. [1957] All ER 125 at 139, [1957] AC 555 at 587. After indicating that there are cases in which a duty arising out of the relationship between employer and employee could be analysed as contractual or tortious Lord Radcliffe said:

> *"Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since, in modern times, the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract".*

> *Their Lordships do not, therefore, embark on an investigation whether in the relationship of Banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract. If, therefore, as their Lordships have concluded, no duty wider than that recognised in Macmillan and Greenwood can be implied into the Banking contract in the absence of express terms to that effect, the respondent Banks cannot rely on the law of tort to provide them with greater protection than that for which they have contracted".*

It would appear, (and the inference is very strong) that the Privy Council considered the principle established by Oliver J in Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp *(op. cit.)* (which has been approved judicially in many subsequent cases) to be wrong. The argument of Mr. Le Cocq is that this Court is not bound by precedent established in the English Courts (they are persuasive only) but is bound by decisions of the Judicial Committee of the Privy Council. We are grateful to Counsel for drawing the case to our attention. Because the Plaintiffs have founded their action entirely in contract we do not need to take the matter further. (We are fortunately not concerned with limitation. It has not been pleaded). We should however say that the Tai Ming judgment has been considered very recently by a Court of first instance in England; in Lancashire and Cheshire Association of Baptist Churches Inc. v. Howard & Seddon Partnership (a firm) (1993) 3 All ER 467 at 475, Judge Kershaw Q.C. distinguished the Privy council case but was able to follow the Midland Bank case. He said:

> ***"Further the effect of the contractual period is that the Plaintiffs' claim can be statute-barred before he knows, or could know, that there is anything to complain about. If limitation is relevant to whether there is a duty in tort, I consider that this helps to show that it is just and reasonable that there should be such a duty, limited as I have said, in its extent by the express and implied terms of the contract".***

From the point of view of Jersey law, the position is far from clear. There is authority to show that there is no liability in tort where there is a clear and effective contract. As we have said, it does not fortunately fall to us to decide the matter conclusively. We draw consolation from that fact because we would have felt bound to follow a decision of the Privy Council dealing with a common law problem which is recognised in this jurisdiction.

There is one matter on the pleadings which needs to be dealt with at this stage. The Defendants' Answer refers to the completion meeting taking place at 11.30 a.m. on the 5th January 1988. It states that at 11.00 a.m. Mr. & Mrs. Louis met with Mr. Crill, (the time is borne out by a diary entry) who provided them with copies of the final draft of the sale and purchase agreement, a final draft of loan documentation between Stanton and the Royal Bank of Scotland plc, a final draft of a Guarantee and Bond to be entered into by Stanton in favour of Mrs. Daniels and a copy of the final draft of the loan documentation to be entered into by Mr. & Mrs. Louis in favour of Mrs. Daniels. There is then an assertion that Mr. Crill took Mr. & Mrs. Louis through that documentation, explaining the significance of each of the documents but concentrating on the loan documentation as Mr. &

Mrs. Louis had previously received drafts of the Share Vending Agreement and had approved it.

The pleaded reply is totally unambiguous. It stated that *"the initial meeting never occurred"*. Mr. & Mrs. Louis were (on the pleadings) taken straight to the completion meeting. They denied ever receiving copies of the documentation. We saw a letter dated the 6th May, 1990, (when relationships between Mr. & Mrs. Louis and Mrs. Daniels had ruptured). It implies (and it is only an inference) that Mr. and Mrs. Louis were not given copies of the documentation. The letter reads:-

> *"She has never expressed any other point of view and to suddenly decide we have broken our agreement by developing the restaurant in a manner she was fully aware of and had expressed support for leaves me dumbfounded. It certainly appears to me that she deliberately manoeuvred us into a situation where she could hope to break from the terms of her freely offered five-year mortgage.*
>
> *In view of her evident determination to sue, I would like to receive your comments on the above, together with copies of the relevant Guarantee and agreements referred to in previous correspondence by Advocate Backhurst".*

We have no doubt that there was a pre-completion meeting between Mr. & Mrs. Louis and Mr. Crill, at which Mrs. Glendawar (his assistant) made her contribution by providing the documentation which had been carefully scrutinised and amended in the relatively short time available.

Mr. Crill was confident that he took Mr. & Mrs. Louis through the clauses in the documentation, not word for word, but paraphrasing. He gave us an example of how he would have explained the matter. It was the way that many of these documents must have been explained in Jersey offices for many years. If Mr. Crill explained it in this way, he was not in breach of contract. If Mr. Crill failed to point out these material clauses to Mr. & Mrs. Louis, then he was in breach of his contract.

There is no doubt that Mr. & Mrs. Louis were ambitious. Despite the hyperbole of Mr. Frank Luce, an estate agent who was retained by Mr. & Mrs. Louis both to sell and at times to value the "Cutty Sark", we agree with Mr. Louis' initial description of the "Cutty Sark" when it was purchased. It had a small restaurant without sea views; it was registered for only fifteen guests; it was in a fairly dilapidated condition because it had been run down and it needed redecoration and repairs to its substandard roof. The "Riviera" Guest House had, in our view, exhausted its current potential but the "Cutty Sark" was a property into which, on the face of it, the Louis' could throw all their undoubted determination and experience. Initially, they took a tremendous

risk. There was no planning permission for the property and it lay within an area notorious for the difficulty in obtaining Island Development Committee consent to alterations. The "Watersplash", further along the bay, had long been plagued by well-publicised refusals for permission to extend.

The Louis were also clearly strapped for working capital. They put £100,000 of the proceeds of the "Riviera" Guest House into the purchase; they borrowed £115,000 as a first charge from the Royal Bank of Scotland (Jersey) Ltd. and (through the good offices of Mr. Luce) persuaded Mrs. Daniels to leave a second charge of £75,000 at 2% below base rate on the property. Within a matter of nine months, they had borrowed, initially unregistered, a further £25,000 in 3 tranches from the Royal Bank of Scotland plc and a registered £30,000 from Randalls.

We have to decide this case on the balance of probabilities and it is, of course, for the Plaintiffs to prove all the serious allegations that they make on that basis. This is a case which it might be easy to assess on hindsight. We do not feel that that is the way for us to proceed. We feel that our duty is to view the situation as it stood at the time in order to test the reasonableness of the decisions.

Mr. Louis at trial seemed to remember the pre-completion meeting but seemed only to recall that Mr. Crill was advised, almost in passing, that the restaurant was to be developed. Later, under cross-examination, he told us that he could not remember if Mr. Crill went through the Bond and Guarantee or not. The onerous terms were in the Guarantee. We must recall that on the 17th December, 1985, Mr. Crill had sent Mr. Louis a copy of a Bond and Guarantee for the borrowing of £110,000 from the Royal Bank of Scotland (Jersey) Ltd. when Mr. and Mrs. Louis purchased the "Riviera" Guest House. The Bond and Guarantee contained clauses virtually identical to those in Mrs. Daniels' Bond and Guarantee and absolutely identical to those contained in the present Bank borrowing of £115,000. Mr. Louis seemed to imply that he would only have regard to documents that he was specifically asked to examine. We find that very difficult to accept and we do not believe that Mr. Louis failed to read the terms of any documentation sent to him. Mrs. Louis told us that had Mr. Crill told her and her husband that they could not develop the "Cutty Sark" without permission, then she would have remembered. Put in a certain way that is clear. We do not believe that a positive warning, in that sense, was ever put to Mr. & Mrs. Louis. There was much uncertainty in Mr. and Mrs. Louis' minds. Mr. Sinel attacked Mr. Crill strongly because he thought that copies of the Bond and Guarantee had not been retained on file. This was one of the many examples that he gave of a continuous attitude of laissez-faire. The criticism proved to be incorrect. There were two copies (one with amendments) of the copy documents in the discovered files.

Mr. & Mrs. Louis had a good relationship with their Bankers (although no one from the Bank gave evidence) and they had initially a friendly relationship with Mrs. Daniels. The problems that they were to face with development plans were unknown. The initial meetings were amicable. Mr. Crill made a jocular remark at the pre-completion meeting, which everyone recalled, about their future plans. We do not believe that Mr. Louis gave the possibility of failure a moment's thought. More importantly, not once, in any correspondence, does he mention to anyone that he did not know the terms of the Bond and Guarantee, yet he was clearly a cautious man. Within days of the completion, he wrote to thank Mr. Crill and Mrs. Glendawar for their help and assistance and to question whether a housing application was necessary, because he recalled that none had been filed. When, later, there was a failure by Mr. Crill to lodge an application for a 7th Category Licence, Mr. Louis did not hesitate to castigate him.

Advocate Backhurst remembers the completion meeting. He had explained the terms of the Bond to Mrs. Daniels before the meeting. It was his practice to do so.

We do not accept Mrs. Daniels' evidence when she told us that at the completion meeting, the clauses were read out to her. We think that she was recalling the pre-completion meeting that she had with Advocate Backhurst.

It is not surprising that memories are not always clear. Everyone was under pressure. The Louis', for commercial reasons, had advanced the completion meeting by almost a month. Despite this, we are confident in our minds that the documentation was explained to a man to whom the wording would have been familiar and who was practised in the art of borrowing money.

After a most careful consideration of all the evidence and in particular, the evidence of Mr. Crill and Mr. Louis, we are satisfied that in the "Cutty Sark" transaction, the terms of the Bond and Guarantee were explained satisfactorily to Mr. & Mrs. Louis. This does not mean that the clauses in the Guarantee were read word for word. They were explained to Mr. Louis (who was not a tyro in these matters) in a way which he would have understood.

Matters do not, however, end there.

On the 22nd April, 1988, there was a request from Mr. Louis for information as to his boundaries "for the architect to do some plans for him". Mr. Crill, in a letter dated the 11th May, 1988, supplied the measurements. He did no more. Was he at that point bound to remind Mr. and Mrs. Louis of the obligations that he had explained only three months earlier? It is an interesting question.

A solicitor has a duty of care to his client and it requires no research into the authorities for us to affirm the fact that a solicitor is bound to explain material facts in any document to his client. But we have found that Mr. Crill did take his client satisfactorily through the Bond and Guarantee. Did Mr. Crill breach his contractual duty when he had a clear opportunity to remind his clients of a pitfall which they might have forgotten? The question rests on the meaning of the retainer whereby Mr. and Mrs. Louis retained the services of Mr. Crill.

Each case depends on its own particular facts. This can be illustrated by an example.

Mr. Le Cocq brought to our attention a passage from Hall v. Meyrick (1957) 2 All ER 722 at 730 where Ormerod L.J. said:-

> ***"I certainly do not, however, accept the view that it is the duty of a solicitor so to advise"*** (on the effect of subsequent marriage on a will) ***"merely because the question of marriage has been casually, and perhaps jocularly, mentioned to the solicitor in an interview either by a third person, as was the case here, or even by the client himself. In my judgment, whether the duty would arise on such an occasion would depend on the actual words used at the time and on the whole of the circumstances in which they were used, including, of course, the previous knowledge of the solicitor of the affairs and intentions of his client".***

But, having taken Mr. and Mrs. Louis through the terms of their Bond and Guarantee, how was Mr. Crill to respond to this later opportunity to remind?

Is it sufficient, four months after the "Cutty Sark" purchase, when Mr. Louis writes to ask for measurements to be supplied, for a solicitor to say to himself (and the questioning is hypothetical) "I have told you once that you cannot develop without permission. That is my obligation fulfilled. I can see that you have development plans in mind, but even though you may be entering into a position of some peril, I am not going to remind you again".

What duty in law did Mr. Crill have to remind his clients of their obligations under the Bond and Guarantee? Jackson & Powell on Professional Negligence (3rd Ed'n) at page 371 says this:-

> ***"Reminders. <u>As a general rule, there is no duty on a solicitor to remind a client of advice once it has been given.</u> In <u>West London Observer v. Parsons</u> (1955) 166 EG 749 (QBD), the Defendant solicitors acted for lessees. The lease could be renewed if the lessees gave notice on March 25, 1953 and were not, on that date, in breach of covenant. The Defendants explained the provisions for renewal both in a***

letter dated October 1950 and during an interview in April 1951. It was held that the Defendants were not negligent in failing to repeat that advice in or shortly before March 1953. In Yager v. Fishman & Co. (1944) 1 All ER 552, the Plaintiff's company held a 21 year lease of premises, under which the Plaintiff guaranteed the payment of rent. The lease could be terminated early if the company gave notice on or before December 14, 1940. In October, 1940, the Plaintiff asked his solicitors (the second Defendants) whether he could get his liability under the Guarantee postponed. The solicitors replied that there was no way he could get out of his liabilities "at present". They did not go on to remind him that by giving notice before December 24 he could determine the underlease, nor did they advise him that he should take this course. The question of termination had been specifically referred to in earlier correspondence, and the Court of Appeal held that the solicitors were not negligent in failing to remind the Plaintiff of the date by which notice should be given.

"... the respondent's solicitors were not bound to supply deficiencies in their client's memory unless they were clearly requested to do so. I am by no means sure that Yager would have welcomed a bill of costs which included charges for reminding him unasked of dates which he might be assumed to have in mind".

The rule is not an invariable one. In R.P. Howard Ltd. v. Woodman Matthews (1983) BCLC 117, the Defendant solicitors were instructed by the Plaintiffs in relation to a business tenancy which was expiring. When first instructed in October 1975, the solicitors told their clients of the need to initiate an application to the County Court to obtain a new tenancy under the provisions of the 1954 Landlord and Tenant Act, Part II. Negotiations then took place between the solicitors and their client's landlord. Staughton J. found that the solicitors were negligent in not reminding their client of the need to make the application to the Court".

But of course other matters were being dealt with by Mr. Louis at the time of the letter of the 11th May, 1988. Some of these matters were not unimportant. Initially, quite unbeknown to Mr. Crill, Mr. Louis had taken two further charges from the Royal Bank of Scotland, one for £5,000 dated the 5th February, 1988, the other for £10,000 dated the 23rd February, 1988. On the 7th October, 1988 the lawyers acting for the Bank telephoned Mr. Crill's office to say that it was intended to register these two charges. There were outstanding charges cancelled but still registered against the property in the Public Registry. They were long outstanding from the time when Mrs. Daniels owned the company. The Defendants wrote to Advocate Backhurst to ask him to have those outstanding and defunct charges cancelled. There was

criticism levelled against Mr. Crill for not having cancelled the charges previously, and for not, at that stage, reminding Mr. and Mrs. Louis of their obligations. We can see nothing in that to assist the Plaintiffs. The first criticism is of an understandable oversight. It no more assists the Plaintiffs than the allegation that Mr. Crill failed to defend the action eventually brought by Mrs. Daniels to protest the four unauthorised charges. That allegation was shown to be without substance and we are satisfied that Mr. Crill took every step in that matter to protect his client commensurate with his obligation not to act on a matter *"denué de tout droit"*. The second criticism is more worrying but, in the circumstances, we can see that Mr. Crill was dealing with a situation not of his making and which was a *fait accompli*.

What is important is that Mr. Louis did not need advice on this question of a breach of Mrs. Daniels' lending. The fact that he could not further charge the property without her consent was known to him. He chose to ignore the prohibition. He did not ask for advice. In our opinion, on this point, he did not need advice.

Mr. Sinel spoke of a "litany of disinterest and negligence". He itemised his concerns. We have considered them most carefully. We can quite understand Mr. Crill's doing nothing when he found that further charges were going to be registered on the property by the Royal Bank of Scotland. He had not been consulted when they had been obtained unregistered. Of one thing we are certain: Mr. & Mrs. Louis might have forgotten that they could not develop the property but Mr. Louis must have known that he was precluded from registering other charges without permission. He had worked in a bank for many years. He held himself out to the Economic Adviser as a financial expert. It is not possible for us to believe that he did not know.

There are other matters of concern. Mr. Crill "sat" on the application for the Seventh Category licence; he sent the most urgent communications by post instead of telephoning; he even failed to send copies of the Bond and Guarantee when they were requested on the 6th May, 1990. Development permission was not granted until the 5th January 1990. (It does seem incredible that Mr. & Mrs. Louis purchased the "Cutty Sark" intending to make substantial alterations to the property, with no indication of how long the application would take). Mr. Crill was alerted in every sense of the word to the fact that development was intended. He was alerted to the development when asked to give measurements in 1988; he was alerted to the development when he received copies of the plans from the Island Development Committee; he was alerted when requests were made for application to the Licensing Assembly. He never so much as lifted a finger to remind Mr. and Mrs. Louis of their continuing obligations towards Mrs. Daniels.

We conclude that Mr. Crill was in breach of his contractual duty owed to the company and to Mr. and Mrs. Louis in not reminding them of their obligation to obtain the permission of Mrs. Daniels to alterations to the property. This is nothing to do with Mr. Sinel's "inherent probability" theory. Mr. and Mrs. Louis, we have found, had borrowed money before the breach occurred, in an unregistered form without the foreknowledge that the borrowings would be registered. At that point, in our view, they knew precisely what they were doing. They borrowed the money because they would not have survived without it. The charges were registered, we can assume, because the situation viewed objectively by the Bank, had deteriorated. This, in our view, supports Mr. Keevil's conclusions.

We must recall that Mrs. Daniels was eager only to protect her investment of £75,000 and had no reason to prevent the development. As she very candidly told us "She could not have run a 90-seater restaurant if she had tried." It was interesting that she spoke of "The Cutty Sark" as though it were some old friend. She had no reason that we could see to go against the projected plans. She was even quite happy to accept the new financing arrangements that were proposed whereby she would receive a £30,000 repayment and the balance would be paid at more advantageous rates of interest. Why, then, did she foreclose? We do not find that she was vindictive. Mrs. Daniels appeared to us to be a nervous lady, set in her ways, who was totally devastated by the way that she saw the peril to which her life savings and investment of £75,000 had been put. She spoke of being "hurt" and "disappointed". We think that all her descriptions are synonymous with worry. Perhaps the Louis were unfortunate in their reliance on Mr. Luce, an agent who had a chameleon like ability to act for vendor and purchaser and to value the property for the vendor while acting as selling agent. Mrs. Daniels eventually fell back on her strict legal rights set out fairly and squarely in her Guarantee. This she was entitled to do. It is not enough for Mr. Sinel to say that she should have remained calm because she not only had an improved security (Mr. Luce had pounded up the value in a burst of exuberance from £450,000 in October 1989 to £615,000 in March 1990) but the Royal Bank of Scotland now had charges registered after her second charge which meant presumably that on a *dégrèvement* they would be compelled to redeem up. This is not the point. Borrowers must take their lenders as they find them. A highly nervous single lady (who took advice from her Advocate) cannot be criticised for taking the action that she did which was not, in any event, taken with undue precipitation.

In our judgment, despite the ferocious cross-examination of him by Mr. Sinel, Mr. Keevil was correct when he said that the scenario as it existed in the first year could well have been a recipe for disaster unless there were "more profitable things ahead". We take the view that at the end of 1989, the company was under-capitalised, over-borrowed and its income could not support

its outgoings. Even Mr. Bisson (the company's accountant) agreed that a potential lender would not be over impressed by the historic accounts. He would have to view any lending potential against future projections.

At the end of 1989, Stanton Limited had an overdraft of £20,000. It had a continuing debt of £129,000 to the Royal Bank of Scotland and Mrs. Daniels' loan was, of course, £75,000.

We heard of many potential lenders (including nearly all the clearing banks) that Mr. Louis approached at this time to no avail. The summons issued by Mrs. Daniels was not issued until June 1990. She showed restraint. Much of this restraint was due, we feel, to the common sense and good counselling of Advocate Backhurst. The period where alternative lending was sought ran from October 1989. We can, on the evidence we heard, gainsay no confidence that anyone would have lent money on this project.

When, on the inspired suggestion of their chef, the Louis opened a Mexican Restaurant in 1990, their fortunes temporarily changed. The à la carte restaurant had not been viable. the louis had decided to open for the summer months only with a reduced menu. while the wages bill dropped, the loan interest charges, over which they had no control, continued to increase. We can reach no other conclusion on the expert evidence that we heard but that the Mexican Restaurant came too late in the day.

No one could have been expected to know that Mr. & Mrs. Louis would develop without having the necessary finance in place; that they would need to borrow substantially at a time of extraordinarily high interest rates, that they would place themselves in some financial jeopardy by reason of the fact that they were trading at a loss and were only given a lifeline by the inventive suggestion of their chef that they commence to serve highly successful Mexican food.

When in June 1990, the new restaurant had opened with a 90 persons capacity, this had not proved viable. The change to a Mexican Restaurant pumped much needed funds into the business. Even so, Mr. Lynch looked at significant budget assumptions and saw that it was envisaged that a loan of £225,000 would have to be obtained (to replace the existing loan of £115,000). With capitalised interest of £39,000, this would result in a total loan of some £264,000.

We find it impossible to share the enthusiasm of Mr. Lynch because we cannot see that anyone would have lent a further minimum of £110,000 on a business which at that time had no significant track record. We have no doubt that Mr. Keevil is correct when he says that at the end of September 1990 the Company required £369,000 to break free before any working capital could be provided. Even though Mr. Keevil did not have available to him

all the projections of Mr. Lynch when he made his report, he still had no doubt at the end of his evidence, having been very closely cross-examined, and having listened to much of the other evidence and having read later reports, that the business was doomed to failure.

Nor can we share the enthusiasm of Mr. Frank Luce for the "Cutty Sark", nor his hyperbole in describing St. Ouen's Bay as one of the "finest in Europe". We have to say that, in our view, the venture was destroyed by the fact that Mr. & Mrs. Louis were short of working capital; by the fact that base rates began an astronomical climb in 1988 - they rose from 8.5% in January 1988 to 15% in October 1989; by the fact that it took until the 5th January, 1990 for the Company to obtain Island Development permission to undertake development works which commenced in February, 1990; by the fact that the cost of the works almost doubled the estimate given, despite Mr. Louis' working on the site with his builder, and by the fact that it took so long for the Louis' to discover the possibilities of the Mexican type restaurant.

On 18th December, 1989, Mr. Crill wrote to Advocate Backhurst asking whether Mrs. Daniels would agree to a refinancing operation whereby £225,000 would replace the £115,000 as a first charge. That new first charge was provisionally from a private lender. Advocate Backhurst's reaction was uncompromising but understandable:-

> *"I note the new borrowing is to be in the sum of £225,000 which is substantially greater than that due to the Royal Bank of Scotland (Jersey) Limited. Our records show that the borrowing from the Royal Bank of Scotland as registered, is in the sum of £115,000.*
>
> *In the circumstances we have to advise our client that her security would be prejudiced by agreeing your request and that if your clients wish to refinance they would first have to undertake to repay all monies due to our client from the new borrowing".*

Mrs. Daniels knew about the refinancing operation. At that point, she knew about the proposed development. We have to consider - and we have listened to several expert accountants - Mr. Owen F. Lynch B.B.S., A.C.A. of Norman Allport & Co. (retained by the Plaintiffs) and Mr. David Keevil FCA of Touche Ross & Co. (retained by the Defendants) and to Mr. David William Bisson FCA of Graham Le Rossignol & Company who were at all material times accountants to Stanton Ltd. - that however carefully we view the arguments put before us, the project was under-capitalised. We can reach no other decision. The almost immediate borrowing of a further £25,000 is a clear indication of the fact. The company traded for two seasons and it always traded as a net loss - £7,000

at the end of the first year and £15,000 at the end of the second year. In 1989, the wages bill was down, repairs and renewals were well down, but interest rates were almost doubled and the gross profit was down £20,000.

At year ending 1989, the situation was, in our view, parlous. Mr. Bisson talking of the net cumulative loss of some £22,000 agreed with Mr. Le Cocq that there were problems ahead unless matters improved radically.

The evidence of Mr. Peter Winn, the Plaintiff's architect, showed (as we have seen) that the first approval from the Island Development Committee came only in January, 1990. That was in the form of stamped approved plans. Thereafter, of course, the Licensing Bench had to give its approval. By this time, in our view, the situation was virtually hopeless. It is not too surprising that the property was taken up on the *dégrèvement* by a company called Valley Properties on the 19th July 1991, the principals of which were a Mr. de la Haye, Mr. Stammes (the restaurateur who had shown some interest in the property at earlier stages) and Mr. Roger Maddison, the Managing Director of Randalls whose company had taken a £30,000 charge on the property). They sold the "Cutty Sark", not as a restaurant and hotel, but to a private individual who was able to benefit from its being outside the Housing Committee Laws. The property was sold at the 31st October 1991 for £475,000. It is not unimportant that nobody "snapped the property up" as a hotel and restaurant which, on Mr. Luce's assessment, was a prime property in a prime site.

Mr. Keevil had told us that the company was not viable by reference to its financing, bearing in mind the level of profitability shown by the forecasts of Mr. Louis. The figures upon which Touche Ross worked were, in our view, the most favourable to the company.

What damages, if any, flow from the breach?

The claim for damages raises two questions. First is the question of remoteness of damage. In Hadley v. Baxendale (1854) 9 Ex 341 it was decided that damage is not too remote if it is ***"such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it"***. The second question is the measure of damages and there, of course, the general rule is that the Plaintiff recovers his actual loss (in respect of damage which is not too remote). The rule in Hadley v. Baxendale was explained in Denny v. Hodge (1973) JJ2389 (a Jersey Court of Appeal decision).

We have already considered the matter in West v. Lazard Brothers (18th October 1993), Jersey Unreported where we set out the rules as they had been accepted by us as follows:

> ***a) The general rule is that the Plaintiff claiming damages must prove his case and, in order to justify an award of substantial damage, he must satisfy the Court both as to the fact of damage and as to its amount.***
>
> ***b) Where the fact of damage is shown but no evidence is given as to its amount, so that it is virtually impossible to assess damages, this will generally only permit an award of nominal damages.***
>
> ***c) Where it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding merely nominal damages. Thus where the subject matter is the provision of an opportunity to make a profit, the deprivation of that opportunity may itself constitute a loss capable of more than nominal compensation; Chaplin v. Hicks (1911) 2 KB 786.***
>
> ***d) The onus is, however, on the Plaintiff to satisfy the Court that he has lost some right of value, some chose in action of reality and substance; Kitchen v. RAF Association (1958) All ER 241 at 251.***

There must always be an element of risk attaching to a lost chance and this matter was considered in Kententertainments Limited v. Great Yarmouth Borough Council (1983) unreported where Cantley J said:

> ***"In Kitchen v. Royal Air Force Association [1958] 3 All ER 241, [1958] 1 WLR 563 at 576, Parker L.J. (as he then was), in referring to the Plaintiff's claim which had become as a chance, said:***
>
> > ***"The matter remains a mystery and where it is necessary for this court to decide whether the Plaintiff would have succeeded, I, for my part, would have found great difficulty in coming to that conclusion; but, as I understand it, that is not our task. If the Plaintiff can satisfy the court that she would have had some prospect of success, then it would be for the court to evaluate those prospects, taking into consideration the difficulties that remained to be surmounted. In other words, unless the court is satisfied that her claim was bound to fail, something more than nominal damages fall to be awarded.***

It seems to me that a chance which includes the chance of loss can still be a valuable chance, even a very valuable chance. Suppose in the present case that chances of success and failure were even, but success would bring a profit of many thousands of pounds and failure could not produce a loss of more than a few hundred pounds, and the contract was assignable to another impresario, I would expect it to find a ready purchaser. Life and trade are full of chances which an ordinary prudent man would take, even though they involve a risk of not turning out well and so causing some loss in the end. If the Court has material from which it can put a value on a chance of which the Plaintiff has been deprived by breach of contract he ought to be able to recover that value as damages. A chance which may produce gain and does not involve any risk of loss will usually have some clause depending on the contingency or number of contingencies on which success is based. BUT A CHANCE WHICH MAY INVOLVE EITHER GAIN OR LOSS INTRODUCES ANOTHER IMPORTANT FACTOR TO BE TAKEN INTO ACCOUNT AND THAT MAY MAKE THE CHANCE INCAPABLE OF EVALUATION. (our emphasis). ***I think that is the kind of chance that the Plaintiff has lost. It might have gained; I cannot pretend to assess how much or how little it would have lost. There might have been another disaster or there might have been another success. On the evidence I have heard it is all too speculative to place a valuation on the chance. Accordingly, I cannot and therefore I do not, put any value on it".***

As Mr. Keevil pointed out, Mr. and Mrs. Louis had so little working capital that they had to borrow (without consulting Mr. Crill) unregistered but in the certain knowledge that they had given the Bank authority to register at any time. This, they must have known, could lead to a clear breach of their borrowing with Mrs. Daniels. By the end of 1989, the business was desperate for working capital. It was then that the work started, just as negotiations were in train to borrow more money. We regard that attempt to borrow as no more than a hope. We do not consider that it was a hope which realistically would have succeeded.

The shares were purchased on the 15th January, 1988 - the breach occurred on the 11th May, 1988. But by then, the Plaintiffs were already set on a disastrous road. Had Mr. and Mrs. Louis been reminded of their obligation, there is a chance that they would have approached Mrs. Daniels formally to obtain her consent.

This would not, in our view, have helped matters because, having considered the evidence of the accountants and the very intense criticism particularly of Mr. Keevil by the Plaintiffs' advocate, we still take the view that the chance of success, as matters developed, was totally speculative. We must recall that

when Mr. Louis paid the £10,000 deposit it was deemed to be non-returnable (although the later Share Vending Agreement failed to mirror the Estate Agents' instructions). This was a clear example of his absolute determination to purchase (and expand) this property which was described to us at one time as an impossible dream. The morass into which the Plaintiffs so unfortunately fell, was not, in our view, of Mr. Crill's making. Even the anxiety suffered by Mrs. Louis (and her doctor/employer cured her by counselling) cannot, in our view, be seen as being a necessary result of the breach of his contractual duty by Mr. Crill. The financial ruin of the Plaintiffs was brought about by financial shortcomings and by the movement of world markets which nobody at the time of the "Cutty Sark" purchase could possibly have foreseen. The chance of matters coming right is, in our view, too speculative to contemplate.

In the circumstances, we find that the Plaintiffs have failed to prove that any loss they suffered was due to the breach of contract and accordingly, the claim is dismissed.

Authorities

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Tai Ming Cotton Mill Ltd -v- Liu Chong Hing Bank Ltd & Ors. (1985) 2 All ER 947 HL.

Lister -v- Romford Ice and Cold Storage Co. Ltd. (1957) All ER 125 at 139; (1957) A.C. 555 at 587.

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Hall -v- Meyrick (1957) 2 All ER 722 at 730.

Jackson and Powell on Professional Negligence (3rd Ed'n) 1-06; p.371.

Hadley -v- Baxendale (1854) 9 Ex 341.

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Chaplin -v- Hicks (1911) 2 K.B. 786.

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Kententertainments Ltd -v- Great Yarmouth Borough Council (1983) unreported.